

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. FD 36426

MOTION TO DISMISS PETITION FOR DECLARATORY ORDER

Tri-City Railroad Company, LLC (“TCRY”) hereby requests the Board dismiss the Port of Benton Washington’s (“Port”) Petition for Declaratory Order. The request is based on two reasons: 1) The Port is requesting the Board interpret its lease with TCRY and 2) The Port has no basis to be seeking this declaratory order.

BACKGROUND

TCRY leases its line from the Port.¹ The Port received the line from the Department of Energy (“DOE”) in 1998.² The line is approximately 17 miles, with one way in and one way out, meaning that all freight either terminates or originates in Richland, WA.

¹ TCRY entered into the current lease with the Port in 2002 (Appendix 1). TCRY’s predecessor in interest, Livingston Rebuild Center (“LRC”) had a contract for maintenance and operation of the line with the Port that was entered into in 1998 attached as Appendix 2. That agreement was assigned to TCRY in 1999 (Appendix 3). TCRY was granted its common carrier exemption from the Board in 2000 (Appendix 4).

² The Indenture between the Port and the DOE contained the provisions of the transfer of 768 acres of land, 26 buildings and approximately 17 miles of railroad track (Appendix 5).

The Burlington Northern Santa Fe Railroad (“BNSF”) and the Union Pacific Railroad (“UP”) have operating rights over the line as a result of a 1947 and subsequent agreements between their predecessors and the Atomic Energy Council (“AEC”) the predecessor to the DOE. The agreement provided rent free access to a portion of the line during its useful life that the DOE owned in exchange for the predecessors of the BNSF and the UP paying for the construction of 5.4 miles of rail line to connect to the existing AEC railroad line (Appendix 37).

In 1998 there were approximately 800 annual carloads of traffic that traversed the Port owned rail line. Today there are over 10,000 annual carloads of traffic that traverse the Port owned line that is leased to TCRY. TCRY was and has been instrumental in that growth of traffic, so much so that in 2009 the BNSF chose to sue TCRY so that it could serve the customers that TCRY developed directly.

The Port would like the Board to believe that the BNSF sued TCRY because TCRY sought to impose additional trackage rights fees for maintenance of the leased lines (Port’s Petition footnote 2), but in reality, BNSF wanted to cut TCRY out of the picture and not pay it for its interchange services (Appendix 36).

The Port supported BNSF’s direct service over its line contrary to TCRY’s objection which was a reversal of the position that it took with the UP in 2000³ when it directed TCRY to cancel UP’s operating rights.

³ The Port directed TCRY to cancel the UP’s operating rights over the tracks for their refusal to pay for their usage (Appendix 6).

The Port's reversal of position came as a result of a land dispute between TCRY and the Port and its desire to play nice with the BNSF so that it could purchase land from it located in Prosser, WA (Appendix 7).

The BNSF was granted the relief it sought in 2009 (Appendix 8) and began direct operations over the line. The UP continued its interchange operations with TCRY until late 2017.

Through an affiliate company of TCRY, 10 North Washington Avenue, LLC ("10 NWA"), purchased land from the City of Richland ("City") in 2008 and built a loop track and grain unloading facility in the City of Richland's Industrial Park (Appendix 9).

The UP spent \$8,000,000 of unbudgeted money in 2008 in order to upgrade their Kalan Industrial lead (the track that connects to the TCRY line) in order to handle the unit train traffic that was anticipated as a result of the 10 NWA unloading facility.

The predecessor to the BNSF was granted trackage rights over the Kalan Lead by the predecessor to the UP as part of the agreement with the AEC to connect to the AEC trackage (Appendix 37). The BNSF continues to use the UP's Kalan Lead to access the TCRY line.

In 2001, TCRY entered into a Temporary Service Agreement with the City of Richland (Appendix 10). The City canceled that Agreement in an attempt to strong arm TCRY into granting them an easement through TCRY's interchange at Richland Junction (Appendix 11).

The City paid UP 2.1 million dollars to relocate its interchange from Richland Junction in 2011(Appendix 12). The UP named TCRY as its agent along the City owned Railroad called the Horn Rapids Rail Spur (Appendix 13).

In 2017 the City threatened litigation against the UP if it didn't get TCRY to consent to an easement through Richland Junction (Appendix 14).

TCRY had sought Board protection of its interests at Richland Junction, which the Board granted (Appendix 15).

The UP subsequently relented to the City's threats and canceled TCRY as its agent along the City of Richland Railroad and also canceled its Commercial Marketing Agreement it had with TCRY (Appendix 16).

During this time period the Port hired the same railroad consultant and railroad attorney as the City of Richland in order to "rid itself" of TCRY (Appendix 17).

TCRY filed suit in the Eastern District of Washington⁴, which is currently on appeal⁵. The Federal Court dismissed the State Court claims contained in the suit which have been refiled by TCRY in Superior Court⁶.

The Port of Benton filed for and was granted its Petition for Adverse Discontinuance against TCRY, with the caveat that TCRY still has Board authority to operate as long as it has a lease, for the Board does not wade into contract interpretation (Appendix 18).

The Port would like the Board to believe that TCRY is some type of mischievous malcontent, only interested in stirring up trouble, but nothing could be further from the truth. TCRY is a small, family owned business that has been fighting to realize the fruits of its labor since 2000. They are akin to the Little Red Hen. They did the work in order to bake the bread,

⁴ *Peterson et al v. Port of Benton Co.*, CV-17-191 (E.D. Wash. 2017).

⁵ *Peterson ex rel. U.S. v. Port of Benton Co.*, No. 20-35004 (9th Cir. 2020).

⁶ *Tri-City R.R. Co., LLC v. Port of Benton*, Superior Ct., Benton County, WA, No. 20-2-00649-03.

by creating a successful railroad, now the City of Richland, the Port of Benton, the BNSF and the UP are eating it.

The City of Richland has spent hundreds of thousands of taxpayer dollars in order to harm TCRY. The Port of Benton has spent over a million dollars of taxpayer money to harm TCRY. The BNSF and the UP have had no regard to partnership or relationship that had been built up over the years. But to everyone's surprise, TCRY is still in business and is petitioning the Board to dismiss the Port's latest attempt to harm TCRY.

ARGUMENT

I. The Port's request for Declaratory Order is a veiled attempt to have the Board interpret TCRY's Lease with the Port.

As the Board has stated previous, the Board does not interpret private contracts nor enforce them.⁷ In order for the Board to grant the relief requested by the Port, it would have to do just that. The Board is particular when deciding an issue, taking into account the facts and circumstances surrounding each issue. Here the Port is asking the Board to determine if a "rail carrier such as TCRY have the authority to assess the charges set forth in Supplement 1 against entities that are not rail customers or shippers served by TCRY?"

⁷ *Port of Benton County, Wash.-Adverse Discontinuance of Rail Service- Tri-City Railroad Company, LLC*, AB 1270 (served Oct. 31, 2019) slip op. at 5.

In order for the Board to answer the Port's question it must first determine the facts and circumstances surrounding the issue, i.e. take into account TCRY's lease with the Port and the underlying agreement, the Indenture. It then must interpret them in order to determine if TCRY may assess charges to users of the railroad.

The Port attempts to confuse the Board as it relates to TCRY's Miscellaneous Charges Tariff Supplement 1. Supplement 1 was submitted to the Port for approval per the terms of the lease on August 29, 2018 (Appendix 19).

In order for the Port to review Supplement 1 the Port, just like in a previous tariff submittal, the Port demanded TCRY provide it with copies of five years of its tax returns and other associated maintenance expenditures (Appendix 20). Nowhere in TCRY's lease does it require TCRY to provide the Port with copies of its tax returns or expense reports, let alone grant the Port any authority to review and approve TCRY tariffs other than "to insure compliance with the Port's agreements with the United States."⁸

On January 16, 2020, after nearly a year and a half of waiting, TCRY's Supplement 1 was approved by the Port (Appendix 21). Supplement 1 contains a provision in Item 5 titled **Railroad Maintenance Charge**, which states:

*A track maintenance charge of Ninety-Five Dollars (\$95.00)
per car will be charged by TCRY on all cars that enter the
TCRY railroad at RICHLAND CONNECTION in Kennewick,
Washington.*

⁸ Found in section 7.1 of the TCRY/Port railroad lease

In its approval letter the Port stated, *“In light of the Court Order, the Port cautions TCRY that, while the Port approves the Proposed Tariff as reasonable, the Port believes TCRY would be in breach of the Lease and in violation of the Court Order were it to seek to impose the tariff on the BNSF or UP.”* (Id.)

As a result of this response from the Port, TCRY sought to collect on the Railroad Maintenance Charge directly from the Port, for the Port has the ability to cancel the 1947 agreement it has with the BNSF and the UP upon 6 month notice⁹. Had the Port followed its own precedent set in 2000, when it directed TCRY to terminate UP’s rights under the 1947 agreement TCRY would have been able to collect from the BNSF and the UP, but it did not (Appendix 6). The Port has so far refused to pay (Appendix 22).

TCRY then looked to the users of the railroad which had been identified by the Port multiple times over the years, first in 2012¹⁰ and later in 2017¹¹ to pay the Railroad Maintenance Charge. The basis for the users of the railroad to pay for the maintenance service provided by TCRY is found in the Indenture, section XVIII, titled USE OF REAL PROPERTY AND RAILROAD, where it states:

Grantee shall insert and enforce provisions requiring the party to: (i) furnish said service on a fair, equal and nondiscriminatory basis to all users thereof; and (ii) charge fair, reasonable, nondiscriminatory prices for each unit for service, provided, that the contractor may be allowed to make

⁹ Article XV. of 1947 Agreement (Appendix 37).

¹⁰ Port of Benton Rail Plan (Appendix 34).

¹¹ Port of Benton and City of Richland Rail Master Plan (Appendix 35).

reasonable and nondiscriminatory discounts, or other similar types of price reductions to volume purchasers.

TCRY has received direct feedback from users of the railroad to TCRY invoicing them for the service provided. On July 7, 2020 CWCP responded to TCRY's maintenance invoice stating in part, "*As you are aware, CWCP has no contracts, agreements or working relationships of any kind with the TCRY*" (Appendix 23).

On August 6, 2020 TCRY received an email from Henningsen Cold Storage, another user of the TCRY line which stated, "*After speaking with our corporate office, I have been instructed to tell you that we do not have a contract with TCRY and will not be paying this invoice. I also spoke with Diana Howard at the port of Benton and they did not approve this invoice*" (Appendix 24).

Unlike the Port's claim in their Petition that "*TCRY did not provide a response to the complainants' position that TCRY cannot legally assess charges upon non-TCRY customers*" (Port's Petition at 5-6) TCRY responded to the Port's request on June 15, 2020, stating, "*TCRY has a contractual right to impose tariffs*" which the Port acknowledged by stating, "*Thank you for your responses to the Port's inquiries*" (Appendix 25).

The Port is now asking the Board to determine whether or not, TCRY has a contractual right to impose the Port approved Railroad Maintenance Charge on users of the Port owned railroad in complete contravention to the Board's stated position that it does not interpret nor enforce contracts.

The Port also attempts to confuse the issue by bringing before the Board TCRY's proposed Supplement 5 to its Miscellaneous Charges Tariff, submitted to the Port for their approval on June 8, 2020.

The main purpose in proposing Supplement 5, was the need to develop additional revenue to adequately compensate TCRY for its service not only in the maintenance of the rail line, but also for its efforts in the ongoing management and operation of it.

The Port presents a false narrative in their Petition in regard to Supplement 5, by first selectively quoting from it. TCRY clearly defines who a "Local Rail User" is that is subject to the Track Use Fee. It is stated as "*any entity, person, or business that ships and/or receives loads that traverse the TCRY trackage*" (Appendix 26) and provides examples of such Local Rail Users as identified in the Port of Benton Rail Plan and the Port of Benton and City of Richland Rail Master Plan. (*Id.*)

The Port also attempts to have the Board believe that TCRY has somehow implemented Supplement 5 by quoting the sentence, "*The Track Use Fee has been reviewed and approved by the Port of Benton to ensure its compliance with the Port of Benton's agreements with the United States.*" (Port Petition at 6-7).

When TCRY submits its tariffs to the Port for approval, it submits them in the final form in which they are seeking approval.

It was important for TCRY to include the aforementioned sentence in its Supplement 5 based upon previous inquiries sent to it by Local Rail Users such as DelHur Industries where they state "*We would think that if the Port Of Benton has approved these charges that TCRY is*

invoicing that we would have received a formal written direction concurring with Miscellaneous Track Maintenance charges.” (Appendix 27).

On June 24, 2020, TCRY further clarified to the Port its position as it related to its contractual right to set and charge tariffs:

“TCRY is working within the framework provided by the railroad lease and subsequently the Indenture. The railroad lease gives TCRY the right to establish tariffs and the Port the right to ensure their compliance with the Indenture. A major tenet of the Indenture was for the Port or its agent, in this case TCRY, to be able to charge money for the use of the railroad in order to develop revenue, to offset the costs of the operation and maintenance of the railroad.

TCRY’s position remains the same as I’ve previously stated, it has a contractual right to set tariffs and it knows of no legal authority that would prevent it from establishing and collecting on Supplement 5. If the Port is able to locate that legal authority showing that Supplement 5 is somehow illegal or without basis, please share.” (Appendix 28).

The Port is attempting to have the Board determine TCRY’s contractual rights under its lease.

II. The Port has no basis to seek this Declaratory Order other than to Harm TCRY.

The Port correctly cites to 5 U.S.C. §554(e) and 49 U.S.C. §1321 which give the Board broad discretion to issue a declaratory order to terminate controversy or remove uncertainty. Part of that discretion allows the Board to not exercise its authority in issuing declaratory orders as it did in the Petition of Nebkota Railway, Inc. and West Plains Company for Declaratory Order STB Docket No. FD 35352, when it determined that there was no longer any controversy or uncertainty before the Board that would justify declaratory relief.

Here the Port is attempting to exploit the perceived controversy between TCRY and the users of the rail line that the Port created in an attempt to complete their systematic dismantling of TCRY¹² utilizing the Board to do its bidding.

Why would the Port approve Supplement 1 if it did not intend TCRY to be able to collect on it? That is the question the Board needs to ask itself when determining the Port's true motives in seeking this Declaratory Order.

The answer that the Board should come up with is that the Port has done so in bad faith. The Port has done so in an attempt to make themselves look better in the eyes of the Federal Court. The Port has done so, because it never thought TCRY would still be around to meet its contractual duties under lease as it has for the previous three years with hardly any railroad revenue.

¹² "The Southern Connection Options List" (Appendix 29) was created at the direction of the Port by Fletcher & Sippel and Tangent Rail Services. The "Options Specific to the Port's Relationship with TCRY" include *"Identify a TCRY default under the terms of the 2002 Lease and, in accordance with the Lease terms, effect termination of TCRY's leasehold interest."* They also include *"Terminate 2002 Lease Agreement without TCRY's consent, and pursue corresponding involuntary termination of TCRY's operating rights/obligations via adverse discontinuance at the STB."*

The Surface Transportation Board was not created to be used as a tool by taxpayer funded organizations, such as the Port of Benton, to harm private enterprise. The controversy that the Port seems to be so gallantly presenting to the Board, can and should be resolved by the Port, per the terms of the lease that it has with TCRY and the underlying Indenture which controls the property and railroad in which it conveyed. The Port has the authority to tell the users of the railroad, just like the Indenture intended, that the users of the railroad need to pay the Railroad Maintenance Charge that was included in Supplement 1 and approved by the Port.

The Port has sought Board assistance in continuing to bleed TCRY dry. Forcing it to continue to pay insurmountable legal bills and depriving it of the sorely needed revenue in order to take care of the Port's own asset. The Port is so brazen in its disdain for TCRY that as it starves TCRY of revenue, it collects on State funded grants to rebuild the 1940's railroad on the backs of TCRY's reputation. ¹³

If the Port directed the users of the railroad to pay the Railroad Maintenance Charge, then they would, just as Mr. Martin with Lamb Weston asked the Port to *"confirm that Miscellaneous Charges Tariff Supplement 1 Effective September 18, 2018 is still active and approved."* (Appendix 31)

In response to Mr. Martin's inquiry to the Port, TCRY was requested to provide a response, which it did, stating:

"Yes, Supplement 1 to the Miscellaneous Charges tariff is due and owing.

We apologize for not notifying Lamb Weston earlier, but did not realize their year end was May 31.

¹³ Port grant application (Appendix 30), in which it claims TCRY's failure to meet a FRA Class 3 Track Standard which does not exist in the lease.

If they would like to make payment for the amounts owed June 1 to present we can resend them an invoice for that amount and we can work out a payment plan to deal with the amount they owe from January thru May. This plan would not be difficult to implement from an accounting perspective and would not require them to "re-open" the book. They should contact me or Lisa directly to discuss.

We value their commitment to the community and want to be able to continue to provide them a safe and serviceable railroad for their continued use.” (Id.)

In looking for direction on Supplement 1 from the Port, counsel for Preferred Freezer was told: *“the Port did not intend any entity other than a servicing railroad would possibly be [sic] subject to the tariff at issue. Accordingly, Preferred Freezer will not be paying this invoice.”* (Appendix 32).

This explanation runs contrary to what the Port told TCRY when it approved Supplement 1 on January 16, 2020. (Appendix 21) When TCRY requested permission from the Port on March 17, 2020 to *“impose the tariff on the BN and the UP”* (Appendix 33) the Port declined to do so.

Per the terms of the lease, the Port has the self-prescribed duty to attempt to resolve disputes between any “user of the railroad”¹⁴ regarding “Tenant’s rates, tariffs or operations.”

*“If the complaint involves matters which are within the purview of National Surface Transportation Board (NSTB), the Port will, to the extent applicable, utilize the rules of the NSTB to resolve the dispute.”*¹⁵ To date TCRY has not been notified of the “rules of the NSTB”

¹⁴ Section 7.2 of the railroad lease outlines the procedures the Port is supposed to follow in regard to complaints by users of the railroad concerning TCRY.

¹⁵ Section 7.2.1 of the railroad lease.

the Port sought to follow in resolving the supposed complaints regarding TCRY's Supplement 1 that the Port approved as valid.

Section 7.2.2 goes on to state that:

“If the Port is unable to resolve the complaint which is within the jurisdiction of the NSTB and which the NSTB will accept for resolution, the complaint shall be referred to the NSTB, if permitted by the terms and conditions of the Indenture and the Quit Claim Deed. [underlined for emphasis]”

Nowhere in the Indenture does it permit the Port of Benton to seek the assistance of the Board in determining the contents of the Indenture or what they mean, which is exactly what the Port is attempting to do. As mentioned above, the Indenture was clear in that it provided that “users” of the railroad would pay for its use.¹⁶ The Port is now requesting the Board interpret provisions of the Indenture in direct contravention of Board stated precedent that the Board does not interpret contracts. The only inference that can be drawn is that the Port continues to try and weaponize the Board in order to hurt TCRY. The proper forum for the Port to resolve the contents of the Indenture and what they mean, would be in Washington State Court or possibly Federal Court, not in front of the Surface Transportation Board.

The Board cannot permit the Port's Petition for Declaratory Order to be heard before the Board.

CONCLUSION

¹⁶ Section XVIII of the Indenture is titled USE OF REAL PROPERTY AND RAILROAD.

The Port of Benton has had a long standing goal of getting rid of TCRY. TCRY can only speculate as to the ultimate reasons why, but there is no speculation as to the Port's desire. The Port was successful in getting the Board to approve their application for Adverse Discontinuance¹⁷ and they are now attempting to remove TCRY from its leasehold.¹⁸ TCRY continues to fight for its rights under the lease and its claims for breach of contract against the Port.¹⁹ TCRY implores the Board to not assist the Port in the further destruction of TCRY. If anything the Board should assert its authority in the protection of the rail infrastructure that TCRY leases and issue a strongly worded opinion when it dismisses the Port's Petition, cautioning the Port in regard to their actions in their attempted decimation of one of the nation's shortline rail providers.

Based upon the foregoing reasons, TCRY respectfully requests that the Board dismiss the Port's Petition for Declaratory Order.

¹⁷ Appendix 18.

¹⁸ *Port of Benton v. Tri-City R.R. Co., LLC*, Superior Ct., Benton County, WA, No. 20-2-01057-03.

¹⁹ *Tri-City R.R. Co., LLC v. Port of Benton*, Superior Ct., Benton County, WA, No. 20-2-00649-03.

Respectfully submitted,

/s/ Rydel V. Peterson

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served by email on the following persons:

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Dated: October 8, 2020

APPENDIX 1

August 1st
2002

RAILROAD LEASE
Port of Benton-Tri-City Railroad Company

PARTIES:

LESSOR: PORT OF BENTON, a municipal corporation of the State of Washington. hereafter "Port".

TENANT: TRI-CITY RAILROAD COMPANY, L.L.C., a Washington limited liability company hereafter "Tenant".

RECITALS:

WHEREAS, the Port acquired the Southern Connection of the Hanford Railroad from the United States Department of Energy (hereafter "DOE") to prevent the closure of the railroad and to maintain railroad operations for economic development purposes.

WHEREAS, DOE conveyed the former 1100 Area to the Port to enable the Port to generate revenues to pay the costs of operation and maintenance of the railroad.

WHEREAS, the Port entered into an Operations and Maintenance Agreement with Livingston Rebuild Company dated October 1, 1998 which has been assigned to the Tenant and this agreement requires the Port to pay certain expenses related to the railroad, including insurance premiums, in excess of \$100,000.00 per year and the Port has the responsibility for the inspection, maintenance and replacement of the bridges and overpasses.

WHEREAS, the Port has been required to pay for the replacement of a section of the railroad bridge which was destroyed by fire.

WHEREAS, the Port entered into a Building Lease with Livingston Rebuild Company for the railroad maintenance building in the Port's Manufacturing Mall (formerly DOE's 1100 Area), which Lease has been assigned to the Tenant.

WHEREAS, the parties wish to transfer the costs associated with the operation of the railroad, including the insurance and the responsibility for the inspection and maintenance of the bridges and overpasses to the Tenant.

WHEREAS, the Port has been required to respond to an inquiry by the Railroad Retirement Board concerning the Port's liability for pension payments as an railroad operator and the Port wants to avoid classification as a railroad operator.

WHEREAS, the Port wishes to transfer the responsibility for rail operations and for negotiating with major carriers to the Tenant and to relieve the Port of the responsibility for such activities; now therefore it is hereby agreed among the parties as follows:

AGREEMENTS:

1. LEASE. Port hereby leases to Tenant upon the terms, covenants and conditions contained herein, the real and personal property known as the Port of Benton Railroad Southern Connection and the 1171 Building (hereafter the "Property"). The real property is described on Attachment 1.

1.1 The Property consists of approximately 16 miles of railroad trackage and right of way extending from the Richland Connection in Kennewick, Washington to the Port of Benton's Manufacturing Mall in Richland, Washington, and generally bordered by Horn Rapids Road on the north, formerly known as the 1100 Area, including the tracks, bridges, trestles, crossings and maintenance equipment. The equipment and fixtures are more particularly described on Attachment 2 to this Agreement.

1.2 The Tenant has been operating the Port of Benton railroad and has occupied the 1171 Building since October, 1998 and is fully familiar with the Property and agrees to take the Property in its present condition, and subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto, and the Quit Claim Deed from the United States of America, copies of which has been provided to the Tenant. The Tenant agrees to take the Property in its present condition without warranties. The Tenant is relying upon its own inspections of the Property to determine whether to enter into this Lease, and the Tenant is not relying upon any representation made by the Port, its employees or agents, except as specifically set forth in this Lease.

1.3 The Port may acquire trackage rights to use additional railroad tracks owned by DOE serving the Hanford Project. To the extent that the Port acquires additional trackage rights from the DOE, the Port will attempt to negotiate an agreement with the Tenant to add the track rights to this agreement, if permitted by the terms of any agreements with the United States and to the extent the terms of the agreement for trackage rights are acceptable to the Tenant. An agreement to add additional track to this agreement, may require the Tenant to pay additional fees to the Port based upon volume of traffic over the tracks. Provided, that the Port may cancel any agreement with the United States for trackage rights without any further obligation to Tenant. Provided, further, in the event the Port terminates its agreement with the United States for trackage rights, the Tenant shall be free to negotiate with the United States for the trackage rights.

1.4 The Port of Benton currently has a Memorandum of Agreement with DOE to use the track north of Horn Rapids Road to the Energy Northwest Generating Station site, which the Port agrees to allow the Tenant to utilize under the terms of this Lease, provided that the Tenant maintains the track as herein required. DOE has proposed a Memorandum of Agreement with the Port of Benton for use of the Hanford Railroad north of the Energy Northwest Generating Station. After the execution of the MOA by the Port and DOE, the Port will permit the Tenant to utilize additional track which is covered by the MOA, provided that the Tenant complies with the terms and conditions of the MOA and subject to the provisions of this Lease.

2. TERM. This lease shall run for a period of ten years commencing on the 1st day of August, 2002 and terminating on the 31st day of March, 2012.

2.1 The Tenant shall have the option to extend this Lease for two additional terms of ten years each after the expiration of the initial term and after the expiration of the first renewal term.

2.2 The option to extend this Lease shall be deemed to have been exercised unless the Tenant shall give the Port written notice of its intent not to exercise an option at least one hundred eighty (180) days prior to termination of the initial term or the expiration of the first renewal term.

2.3 The Tenant may only exercise the right to extend the term of this Lease if the Tenant is not in material default in the performance of the terms of this Lease at the time the Tenant exercises the option or at the time an option is deemed to be exercised under Section 2.2.

2.4 In the event the Tenant elects not to exercise the Lease extension as provided in this Section, then this Lease shall terminate and the Tenant shall have no further rights under the terms of the Lease.

3. RENT. Tenant shall pay rent, in advance on the first day of each month during the term of this lease, in the following amounts:

3.1 During the initial term of the lease, the parties have agreed that the monthly rental for the real property, railroad trackage, right of way and building more particularly described in Attachment 1, shall be \$2,000.00, plus the applicable leasehold tax as hereafter provided.

3.2 In addition to the rent for the real property, the Tenant shall pay \$2,000.00 per month as rent for the railroad maintenance and operation equipment owned by the Port and more particularly described on Attachment 2. The Tenant shall be responsible for the payment of any sales tax which may be payable as a result of the lease of equipment.

3.3 Rent payments shall be made payable to the Port of Benton and shall be paid at the Port offices at 3100 George Washington Way, Richland, Washington, or at such other address as the Port shall direct in writing.

3.4 In addition to the rent provided for herein, the Tenant shall pay the Leasehold Tax as required by the Revised Code of Washington Chapter 82.29A, as the statute may be hereafter amended. The Leasehold Tax shall be paid with each monthly installment of rent. The current leasehold tax rate is 12.84%.

3.5 Commencing five (5) years from the commencement date of this lease, and on every anniversary thereafter, the minimum rent set forth in sections 3.1 and 3.2 shall be increased in order to reflect the proportionate increase, if any, occurring between the commencement date and such adjustment date in the cost of living as indicated by the Consumer Price Index for Urban Consumers -Western US Average - All Items, as published by the U.S. Department of Labor's Bureau of Labor Statistics (the "Index"). Such adjustment shall be accomplished by multiplying the numerator of which shall be the Index level as of the January preceding the date of adjustment, and the denominator of which shall be the Index level as of the January preceding the Lease commencement date. Any adjustment of rent shall become effective immediately. In no event shall the rent be less than that specified in sections 3.1 and 3.2. If the index is discontinued, Landlord shall substitute a similar index of consumer prices.

3.6 Any rent payment not paid within ten days of the date upon which the Tenant receives notice that a payment is past due shall accrue interest on the unpaid rent at the rate of one and one-half percent of the late payment for each month or portion of month by which the payment is delayed.

4. **CONDITION OF PROPERTY.** The Tenant shall take the Property in its present condition, without warranties or representations by the Port except as set forth in this Lease. The Tenant shall be responsible for the maintenance and repair of the railroad maintenance and operation equipment owned by the Port and used by the Tenant pursuant to this Lease. In the event any of the Port equipment becomes inoperable or unusable for any reason the Port shall not be required to provide replacement equipment. If the equipment becomes obsolete or inoperable through no fault of the Tenant, the unusable equipment shall be returned to the Port and the rent shall be adjusted to account for the equipment which is no longer being used by the Tenant. This provision shall not apply to the equipment that becomes inoperable due to the Tenant's failure to properly maintain the equipment.

5. **SECURITY.** The Tenant shall provide a rent security in accordance with RCW 53.08.085 in an amount equal to the rent and Leasehold Tax to be paid during the initial year of this Lease.

6. **TAXES AND ASSESSMENTS.** Tenant shall pay all taxes assessed against the buildings and improvements owned by the Tenant and the other property of Tenant located upon the Property, promptly as the same become due. Tenant shall pay all assessments hereafter levied against the Property, or a portion thereof, during the term of this Lease, including assessments coming due to any special purpose governmental district; provided, however, if the assessment is payable in installments, whether or not interest shall accrue on the unpaid installments, the Tenant may pay the assessments in installments as they become due, provided

that the Tenant's obligation to pay the assessments levied during the term of the Lease, even though paid in installments, shall survive the termination or expiration of this Lease.

6.1 Tenant may contest the legal validity or amount of any taxes, assessments or charges which Tenant is responsible for under this Lease, and may institute such proceedings as Tenant considers necessary. If Tenant contests any such tax, assessment or charge, Tenant may withhold or defer payment or pay under protest but shall protect Port and the Property from any lien. Port appoints Tenant as Port's attorney-in-fact for the purpose of making all payments to any taxing authorities and for the purpose of contesting any taxes, assessments or charges.

7. USE. The Tenant shall use the Property for the operation and maintenance of railroad transportation facilities, for uses in conjunction with or reasonably connected to the permitted uses and for no other purposes except those approved in writing by the Port.

7.1 The Tenant's use, operations, and maintenance of the tracks shall comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property. In addition, the Tenant shall comply with all laws, rules and regulations applicable to the Tenant's use, operation and maintenance of the property. Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States.

7.2 In the event the Department of Energy, or any user of the railroad files a complaint with the Port concerning the Tenant's rates, tariffs or operations, the Port will notify the Tenant of the complaint and will attempt to resolve the complaint through negotiations with the Tenant and the complainant.

7.2.1 If the complaint involves matters which are within the purview of National Surface Transportation Board (NSTB), the Port will, to the extent applicable, utilize the rules of the NSTB to resolve the dispute.

7.2.2 If the Port is unable to resolve the complaint which is within the jurisdiction of the NSTB and which the NSTB will accept for resolution, the complaint shall be referred to the NSTB, if permitted by the terms and conditions of the Indenture and the Quit Claim Deed.

7.2.3 Complaints which can not be referred to the NSTB, shall be resolved pursuant to the terms and conditions of this Lease.

7.3 The Port acquired title to the Property by conveyances from the United States of America. The Tenant covenants that it will not use the Property in any manner which would subject the Property to forfeiture under the provisions of the above-described Indenture or quit claim deed.

7.4 The Tenant shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the

Port's prior written consent. The Tenant shall continue to provide railroad access to areas currently served by the railroad unless the Port and Tenant mutually agree that such access is no longer practicable.

8. MAINTENANCE OF PROPERTY. Throughout the term of this Lease, Tenant, at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear, and in accordance with all applicable covenants, laws, rules, ordinances, and regulations of governmental agencies applicable to the maintenance and operation of the railroad, provided, however, that the Port shall be responsible for the maintenance of the roof and the exterior walls of the 1171 Building. The Tenant will maintain the equipment described on Attachment 2 in good working condition and repair, ordinary and usual wear and tear excepted.

8.1 Tenant will provide for regular inspections of the railroad bridges, spans and overpasses by certified personnel. The inspections will comply with the requirements of CFR 49 and any other applicable laws and regulations to maintain the railroad as a Class 3 railroad. Tenant will promptly repair any conditions which require repair or replacement in order to comply with applicable rules and regulations. The obligation to maintain the railroad shall include the maintenance, repairs or replacements of the bridges, spans and overpasses and the maintenance, repair and replacement of the tracks which cross the bridges, spans and overpasses. In the event the Port assigns trackage rights to the Tenant pursuant to agreements with DOE, and the Tenant accepts the trackage rights, the Tenant agrees to assume the obligation to maintain the additional track in accordance with the terms and conditions of the agreement which the Port has entered into with DOE.

8.2 Any repairs or maintenance which is necessary for safety or the protection of life and property shall be done as soon as possible. Tenant shall promptly report any such conditions to the Port.

8.3 Tenant will provide for regular inspections and maintenance of the railroad crossings and the crossing signals by certified personnel. The inspections will comply with CFR 49 and any applicable law and regulations. The crossings and crossing signals shall be maintained in at least their present condition.

8.4 Tenant will provide all of the labor and materials necessary to maintain, repair or replace any of the railroad as required to meet the conditions of this contract.

8.5 Tenant shall be responsible for the maintenance of the equipment during the term of this agreement and shall insure the equipment against loss or damage. Upon the termination of this agreement or if Tenant determines that the equipment is no longer needed for maintenance of the railroad, Tenant shall return the equipment to the Port in its present condition, reasonable wear and tear excepted.

8.6 In the event the equipment becomes unavailable for use due to obsolescence or for any other reason, Tenant shall provide sufficient equipment to fulfill its obligations under the terms of this agreement.

8.7 The equipment shall be used only for the maintenance and operation of the railroad and for no other purpose without the prior written consent of the Port and an use agreement which provides for payment for the use of the equipment.

8.8 The Port shall retain title to the equipment and the Port may dispose of any of the equipment which is not needed for the maintenance of the railroad.

9. CONDITIONS OF CONSTRUCTION. Before any construction, reconstruction or alteration of the improvements on the Property, except for interior improvements or non-structural modifications is commenced and before any building materials have been delivered to the Property in connection with such construction, reconstruction or alteration by Tenant or under Tenant's authority, Tenant shall comply with all the following conditions or procure Port's written waiver of the following condition or conditions:

9.1 Tenant shall deliver to Port, for its approval, one set of preliminary construction plans and specifications prepared by an architect or engineer licensed to practice as such in the State of Washington including, but not limited to, preliminary grading utility connections, locations of ingress and egress to and from public thoroughfares, curbs, gutters, parkways, street lighting, designs and locations for outdoor signs, storage areas, and landscaping, all sufficient to enable Port to make an informed judgment about the design and quality of construction. All improvements shall be constructed within the exterior property lines of the Property provided that required work beyond the Property on utilities, access, and conditional use requirements will not violate this provision. Tenant shall permit Port to use the plans without payment for purposes relevant to and consistent with this Lease.

9.2 The Port shall examine the plans and specifications for the purpose of determining reasonable compliance with the terms and conditions of this Lease, the Protective Covenants and compatibility with the overall design and use. Approval will not be unreasonably withheld. Approval or disapproval shall be communicated to the Tenant, and disapproval shall be accompanied by specification in reasonable detail of the grounds for disapproval; provided that Port's failure to disapprove the initial construction plans within fourteen (14) days or subsequent construction plans within thirty (30) days after delivery to Port shall be considered to be approval.

9.3 Tenant shall prepare final working plans and specifications substantially conforming to preliminary plans previously approved by the Port, submit them to the appropriate governmental agencies for approval, and deliver to Port one complete set as approved by the governmental agencies.

9.4 Tenant shall notify Port of its intention to commence the initial construction at least fourteen days before commencement of any such work or delivery of any

materials. The notice shall specify the approximate location and nature of the intended improvements. During the course of construction, Port shall have the right to post and maintain on the Property any notices of non-responsibility provided for under the applicable law, and to inspect the Property at all reasonable times.

9.5 Except as specifically provided in this Lease, Port makes no covenant or warranties respecting the condition of the soil or subsoil or any other condition of the Property.

9.6 Once work is begun, Tenant shall, with reasonable diligence, complete all construction of improvements. Construction required at the inception of the Lease shall be completed and ready for use within eighteen (18) months after commencement of construction, provided that the time for completion shall be extended for so long as the Tenant is prevented from completing the construction due to delays beyond the Tenant's control; but failure, regardless of cause, to commence construction within eighteen (18) months from the commencement date of the Lease shall, at Port's election exercised by thirty days written notice, terminate this Lease. All work shall be performed in a workmanlike manner, substantially comply with the plans and specifications required by this Lease, and comply with all applicable governmental permits, laws, ordinances, and regulations.

9.7 Tenant shall pay the cost and expense of all Tenant's improvements constructed on the Property. Tenant shall not permit any mechanic's, or construction liens to attach to the Property. Tenant shall not permit any mechanics', materialmen's, contractors' or subcontractors' lien arising from any work of improvement performed by or for the Tenant to be enforced against the Property, however it may arise. Tenant may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, so long as Port's Property interests are not jeopardized. Tenant shall defend and indemnify Port against all liability and loss of any type arising out of the construction of improvements on the Property by Tenant. Unless caused by the Port, its agents, contractors, and invitees, Tenant shall reimburse Port for all sums paid according to this paragraph, together with the Port's reasonable attorneys' fees and costs plus interest on those sums at the legal rate.

9.8 On completion of the construction of any improvements, additions or alterations, covered by this Section 9, Tenant shall give Port notice of all structural or material changes in plans or specifications made during the course of the work and shall at that time supply Port with drawings accurately reflecting all such changes. Changes which are non-structural or which do not substantially alter the plans and specifications as previously approved by the Port do not constitute a material change.

10. OWNERSHIP OF IMPROVEMENTS. All improvements constructed on the Property by Tenant as permitted by this Lease shall be owned by Tenant until termination of this Lease. Upon the termination of this Lease for any reason, any buildings, improvements or trade fixtures installed on the Property shall become the property of the Port. Provided, however, in the event, the Tenant has failed to maintain the Property as required by this Lease, or the Property is contaminated by toxic or hazardous materials as the result of the actions of the Tenant or its successors, such that in any event the value of the improvements is less than the cost of removal,

remediation or renovation to bring the Property into compliance, then the Port may require the Tenant to remove any improvements or trade fixtures installed by the Tenant. The Tenant shall repair, at Tenant's expense, any damage to the Property resulting from such removal.

10.1 The equipment and fixtures on the property which belong to the Port shall remain the property of the Port and the Tenant shall be required to maintain the Port-owned equipment and fixtures during the term of this Agreement. The equipment and fixtures owned by the Port shall be returned to the Port upon the termination of this Agreement, reasonable wear and tear excepted.

11. ASSIGNMENT AND SUBLETTING. Tenant shall neither assign, sublet nor transfer its interest in this Lease, in whole or in part, to any person or entity, without Port's prior written consent. Each sublease for any portion of the premises in addition to the reference to Section 7 of this lease, shall specifically advise the subtenant that the sublease is subject to the reverter contained in the deed and indenture from the United States to the Port of Benton. No assignment or sublease of the Lease shall relieve the Tenant of its obligations under this Lease.

12. INSURANCE. Throughout the term, at Tenant's sole cost and expense, Tenant shall keep or cause to be kept in force, for the mutual benefit of Port and Tenant, comprehensive broad form railroad liability insurance (including a contractual liability endorsement) against claims and liability for personal injury, death or property damage arising from the use, operation, maintenance, occupancy, misuse, or condition of the Property and improvements, with limits of liability of at least \$5,000,000 and with deductibles in such amounts as may be reasonably acceptable to the Port. The Port shall be an additional insured on such policies.

12.1 RAILROAD PROPERTY INSURANCE. Throughout the term of the Lease, at Tenant's sole cost and expense, the Tenant shall keep or cause to be kept in force, for the mutual benefit of the Port and the Tenant, property insurance insuring all of the tracks, bridges, trestles, crossing and other improvements, fixtures, equipment and all of the railroad property subject to this lease against loss or damage from any cause, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port.

12.2 BUILDING PROPERTY INSURANCE. The Port shall maintain property insurance insuring the improvement known as the 1171 Building described in Attachment 1 against loss or damage from fire, flood, wind, or other natural disasters, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port. The Tenant shall maintain insurance coverage on the Tenant's property, fixtures and equipment located on the premises.

12.3 PROOF OF COMPLIANCE. The Tenant shall provide the Port with Certificates of Insurance showing the coverages and deductibles. All property insurance which the Tenant is required to maintain on the Port's property shall name the Port as the owner of the property and shall insure the Port's interest in the property. The Tenant shall deliver to Port, in the manner required for notices, a copy or certificate of all insurance policies required by this

Lease. Tenant shall include a provision in each of its insurance policies requiring the insurance carrier to give Port at least ninety (90) days prior written notice before such policy terminates. Tenant shall not substantially modify any of the insurance policies required by this Lease without giving at least ninety (90) days prior written notice to Port.

13. INDEMNIFICATION. The Tenant shall indemnify and hold the Port harmless from all liability, claims, damages, losses, or costs, including attorney fees, arising out of any claim, suit, action, or legal proceedings brought against the Port by any party alleged to have resulted from the Tenant's use, operation, maintenance or occupation of the railroad or any portion of the premises or any of Tenant's activities incidental thereto, or any breach or default in the performance of any of the terms or conditions of the Tenant's obligations under this lease agreement.

14. DEFAULT.

14.1 EVENTS OF DEFAULT. Each of the following events shall be a default by Tenant and a breach of this Lease.

14.1.1 The breach of any of the terms or conditions of the Lease Agreement

14.1.2 The failure or refusal to pay when due any installment of rent or other sum required by this Lease to be paid by Tenant, or the failure to perform as required or conditioned by any other covenant or condition of this Lease.

14.1.3 The appointment of a receiver to take possession of the Property or improvements, or of Tenant's interest in the leasehold estate or of Tenant's operations on the Property for any reason, unless such appointment is dismissed, vacated or otherwise permanently stayed or terminated within sixty days after the appointment.

14.1.4 An assignment by Tenant for the benefit of creditors or the filing of a voluntary or involuntary petition by or against Tenant under any law for the purpose of adjudicating Tenant a bankrupt; or for extending time for payment, adjustment or satisfaction of Tenant's liability; or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; unless the assignment or proceeding, and all consequent orders, adjudications, custodies, and supervision are dismissed, vacated, or otherwise permanently stayed or terminated within sixty days after the assignment, filing, or other initial event.

14.2 NOTICE. As a precondition to pursuing any remedy for an alleged default by Tenant, Port shall give written notice of default to Tenant, in the manner herein specified for the giving of notices. Each notice of default shall specify the alleged event of default and the intended remedy.

14.3 TENANT'S RIGHT TO CURE. If the alleged default is nonpayment of rent, taxes, or other sums to be paid by Tenant as provided in this Lease, Tenant shall have ten

(10) days after receipt of written notice to cure the default. For the cure of any other default, Tenant shall have thirty days after receipt of written notice to cure the default, provided, however, that if it takes more than thirty (30) days to cure a default, the Tenant shall not be in default if it promptly undertakes a cure and diligently pursues it.

14.4 TIME OF THE ESSENCE. Time is of the essence of this Lease, and for each and every covenant or condition which must be performed hereunder.

15. PORT'S REMEDIES. If any default by Tenant continues uncured after receipt of written notice of default and the period to cure as required by this Lease, for the period applicable to the default, subject to the provisions of Section 13, the Port has the following remedies in addition to all other rights and remedies provided by law or equity to which Port may resort cumulatively or in the alternative:

15.1 Without terminating this Lease, Port shall be entitled to recover from Tenant any amounts due hereunder, or any damages arising out of the violation or failure of Tenant to perform any covenant, condition or provision of this Lease.

15.2 Port may elect to terminate this Lease and any and all interest and claim of Tenant by virtue of such lease, whether such interest or claim is existing or prospective, and to terminate all interest of Tenant in the Property and any improvements or fixtures thereon (except trade fixtures). In the event this Lease is terminated, all obligations and indebtedness of Tenant to Port arising out of this Lease prior to the date of termination shall survive such termination. In the event of termination by Port, Port shall be entitled to recover immediately as damages the total of the following amounts:

15.2.1 The reasonable costs of re-entry and reletting, including, but not limited to, any expenses of cleaning, repairing, altering, remodeling, refurbishing, removing, Tenant's property or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, reasonable attorney's fees, court costs, broker's commissions and advertising expense.

15.2.2 The loss of rental on the Property accruing until the date when a new tenant has been or with the exercise of reasonable diligence could have been, obtained.

15.3 Port may re-enter the Property and take possession thereof and remove any persons and property by legal action or by self-help and without liability for damages, and Tenant shall indemnify and hold the Port harmless from any claim or demand arising out of such re-entry and removal of persons and property. Such re-entry by the Port shall not terminate the Lease or release the Tenant from any obligations under the Lease. In the event Port re-enters the Property for the purpose of reletting, Port may relet all or some portion of the Property, alone or in conjunction with other properties, for a term longer or shorter than the term of this Lease, upon any reasonable terms and conditions, including the granting of a period of rent-free occupancy or other rental concession, and Port may not be required to relet to any tenant which Port may reasonably consider objectionable.

15.4 In the event Port relets the Property as agent for Tenant, Port shall be entitled to recover immediately as damages the total of the following amounts.

15.4.1 An amount equal to the total rental coming due for the remainder of the term of this Lease, computed based upon the periodic rent provided for herein and without discount or reduction for the purpose of adjusting such amount to present value of anticipated future payments, less any payments thereafter applied against such total rent by virtue of the new lease.

15.4.2 The reasonable costs of re-entry and reletting, including but not limited to, any expense of cleaning, repairing, altering, remodeling, refurbishing, removing Tenant's property, or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, attorneys' fees, court costs, broker's commissions and advertising expense.

15.5 All payments received by Port from reletting shall be applied upon indebtedness and damages owing to Port from Tenant, if any, and the balance shall be remitted to Tenant.

16. WAIVER. No waiver of any default shall constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No waiver, benefit, privilege or service voluntarily given or performed by either party shall give the other any contractual right by custom, estoppel, or otherwise. The subsequent acceptance of rent pursuant to this Lease shall not constitute a waiver of any preceding default by Tenant other than default on the payment of that particular rental payment, regardless of Port's knowledge of the preceding breach at the time of accepting rent. Acceptance of rent or other payment after termination shall not constitute a reinstatement, extension or renewal of this Lease, or revocation of any notice or other act by Port.

17. ATTORNEYS' FEES. If either party brings any action or proceeding to enforce, protect or establish any right or remedy under this Lease, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs from the non-prevailing party. Arbitration is an action or proceeding for the purpose of this provision. The "prevailing party" means the party determined by the court or the arbitrator to most nearly have prevailed.

18. ACCESS BY PORT. Port, or Port's representatives and agents, shall have access to the Property at reasonable times and upon reasonable notice, for the purpose of inspecting the Property; provided that Port shall exercise all reasonable efforts not to unreasonably disturb the use and occupancy of the Property by Tenant.

19. RECORDING OF LEASE. Either party to this Lease may record the Lease with the Auditor of Benton County. In lieu of recording the entire Lease either party may record a memorandum of lease setting forth the legal description of the property, the parties and the term of the Lease, together with any additional information which the party deems to be relevant, and

as long as the information in the memorandum is accurate the other party agrees to sign the memorandum of lease.

20. **HOLDING OVER.** In the event Tenant shall hold over after the expiration or termination of this Lease, or at the expiration of any option term, such holding over shall be deemed to create a tenancy from month-to-month on the same terms and conditions of the lease except that the rental rate shall be adjusted as provided in Section 3 and the rent shall be prorated over a 365 day year and paid by Tenant each month in advance. The tenancy may be terminated by either party giving the other party thirty days written notice of the intent to terminate.

21. **SECURITY FOR TENANT'S OBLIGATIONS.** In addition to the security provided for in Section 5, in order to secure the prompt, full and complete performance of all of Tenant's obligations under this Lease, including but not limited to, Tenant's obligations to protect and indemnify Port from any liability subject to the lien, if any, of the holder of the first mortgage against the property, Tenant hereby grants to Port a security interest in and assigns to Port all of Tenant's right, title and interest in and to all rents and profits from the Property, all of the materials stored on the premises, and all permanent improvements constructed thereon, to secure the Tenant's obligations under this Lease. In the event Tenant defaults in any of its obligations hereunder, Port shall have the right at any time after the period for cure provided in paragraph 15.3, without notice or demand, to collect all rents and profits directly and apply all sums so collected to satisfy Tenant's obligations hereunder, including payment to Port of any sums due from Tenant. The assignment of rents to the Port shall be subordinate to any assignment of rents to a leasehold mortgagee for security purposes. Such remedy shall be in addition to all other remedies under this Lease. This security interest will not extend to the Tenant's business receivables other than rents and profits from the property, provided that this exception will not affect the enforcement or collection of any judgment obtained against the Tenant by the Port.

22. **HAZARDOUS MATERIALS.** Tenant shall not take or store upon the Property any hazardous or toxic materials, as defined by the law of the State of Washington or by federal law, except in strict compliance with all applicable rules, regulations, ordinances and statutes. Tenant shall comply with the Port's Hazardous Materials Communications Policy, but shall not be subject to the notice requirements thereof in connection with the installation, use, operation, or removal of usual office equipment including, without limitation, computers and photocopiers.

22.1 Tenant shall not permit any contamination of the Property. The Tenant shall immediately remove any contaminants or pollutants and shall promptly restore the Property, subject to any condition existing prior to the commencement of this Lease, which shall be the responsibility of the Port.

22.2 Tenant shall defend Port and hold it harmless from any cost, expense, claim or litigation arising from hazardous or toxic materials on the Property or resulting from the contamination of the Property, caused by the acts or omissions of the Tenant, its subtenants, employees, agents, invitees, or licensees, during the term of this Lease.

22.3 In the event of the termination of this Lease for any reason, the obligation of the Tenant to restore the Property and the obligation to indemnify the Port set forth above, shall survive the termination.

23. GENERAL CONDITIONS.

23.1 NOTICES. Any notices required or permitted to be given under the terms of this Lease, or by law, shall be in writing and may be given by personal delivery, or by registered or certified mail, return receipt requested, or by overnight courier, directed to the parties at the following addresses, or such other address as any party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law:

Port: Port of Benton
3100 George Washington Way
Richland, Washington 99352

Tenant: Tri-City Railroad Company, L.L.C.
2355 Stevens Drive
P.O. Box 1700
Richland, WA 99352

Any notice given shall be effective when actually received, or if given by certified or registered mail, upon the recipient's receipt of a notice from the U. S. Postal Service that the mailed notice is available for pick up.

23.2 NONMERGER. If both Port's and Tenant's estates in the Property or the improvements or both become vested in the same owner, this Lease shall nevertheless not be destroyed by application of the doctrine of merger except by the express election of the owner and the consent of the mortgagee or mortgagees under all mortgages existing upon the Property.

23.3 CAPTIONS AND TABLE OF CONTENTS. The Table of Contents of this Lease and the captions of the various paragraphs are for convenience and ease of reference only, and do not define, limit, augment or describe the scope, content or intent of this Lease or of any part or parts of this Lease.

23.4 EXHIBITS AND ADDENDA. All exhibits and addenda to which reference is made in this Lease are incorporated in the Lease by the respective references to them. References to "this Lease" includes matters incorporated by reference.

23.5 SUCCESSORS. Subject to the provisions of this Lease on assignment and subletting, each and all of the covenants and conditions of this Lease shall be binding upon and inure to the benefit of the heirs, successors, executors, administrators, assigns, and personal representatives of the respective parties. The Port agrees that if the Property is sold, assigned, or

conveyed, except for any conveyance to the United States, the Port will place a provision in any conveyance making the conveyance subject to the terms and conditions of this Lease. The Port represents, that if this Lease is recorded, any subsequent conveyance of the Property by the Port will be subject to the terms of this Lease, with the exception of any conveyance to the United States.

23.6 NO BROKERS. Each party warrants and represents that it has not dealt with any real estate brokers or agents in connection with this Lease. Each party will indemnify and hold the other harmless from any cost, expense or liability (including costs of suit and reasonable attorney fees) for any compensation, commission, or fees claimed by any broker or agent in connection with this Lease.

23.7 WARRANTY OF AUTHORITY. The persons executing and delivering this Lease on behalf of Port and Tenant each represent and warrant that each of them is duly authorized to do so and that the execution of this Lease is the lawful and voluntary act of the person on whose behalf they purport to act.

23.8 QUIET POSSESSION. The Port agrees that upon compliance with the terms and conditions of this Lease, the Tenant shall at all times have the right to the quiet use and enjoyment of the Property for the term of the Lease and any extensions.

23.9 LEASE CERTIFICATION. Upon the request of the Tenant the Port agrees to provide a written certification of the status of the Lease, to the best knowledge of the Port at the time of the certification, setting forth the following: i) whether the Lease is in full force and effect; ii) whether there have been any amendments or modifications to the Lease; iii) whether the Tenant is current in the payment of the rent and other charges under the terms of the Lease; iv) whether the Port is aware of any default or breach on the part of the Tenant.

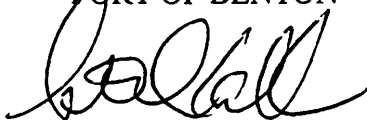
23.10 PARTIAL INVALIDITY. If any provision of this Lease is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

23.11 CONSTRUCTION. The parties lease have reviewed this lease and have the opportunity to consult with their respective counsel. The lease shall not be deemed to be drafted by either party and the lease shall not be construed against either party as the drafter.

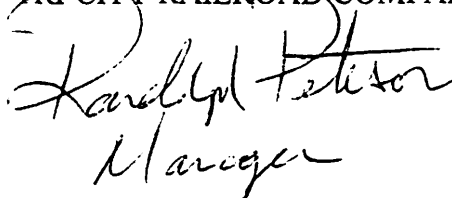
23.12 CONSENT. Whenever the consent or approval of a party to this Lease is required to be given by the terms of this Lease to the other party, such consent or approval shall not be unreasonably withheld or delayed.

DATED this 15th day of Aug., 2002.

PORT OF BENTON



~~TRI-CITY RAILROAD~~ COMPANY, L.L.C.



Manager

Chadwell

SCOTT D. KELLER

Title: _____

) ss.

)

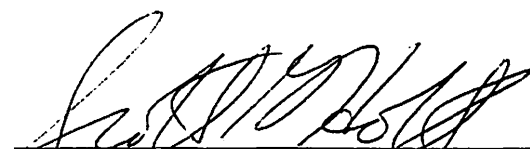
GIVEN UNDER my hand and official seal this 1st day of August, 2002.

My commission expires: June 25 2003

) ss.

)

GIVEN UNDER my hand and official seal this 15 day of August, 2002.



NOTARY PUBLIC in and for the State of

Washington, residing at Pasco, WA

My commission expires: June 28, 2003

APPENDIX 2

PORT OF BENTON

CONTRACT FOR OPERATION AND MAINTENANCE OF RAILROAD

THIS CONTRACT is made and entered into on the 7 day of October, 1998, by and between the PORT OF BENTON, a municipal corporation of the State of Washington, hereinafter called the "Port", and LIVINGSTON REBUILD CENTER, INC., a Montana corporation, hereinafter called the "LRC".

WHEREAS, the United States of America, acting by and through the Department of Energy is proposing to transfer to the Port a portion of the Hanford Railroad extending from Kennewick, Washington to the 1100 Area in Richland, Washington, consisting of approximately 16 miles of track, as more particularly described in Attachment 1.

WHEREAS, the United States of America, acting by and through the Department of Energy is proposing to transfer to the Port the 1100 Area in Richland, Washington, consisting of approximately 768 acres of land including the buildings and improvements, as more particularly described in Attachment 2.

WHEREAS, the United States of America, acting by and through the Department of Energy, is proposing to transfer to the Port the equipment, materials and personal property.

NOW THEREFORE, in consideration of the mutual promises contained herein, it is hereby agreed between the parties as follows:

1. The United States of America will convey to the Port the Southern Connection of the Hanford Railroad which is approximately 16.2 miles long and runs from the Union Pacific tracks in Kennewick, Washington to the former 1100 Area in Richland, Washington, hereafter referred to as "railroad".

1.1 The railroad is more particularly described in Attachment I to this

contract. The railroad includes the right of way, rail bed, ties, tracks, access roads, crossings, crossing signals, spurs, switches, bridges, spans, overpasses, structures, locomotives, railcars, equipment, and all other components associated with the operation of the railroad.

1.2 This contract shall be effective October 1, 1998, but may be rescinded by either party if within ninety days from the effective date of this agreement:

1.2.1 DOE does not convey the railroad to the Port.

1.2.2 The National Surface Transportation Board does not approve the Port for ownership of the railroad.

1.2.3 DOE does not execute the Amendment to Indenture proposed by the Port.

2. The Port hereby contracts with LRC for the maintenance of the railroad in accordance with the terms and conditions of this contract. The railroad shall be maintained in its present condition in accordance with all applicable federal, state and local laws, rules, and regulations, consistent with the tracks present rating as a Class 3 track, including in particular those maintenance standards set forth on Attachment 3. LRC's maintenance of the railroad shall include, but not be limited to the following:

2.1 Within ninety days of the effective date of this contract, LRC will provide the Port with a schedule for the routine inspection of the railroad, including the inspection of any locomotives, railcars or track maintenance equipment.

2.2 LRC will provide all of the labor and materials necessary to maintain, repair or replace any of the railroad as required to meet the conditions of this contract, provided that, as part of the consideration for this contract, LRC shall be permitted to use the equipment listed on Attachment 4 for railroad maintenance.

2.2.1 LRC shall be responsible for the maintenance of the equipment during the term of this agreement and shall insure the equipment against loss or damage. Upon the termination of this agreement or if LRC determines that the equipment is no longer needed for maintenance of the railroad, LRC shall return the equipment to the Port in its present condition, reasonable wear and tear excepted.

2.2.2 In the event the equipment becomes unavailable for use due to

obsolescence or for any other reason, LRC shall provide sufficient equipment to fulfill its obligations under the terms of this agreement.

2.2.3 The equipment shall be used only for the maintenance of the railroad and for economic development purposes in cooperation with municipal corporations or not-for profit organizations. The Port consents to the use of the equipment for an Applied Science of Railroad Technology Course to be operated in conjunction with Columbia Basin College. The equipment may only be used for other purposes or for for-profit purposes (other than the maintenance of the railroad) with the prior approval of the Port and an use agreement between the parties which provides for payment for the use of the equipment.

2.2.4 The Port shall retain title to the equipment and the Port may dispose of any of the equipment which is not needed for the maintenance of the railroad. The Port will consult with LRC prior to the disposition of the equipment.

2.3 LRC will provide for regular inspections and maintenance of the railroad crossings and the crossing signals by certified personnel. The inspections will comply with CFR 49 and any applicable law and regulations. The crossings and crossing signals shall be maintained in at least their present condition.

2.4 LRC will provide for regular inspections of the railroad bridges, spans and overpasses by certified personnel. The inspections will comply with the requirements of CFR 49 and any other applicable laws and regulations. LRC will promptly report any conditions which require repair or replacement to the Port. LRC is not required to provide the maintenance, repairs or replacements of the bridges, spans and overpasses, but LRC will provide the maintenance, repair and replacement of the tracks which cross the bridges, spans and overpasses. LRC shall not be required to maintain the tracks over the bridges, spans and overpasses if the structures are not maintained to the standards necessary to carry train traffic.

2.5 LRC is not required to provide for repair or replacement of any portion of the railroad which is damaged by a natural disaster, such as flooding or storm damage, an act of war, or an uninsured catastrophic loss.

2.6 Any work which must be done on the railroad which is excluded from the work which is required to be performed by LRC as a part of this contract, will be subject to the public bidding statutes and the Port may contract for this work with any party in accordance with the requirements of the public

works statutes. In the event, the Port requests any services from LRC, which are in excess of the services required by this contract, the Port will compensate LRC in accordance with the terms of a written consulting contract to be entered into between the parties at the time the services are requested.

2.7 To the extent practicable, LRC will schedule the routine maintenance to minimize the impact upon customers and others. Any repairs or maintenance which is necessary for safety or the protection of life and property shall be done as soon as possible. LRC shall promptly report any such conditions to the Port.

2.8 LRC will provide periodic maintenance reports to the Port not less frequently than the end of each calendar quarter.

2.9 LRC will not be required to remediate any environmental releases which were not the result of the actions or omissions of LRC.

2.10 LRC may use a rail profile measurement machine to establish a profile of all or a portion of the railroad. If a such a profile is made, LRC will provide a copy of the profile to the Port.

2.11 In consideration of the maintenance services to be provided by LRC, the Port will pay to LRC \$325,000.00 plus the sales tax each year during the term of this agreement. The payment shall be made in equal quarterly installments at the end of each calendar quarter in response to an invoice submitted by LRC to the Port. Within ninety (90) days of the end of the fifth year of the contract term, the parties shall review the compensation payable to LRC under the provisions of this section to determine whether the compensation should be adjusted so the compensation is equal to the rent for the 1171 Building, net of the leasehold excise tax. If the parties do not agree to an adjustment in the compensation, the compensation shall remain at the level provided for in this section, but the Port may consider the amount of compensation in making any decision under Section 5.1 of this contract.

3. The movement of railcars to and from the shippers on the railroad is presently handled by the major rail carriers. In the future it may be economically feasible for the parties to provide for the operation of the railroad. Neither the Port nor LRC is a railroad company. The actual operation of trains on the railroad may require a carrier by rail operations which will be subject to the tax and insurance requirements of the Railroad Retirement Board ("RRB") or the Federal Employers Liability Act ("FELA") other federal acts. The Port agrees that in the event it is desirable for a

carrier by rail operations to perform a portion of the activities under this agreement in order to comply with the provisions of RRB or FELA, then LRC may enter into an agreement with a carrier by rail operations (hereafter "operator") to provide for the operation of the railroad. The operator shall be mutually acceptable to parties and any contract with the operator shall be subject to all of the terms and conditions of this agreement.

3.1 LRC shall provide the direction and interface with the operator on behalf of the Port. LRC shall oversee the operator to determine whether the operator is complying with the contractual terms concerning the operation of the railroad. The operations shall, at a minimum include the following:

3.1.1 Preparation of an annual budget for the operation of the railroad, in a form agreed to by the parties, setting forth the projected revenues from the operation of the railroad and the projected expenses. At least quarterly, LRC or the operating company shall provide the Port with written statements setting forth the actual revenues and expenses for the operation of the railroad.

3.1.2 Negotiation with railroads and carriers regarding connections with the railroad and the transfer of the railcars from the railroad to other carriers; provided, however, that neither LRC nor the operating company shall have any authority to enter into any agreements or arrangements or make any representations which are binding on the Port.

3.1.3 The Port and LRC or the operator, as appropriate, shall establish the tariffs or user fees for the users of the railroad to develop the operating income for the railroad.

3.1.4 Collecting revenues from the users of the railroad and from the rail carriers who receive or send shipments using the railroad. All such revenues shall be subject to the terms of this agreement.

3.1.5 The Port, LRC and the operating company will meet at least annually, prior to the date LRC prepares the annual budget to determine the scope of the operations for the next succeeding year.

3.2 The costs of operating the railroad, including the payments to be made to the operator, shall be deducted from the revenue. The rail equipment described in Attachment 4 may be used for the operation of the railroad, provided that it is still in the ownership and possession of the Port at the time the operations are commenced. The value of the equipment shall be amortized and charged to the cost of operating the railroad in accordance

with generally accepted accounting principals. In consideration of LRC's services in managing the operations and managing the operating contract, seventy percent (70%) of the net revenues from the operations of the railroad remaining after the payment of all costs for operations shall be paid to LRC. The remaining net revenues shall be paid to the Port.

4. Simultaneously with the transfer of the railroad, the United States will transfer to the Port the property adjacent to the north end of the railroad known as the "1100 Area", as more particularly described in Attachment 2, to this agreement. LRC presently leases from the United States a portion of a building known as the 1171 Building, which contains a locomotive repair facility. When title to the 1100 Area is conveyed to the Port, the Port will enter into a lease in the form attached to this contract as Attachment 5. This lease will be for the entire 1171 Building.

4.1 The fair market rental value for the building has been determined to be \$3.50 per square foot per year on a triple net basis. The initial rent for the premises will be \$288,000.00, plus the applicable leasehold tax. LRC will pay the rent to the Port in accordance with the terms of the lease agreement.

4.2 In the event this contract is terminated prior to the termination of the lease, subject to section 4.3, the lease shall continue in full force and effect, provided, however, that LRC shall have the option to reduce the amount of space which it occupies to not less than the amount which it currently occupies under its lease with the United States. LRC shall continue to pay rent after the termination of this agreement. If the space occupied by LRC has been reduced the rent shall be reduced proportionately with the reduction of space.

4.3 In the event this contract is terminated or the property reverts to DOE, LRC shall have the option to substitute its original lease with the United States in place of the lease with the Port effective on the date of termination or reversion.

4.4 Any default under the terms of the lease shall be a default under the terms of this contract as well. In the event a default under the lease remains uncured, and the lease is terminated, the Port, at its sole option, may elect to terminate this contract effective upon the date of the termination of the lease, or any subsequent date selected by the Port.

5. This agreement shall be in effect for twenty years commencing on October 1, 1998 and terminating on September 30, 2018, unless terminated earlier as provided herein.

5.1 The Port may terminate this contract at any time (1) if the United States exercises its right of reversion for the all or any portion of the railroad property or for all or any portion of the 1100 Area, or (2) if the Port, in its sole discretion, elects to terminate the railroad operation and close the railroad, provided, however, that if the Port subsequently elects to recommence operation of the railroad, LRC shall be entitled to reinstate this agreement for up to twenty years from the effective date of this contract.

5.2 Either party may terminate this contract due to a material default or breach of the contract by the other party, which continues after notice of default and an opportunity for cure, and where there is a good faith dispute as to the existence of a default or its materiality, the parties have completed consultation and mediation when consultation and mediation is required by Section 11.

5.3 Upon the occurrence of an event specified in Section 5.1 above, the Port shall provide written notice to LRC and the termination shall be effective upon the date set forth in the notice which shall be at least thirty days after the receipt of the notice by LRC.

6. As part of its response to the Port's request for proposal, LRC proposed significant economic development activities in conjunction with its maintenance and operation of the railroad. The selection of LRC for this contract was made based, in part, upon these economic development activities. In the event the Port determines that LRC has failed to implement an economic development program, this will be a material default under this contract, subject to the provisions of Section 11 of this contract.

6.1 LRC has proposed to implement a training curriculum for students interested in careers within the railroad industry. This program will be implemented in conjunction with Columbia Basin College.

6.2 LRC has proposed to develop and construct high speed locomotives and railcars in the Tri-Cities. This project will be done in conjunction with other entities. LRC may seek a license agreement from the Department of Energy for use of the track to the north of the track which is the subject of this agreement.

6.3 LRC has proposed to work with the HAMMER Training and Educational Facility to establish a rail hazardous materials training course.

6.4 LRC has proposed to recruit a business which is not presently located in the Tri-Cities area to locate along the railroad. This is intended to be an

employment based business with primary income jobs.

6.5 The parties understand that the accomplishment of economic development goals is dependent upon many variable factors which may be beyond the control of the parties. In evaluating whether LRC has achieved the economic development goals, the Port will compare the accomplishments of LRC with the goals set forth in LRC's proposal to the Port and the Port will consider the amount of effort and commitment of resources which LRC has made to accomplish the goals, as well as the actual results. In consultation with the Port, LRC may substitute other goals in place of those in its proposal.

7. LRC will provide insurance coverage as specified by the Port for all of its activities under this contract with limits of \$10,000,000.00 aggregate and \$5,000,000.00 for any one accident with such insurance carriers and such deductibles as are acceptable to the Port. LRC shall name the Port as an additional insured on all such policies and shall provide a certificate of insurance to the Port. The policies shall provide that the carrier may not cancel any policy unless it provides the Port with thirty days written notice of the termination.

7.1 The insurance coverage for LRC's maintenance activities pursuant to this contract shall be paid by the Port.

7.2 At the time LRC or an operator begins operations on the railroad, LRC or an operator will obtain insurance coverage for these operations. The cost of the insurance shall be cost which is paid from the revenues from the operations.

8. LRC, in the performance of the services under this contract, shall be an independent contractor and shall be solely responsible for the performance of the services. The Port shall have no responsibility to pay employee benefits, social security, workers compensation, unemployment insurance, or withholding. LRC shall be responsible for the payment of all employment related benefits for employees.
9. Each party shall hold the other party harmless from all liability, penalties, costs, losses, damages, expense, causes of action, claims, attorney fees or judgments arising from or in any way connected to the party's performance or failure to perform under this Contract. In the event a claim is made against a party for any matters which are covered by this hold harmless agreement, the non-performing party shall defend against any such claim and shall reimburse the other party for any costs or expense, including attorney fees which the other party may incur in defending against the claim. This

hold harmless agreement shall apply to any act or omission, wilful misconduct, or negligence, whether passive or active, on the part of a party. This indemnity shall apply to any claims made by any employee of either party, and to the extent necessary to make this indemnity effective, each party waives the provisions of the Washington State Industrial Insurance Act.

10. LRC shall not assign this contract nor any of its rights or responsibilities under the contract without first obtaining the prior written consent of the Port. LRC may subcontract portions of the work in the ordinary course of performance without the prior consent of the Port, provided, however, such assignment shall not relieve LRC of its responsibilities under the contract. In the event of the sale of LRC or a substantial portion of the assets of LRC, or a change in the control of LRC, the Port may treat this as a prohibited assignment of this contract. This prohibition shall not apply to a transfer of stock to the employees of LRC under the existing LRC Employee Stock Ownership Plan.

11. In the event LRC fails to perform any of the terms or conditions of this agreement, the failure to perform shall constitute a default hereunder. Prior to pursuing its remedies, the Port shall give LRC written notice of the default and LRC shall have ten days from the receipt of the notice in which to cure the default. If the default is such that it can not be cured within ten days, LRC will not be in default if it promptly undertakes to cure the default and diligently pursues the cure thereafter.

11.1 In the event a default creates an imminent threat of injury to persons or damage to property, the Port may require LRC to cure the default immediately, and in the event the default is not promptly cured, the Port may have the default cured and bill LRC for the cost of the cure or the Port may close the railroad to any further operations until the default has been remedied.

11.2 In the case of any default or disagreement which does not create an imminent threat of injury to persons or damage to property, before a party seeks judicial enforcement of any remedy, the party shall request consultation with the other party. The request for consultation shall set forth the matters which are subject to the consultation and the party providing the notification, shall provide the names and titles of its employees or agents who will attend the consultation. The responding party shall have its employees or agents who are most familiar with the matter and who have job titles equivalent to those of the requesting party available for the consultation. The consultation shall take place at the Port offices in Richland, Washington or at such other place agreed to by the parties. The consultation shall take place within ten days of the receipt of the written

request for consultation by the responding party.

11.3 In the event, the parties fail to reach an agreement on any matter subject to consultation, either party may request mediation, but only if the matter in dispute would not be subject to mandatory arbitration if the matter were filed in Superior Court. The party requesting mediation shall deliver a written request for mediation to the other party within seven days of the date of any consultation. The requesting party shall specify the matters for mediation and the responding party may specify in writing any additional matters for mediation within five days of the receipt of the request for mediation.

11.3.1 Within ten days from the delivery of the request for mediation, the parties shall request the appointment of a mediator by a recognized mediation service in the State of Washington such as the Washington Arbitration and Mediation Service or Judicial Arbitration and Mediation Service. Either party may reject one proposed mediator.

11.3.2 The mediation shall take place at the Port offices in Richland, Washington, or at such other place as agreed to by the parties. The mediation shall occur within thirty days from the appointment of the mediator, but not later than forty-five days from the date the request for mediation is delivered to the other party.

11.3.3 The parties shall submit their written statements of position and any documents to the mediator upon the time schedule established by the mediator.

11.3.4 Each party shall pay one-half of the cost of the mediation.

11.4 If the parties are unable to resolve any dispute or disagreement through consultation or mediation, then either party may bring an action in Benton County Superior Court to enforce any of the terms or conditions of the agreement. In any judicial action, any party may invoke any of the rights or remedies available in law or in equity.

11.5 After notice and an opportunity to cure, and consultation and mediation if required by Section 11 of this contract, if a material default or breach of this contract continues, then a party may terminate this contract by giving written notice of termination to the other party.

12. No waiver of any default shall constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No waiver,

benefit, privilege, or service voluntarily given or performed by either party shall give the other party any contractual right by custom, estoppel, or otherwise.

- 13 Any notices required or permitted to be given under the terms of this contract, shall be directed to the parties at the following addresses, or at such other address as the party may designate in writing prior to the giving of such notice:

PORT OF BENTON	LIVINGSTON REBUILD CENTER, INC.
3100 George Washington Way	P.O. Box 992
Richland, WA 99352	Livingston, Montana 59047
Attention: Executive Director	Attention: Randolph V. Peterson

With a copy to:

Thomas A. Cowan	Kenneth D. Tolliver
Cowan Walker, P.S.	Wright, Tolliver and Guthals. P.L.
P.O. Box 927	P.O. Box 1977
Richland, WA 99352	Billings, Montana 59103

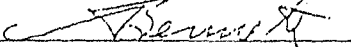
14. The captions and table of contents of the various paragraphs are for the convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content or intent of this contract or of any part or parts of the contract.
- 15 Subject to the provisions of this contract on assignment, each and every covenant and condition of this contract shall be binding upon and inure to the benefit of the successors, assigns, and transferees of the respective parties.
16. The persons executing and delivering this contract on behalf of the respective parties, each represent and warrant that they are duly authorized to do so and that the execution of this contract is the voluntary act of the person on whose behalf they purport to act.
- 17 All exhibits and addenda to which reference is made in this contract are incorporated in the contract by the reference to them. References to "this contract" include matters incorporated by reference.
18. If any provision of this contract is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.
- 19 Whenever the consent or approval of a party to this contract is required to be given by the terms of this contract to the other party, such consent or approval shall not be unreasonably withheld or delayed.

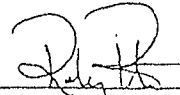
20. If either party brings any action or proceeding to enforce, protect or establish any right or remedy under this contract, the prevailing party shall be entitled to recover reasonable attorney fees as well as court costs. Arbitration is an action or proceeding for the purposes of this provisions.

DATED this 9th day of October, 1998.

PORT OF BENTON

LIVINGSTON REBUILD CENTER, INC.

By 
BEN BENNETT
Executive Director

By 
RANDOLPH V. PETERSON
President
October 10, 1998

APPENDIX 3

**CONSENT TO ASSIGNMENT
AND AMENDMENT OF
CONTRACT AND LEASE**

THIS CONSENT TO ASSIGNMENT is made and entered into this 16th day of November, 1999, by and between LIVINGSTON REBUILD CENTER, INC. a Montana corporation, hereafter referred to as "LRC", TRI-CITY RAILROAD COMPANY, LLC, a Washington Limited Liability Company, hereafter referred to as "TCRC", and the PORT OF BENTON, a municipal corporation of the State of Washington, hereafter referred to as "Port".

WHEREAS, the Port, as the owner, entered into a Contract for Operation and Maintenance of Railroad, dated October 1, 1999 (hereafter referred to as "Contract") with LRC to provide for the maintenance of the Port railroad in Benton County, Washington.

WHEREAS, the Port, as the owner, entered into a Lease Agreement dated October 1, 1999 (hereafter referred to as "Lease") with LRC as the lessee for the premises situated in the former DOE 1100 Area.

WHEREAS, LRC has requested that the Port approve the assignment of the Contract and Lease to TCRC, and the parties now wish to make changes to the Contract and Lease.

NOW THEREFORE, it is hereby agreed among the parties as follows:

1. The Port hereby consents to the assignment of the Contract and the Lease from LRC to TCRC.
2. The Port's consent to the assignment shall not be deemed to release LRC from its obligations, duties and responsibilities under the Contract and under the Lease. In the event, TCRC fails to perform any act required of LRC under the Contract or the Lease, then LRC shall remain fully responsible for performance in accordance with the terms of the Contract or the Lease.
3. The assignment of the Contract and the assignment of the Lease shall be effective on November 10, 1999.
4. The parties agree the second paragraph, page 1 of the Lease Agreement shall be amended to delete "1173 Building" and to substitute "1171 Building".

5. The parties agree that Section 7 of the Contract shall be deleted in its entirety and the following language shall be substituted in its place:

7. The Port will obtain and maintain liability insurance coverage to cover the railroad maintenance activities to be provided by LRC under the terms of this Contract. The policy shall be obtained from an insurer selected by the Port and shall contain such limits and deductibles as are acceptable to the Port. The Port will name LRC as an additional insured on such policies.

7.1 At the time LRC or any other operator begins operations on the railroad, LRC or the operator will obtain liability insurance coverage for all such operations from an insurer and with such limits and deductibles as are acceptable to the Port. The cost of the insurance will be a cost which is paid from the revenues from the operation of the railroad.

7. Except as expressly modified by the terms of this Consent to Assignment, all of the other terms and conditions of the Contract and the Lease shall remain in full force and effect.

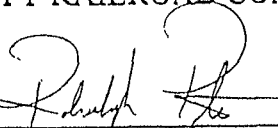
8. This Consent to Assignment supersedes and replaces all other consents to assignment which have been executed by the parties.

DATED this 16th day of November, 1999.

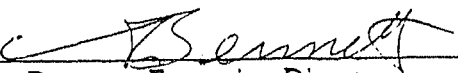
LIVINGSTON REBUILD CENTER, INC.

By: 
Randolph V. Peterson, President

TRI-CITY RAILROAD COMPANY, LLC

By: 
Randolph V. Peterson, Member

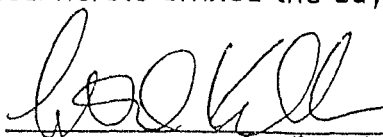
PORT OF BENTON

By: 
Ben Bennett, Executive Director

STATE OF WASHINGTON)
) ss.
County of Benton)

On this 16th day of November, 1999, before me, the undersigned, a Notary Public in and for the State of Washington duly commissioned and sworn, personally appeared Ben Bennett, to me known to be the Executive Director of the PORT OF BENTON, the municipal corporation that executed the foregoing instrument, and acknowledged that instrument to be the free and voluntary act and deed of that corporation, for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.



Print/Type Name: Scott D. Keller
NOTARY PUBLIC in and for the State of
Washington, residing at Richland
My commission expires: 7-15-03

STATE OF MONTANA)
) ss.
County of PARK)

On this 16th day of November, 1999, before me personally appeared Randolph V. Peterson, to me known to be the President of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Print/Type Name: TIFFANI JUHNKE
NOTARY PUBLIC in and for the State of
MONTANA, residing at LIVINGSTON
MY COMMISSION EXPIRES: 4-20-2003

STATE OF MONTANA

)

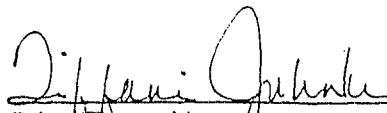
) ss.

County of PARK

)

On this 16TH day of November, 1999, before me personally appeared Randolph V. Peterson, to me known to be the Member of the limited liability company that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument on behalf of the company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Print/Type Name: TIFFANI JUHNKE

NOTARY PUBLIC in and for the State of
MONTANA, residing at LIVINGSTON

MY COMMISSION EXPIRES: 4-20-2003

APPENDIX 4

31116

SERVICE DATE - JUNE 23, 2000

DO

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33888]

Tri-City Railroad Company, L.L.C.--Lease and Operation Exemption--Rail Line of the Port of Benton in Richland, WA

Tri-City Railroad Company, L.L.C. (Tri-City), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease from the Port of Benton (POB) and operate approximately 17 miles of rail line currently owned by the POB,¹ known as the Hanford Site Rail System, Southern Connection extending from milepost 46.6 at the junction with the Union Pacific rail line in Richland, WA, to milepost 28.3 at the border to the U.S. Department of Energy's Hanford Site, connecting with the Hanford Site Rail System, Northern Connection (north of the City of Richland). Tri-City will become a Class III rail carrier.²

Tri-City indicates that it has entered into a maintenance and operation contract with the POB, which provides for Tri-City's operation of the rail line on behalf of the POB.

The transaction is scheduled to be consummated on or after June 21, 2000.

¹ See Port of Benton--Acquisition and Operation Exemption--U.S. Department of Energy Rail Line in Richland, WA, STB Finance Docket No. 33653 (STB served Oct. 6, 1998).

² Tri-City states that its projected revenues will not exceed those that would qualify it as a Class III carrier.

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33888, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on John Hawkenson, 2579 Stevens Drive, Building 1171, P.O. Box 1700, Richland, WA 99352.

Board decisions and notices are available on our website at “WWW.STB.DOT.GOV.”

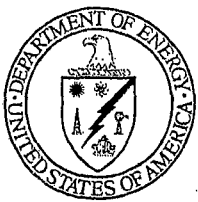
Decided: June 16, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

APPENDIX 5



Department of Energy
Richland Operations Office
P.O. Box 550
Richland, Washington 99352

98-SID-396

AUG 28 1998

Mr. Ben Bennett
Port of Benton
3100 George Washington Way
Richland, Washington 99352

Dear Mr. Bennett:

**TRANSFER OF THE HANFORD RAILROAD SOUTHERN CONNECTION AND THE 1100
AREA TO THE PORT OF BENTON**

The purpose of this letter is to request the Port of Benton's (POB) approval of the attached transfer document. The Department of Energy has worked with your staff and legal counsel in the drafting of this transfer document.

If approved by the POB, this transfer will be the most significant real property conversion in recent times. There are 768 acres with 26 facilities and 16 miles of railroad valued at more than \$5.1 million that will be available to assist in the POB's economic development activities.

If you have any questions, please contact Bill Edwards, of my staff, on (509) 372-1291.

Sincerely,

A handwritten signature in black ink, appearing to read "W. A. Rutherford", is positioned above the typed name.

W. A. Rutherford, Director
Site Infrastructure Division

SID:WFE

Attachment

INDENTURE

STATE OF WASHINGTON §
 §
COUNTY OF BENTON §

THIS INDENTURE is effective the 1st day of October 1998, between the UNITED STATES OF AMERICA, acting by and through the U.S. DEPARTMENT OF ENERGY, (the "Grantor") and the PORT OF BENTON, acting through its Board of Commissioners, (the "Grantee") (collectively, the "Parties").

WITNESSETH:

WHEREAS, Grantor has owned and maintained certain real property and improvements thereto in or proximate to Richland, Washington known as the Hanford 1100 Area (the "Real Property") and the Hanford Rail Line, Southern Connection (the "Railroad") and certain personal property appurtenant to said real property ("Personal Property"); and

WHEREAS, Grantor has determined that it is in the best interest of the UNITED STATES OF AMERICA to convey said Real Property and Railroad to Grantee for the purpose of fostering economic development; and

WHEREAS, Grantor has the authority to sell, lease, grant, and dispose of said Real Property, Railroad, and Personal Property pursuant to the Atomic Energy Act of 1954, as amended, specifically Section 161(g) (42 U.S. Code § 2201(g)); and

WHEREAS, Grantor may need continued rail access to the Hanford Nuclear Reservation (the "Hanford Site") for so long as Grantor conducts operations at said site; and

WHEREAS, Grantee agrees to use said Real Property and Railroad to create economic and employment opportunities in the community served by the PORT OF BENTON; and

WHEREAS, Grantee agrees to provide Grantor continued rail access to the Hanford Site for as long as Grantee continues to maintain and/or operate the Railroad.

NOW THEREFORE, for the following consideration, the Parties agree as follows:

I. DESCRIPTION OF PROPERTY AND CONVEYANCE

- A. Grantor owns and maintains Real Property and improvements thereto having an area of approximately 768 acres and containing 26 buildings, improved parking and other support areas, and grassy swales, which is described in Attachment A. Grantor also owns and maintains the Railroad and improvements thereto having an area of approximately 92 acres and linear track length of approximately 16 miles, which is described, in part, in Attachment B. Finally, Grantor owns Personal Property that is described in Attachment C. Grantor hereby grants, conveys, and forever quitclaims to Grantee, without warranty, either express or implied, said Real Property, Railroad, and Personal Property on an "as is" and "where is" basis and subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument. The quitclaim deed (the "Deed") conveying said Real Property, Railroad, and Personal Property is attached (see Attachment D).
- B. The descriptions of the Real Property, Railroad, and Personal Property set forth, respectively, in Attachments to this Indenture and any other information provided herein are based on the best information available to Grantor and believed to be correct, but an error or omission, including, but not limited to, the omission of any information available to Grantor or any other Federal

agency, shall not constitute grounds or reason for noncompliance with the terms of this Indenture or for any claim by Grantee against the UNITED STATES OF AMERICA including, without limitation, any claim for allowance, refund, deduction, or payment of any kind.

- C. Grantor shall make reforms, corrections, and amendments to the Deed if necessary to correct such Deed or to conform such Deed to the requirements of applicable law.

II. CONSIDERATION

Grantor's conveyance is in consideration of the assumption by Grantee of all Grantor's maintenance obligations and its taking subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument.

III. TITLE EVIDENCE

Grantee reserves the right to procure a title report and/or obtain a title insurance commitment issued by a licensed Washington Title insurer agreeing to issue to Grantee, upon recordation of the Deed, a standard owner's policy of title insurance insuring Grantee's good and marketable title to said Real Property and Railroad.

IV. COSTS OF RECORDATION

Grantee shall pay all taxes and fees imposed on this transfer and shall obtain at Grantee's expense and affix to the Deed such revenue and documentary stamps as may be required by Federal, State of Washington, and local laws and ordinances. The Deed and any security documents shall be recorded by Grantee in the manner prescribed by State of Washington and Benton County recording statutes.

V. EASEMENTS, RESTRICTIONS, AND LIMITATIONS

- A. Grantor retains an easement, described in the Deed found at Attachment D, on the road known as Stevens Drive that extends north from the junction of Spengler Street to Horn Rapids Road (the "Road"). Grantee shall have a right of first refusal governing any conveyance in the Road by Grantor.
- B. Grantee shall take title subject to all public utility and other easements on record, described in Attachment E, and any other zoning regulations and restrictions appearing on plats, in the Deed, or in any title report prepared to support this transfer of Real Property and the Railroad.
- C. Grantor retains an easement, described in Attachment F, for Grantor's existing infrastructure, including telecommunications infrastructure, on the Real Property and Railroad. Grantee shall reasonably negotiate and convey no-cost new easements to support access to existing or new infrastructure of any type or to improve on said infrastructure.
- D. Grantor shall have until March 31, 1999, to remove personal property not conveyed to Grantee and cultural artifacts described in Section XXIII. below from buildings on the Real Property and the Railroad and vacate any of the buildings in which it currently operates.
- E. Grantee shall take title subject to the use permit, described in Attachment F, executed between the Home Depot and Grantor.

VI. LICENSES

- A. Grantor reserves unto itself a no-cost license for whole or partial use of the buildings described in Attachment G and a parking lot for use by Grantor's Safeguards and Security Division to conduct

its "Emergency Vehicle Operations course". The term for these licenses also is listed in Attachment G, said licenses terminating upon: (i) early abandonment of licenses upon notification to Grantee; or (ii) expiration of licenses unless renewed. Renewal shall be in at Grantor's option for one-(1) year periods not to exceed a total of ten (10) periods, and Grantee shall presume that said options are exercised unless notice declining renewal is received within thirty (30) days or more of each license expiration. Grantor shall cooperate with Grantee in the event that Grantee has a commercial tenant for space licensed by Grantor, and to the extent practicable, abandon such license(s) if (i) such abandonment is in the best interest of the UNITED STATES OF AMERICA, and (ii) substitute space is made available by Grantee, if Grantor requires such space and it is not available within the Hanford Site.

- B. Grantor's operations in those buildings and the parking lot in which it retains licenses shall be: (i) conducted in a neat and orderly manner so as not to endanger personnel or property of Grantee or Grantee's other licensees, lessees, and invitees; and (ii) in compliance with all applicable laws, regulations, rules, and ordinances. In the event that the buildings licensed to Grantor become unsuitable for occupancy for any reason, including damage, destruction, or collective wear and tear, Grantor reserves the right to restore the buildings during the term of the licenses.
- C. Before expiration or prior termination of building licenses, Grantor shall restore the buildings or building interiors to the condition in which they were conveyed or to such improved condition as may have resulted from any improvement made therein by Grantee during license terms, subject to ordinary wear and tear for which Grantor is not liable hereunder.
- D. Grantor shall be responsible for all utilities and maintenance associated with operations conducted in the building under license. In the event that partial building space is used, Grantor and Grantee shall agree on a suitable prorated amount for building utilities and maintenance that Grantor shall be responsible to pay to Grantee periodically.
- E. Grantor reserves to the General Services Administration ("GSA") a license to site a double-wide trailer and use parking spaces and a portion of the parking lot for enclosed storage on the Real Property located south of building 1175 (address: 2565 Stevens Drive, Richland, Washington) to have and use until abandoned. GSA shall be responsible for all utilities and maintenance associated with operations conducted from its trailer.
- F. Grantor reserves unto itself a no-cost license providing access to the Railroad for as long as Grantee maintains and/or operates said Railroad. Grantor shall pay published tariffs as applicable.

VII. CONDITION OF REAL PROPERTY AND MAINTENANCE OF RAILROAD

- A. Grantor shall clean the Real Property to an "industrial use" standard prior to transfer under this Indenture and subsequent abandonment of licenses. All buildings, utilities, and other property conveyed will be transferred in "as is" and "where is" condition as at the signing hereof, without any warranty or guarantee, expressed or implied, of any kind or nature, except as otherwise expressly stated in this Indenture. Grantor shall not be obligated to repair, replace, or rebuild any structures if and when licenses are abandoned except when Grantor's use resulted in damages exceeding ordinary wear and tear. Except as provided for in Section VIII. below, Grantor shall not be responsible for any liability to Grantee or third persons arising from such condition of the Real Property. The failure of Grantee to inspect fully the Real Property or to be fully informed as to the condition thereof will not constitute grounds for any noncompliance with the terms of this Indenture.

- B. For 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, to assure its efficient operation and use, provided, however, that such maintenance shall be required as to structures, improvements, facilities and equipment only during the useful life thereof, as determined jointly by Grantor and Grantee.

VIII. WARRANTIES AND REPRESENTATIONS

- A. Grantor represents and warrants under its enabling legislation (the Atomic Energy Act of 1954, as amended) that: (i) it has the full capacity, power and authority to enter into this Indenture and the transactions contemplated herein; and (ii) the execution, delivery and performance by Grantor of this Indenture has been duly authorized and approved by all necessary governmental action on the part of Grantor.
- B. Grantee represents and warrants that: (i) it is a political instrumentality of the State of Washington and duly organized under laws of the State of Washington; (ii) it has full capacity, power and authority to enter into and perform this Indenture and the continuing obligations contemplated herein; and (iii) the execution, delivery and performance by Grantee of this Indenture have been duly and validly authorized and approved by all necessary action on the part of Grantee.
- C. Grantor represents that, to the best of Grantor's knowledge, there are no facts known to Grantor that materially affect the value and condition of the Real Property and Railroad that are not readily observable by Grantee or that have not been disclosed to Grantee. The Parties acknowledge that in the course of abandoning any licenses, Grantor may learn additional facts regarding the value and condition of the Real Property. Grantor shall identify such facts and disclose them to Grantee in a timely manner.
- D. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA") Section 120(h)(1) (42 U.S. Code § 9620(h)(1)), and 40 U.S. Code of Federal Regulations Part 373, Grantor has made a complete search of its records concerning the Real Property and Railroad. These records indicate that hazardous substances, as defined by CERCLA Section 101(14), have been stored, disposed, or generated on the Real Property during the time Grantor owned said Real Property. Quantities of hazardous substances were released or disposed of on the Real Property during the course of ownership by Grantor, and the Real Property was listed on the National Priorities List by the Environmental Protection Agency ("EPA"). Said Real Property was remediated and removed from the National Priorities List in September 1996. Grantor agrees to meet all CERCLA obligations associated with the transfer of the Real Property now or in the future upon notice by Grantee.
- E. All remedial actions necessary to protect human health and the environment with respect to any such hazardous substances remaining on the Real Property have been or will be taken before the date of transfer, and any additional remedial actions found to be necessary by regulatory authorities with jurisdiction over the Real Property or Railroad attributable to contamination of hazardous substances shall be conducted by Grantor at Grantor's expense.

IX. ASSIGNMENT OF LEASES AND CONTRACTS

- A. Grantor hereby assigns Parts 1, 2, and 3 of the lease dated May 1, 1996, (see Attachment H) executed between Grantor and R.H. Smith Distributing Co., Inc. ("Smith") for fuel oil distribution from building 1172A. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by Smith for building 1172A operations, which are assigned herewith to Grantee. Grantor shall notify Smith of assignment.

- B. Grantor hereby assigns the lease dated March 5, 1998, (see Attachment H) executed between Grantor and Livingston Rebuild Center, Inc. ("LRC") for equipment repair services in building 1171. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by LRC for building 1171, which are assigned herewith to Grantee. Grantor shall notify LRC of assignment.
- C. Grantor hereby assigns two agreements, a supplemental agreement, and permit made among and by the Atomic Energy Agency (and its successors); Burlington Northern, Inc.; Oregon-Washington Railroad & Navigation Company; and Union Pacific Railroad Company governing access to the Railroad (see Attachment H). Grantee hereby accepts the obligations and considerations under this agreement and permit. Grantor shall notify successors Burlington Northern and Union Pacific of these assignments.

X OTHER AGREEMENTS

- A. No prior, present, or contemporaneous agreements shall be binding upon Grantor or Grantee unless specifically referenced in this Indenture. No modification, amendment, or change to this Indenture shall be valid or binding upon the Parties unless in writing and executed by representatives authorized to contract for the Parties.
- B. Grantor on written request from Grantee may grant a release from any of the terms, reservations, restrictions and conditions contained in the Deed. Grantor may release Grantee from any terms, restrictions, reservations, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions if Grantor determines that the Real Property and Railroad no longer serve the purposes for which they were conveyed or the Grantee determines that continued ownership of the Railroad is no longer economically viable. All or any portion of the Real Property or Railroad may be reconveyed to Grantor subject to the conditions detailed in Section XVII. below.

XI NOTICES

Any notices required under this Indenture shall be forwarded to Grantor or Grantee, respectively, by Registered or Certified mail, return receipt requested, or by overnight delivery, at the following addresses:

Realty Officer
U.S. Department of Energy
Richland Operations Office
P.O. Box 550, G3-18
Richland, Washington 99352

Executive Director
Port of Benton
3100 George Washington Way
Richland, Washington 99352

XII LIMITATION OF GRANTOR'S AND GRANTEE'S OBLIGATIONS

- A. The responsibilities of Grantor, as described in this Indenture, are subject to: (i) the availability of appropriated program funds for remediation and operation of the Hanford Site; and (ii) the federal Anti-Deficiency Act (31 U.S. Code §§ 1341 and 1517).
- B. Grantee shall, to the extent permitted under applicable law, indemnify and defend the United States against, and hold the UNITED STATES OF AMERICA harmless from, damages, costs, expenses, liabilities, fines, or penalties incurred by Grantor and/or third parties and resulting

from Grantee's activities on the Real Property and Railroad, or any part thereof, including releases or threatened releases of, or any other acts or omissions related to, any hazardous wastes, substances, or materials by Grantee and any subsequent lessee or owner of the Real Property or Railroad or any subdivision thereof, their officers, agents, employees, contractors, sublessees, licensees, or the invitees of any of them.

- C. Grantee hereby releases the UNITED STATES OF AMERICA, and shall take whatever action may be required by Grantor to assure the complete release of the UNITED STATES OF AMERICA from any and all liability for restoration or other damage under the Deed or other agreement covering the use by Grantee or its licensees, invitees, and lessees of any Real Property transferred by this instrument.
- D. Grantee's responsibilities for maintenance and operation of the Railroad under the terms of this Indenture are subject to the economic viability of the Railroad. Section XVII. below shall apply if Grantee determines that economic viability is impossible after ten (10) years.

XIII. RIGHT OF ACTION

The provisions of this Indenture are not intended to benefit third persons, and breach thereof shall not be the basis for a cause of action by such third person against either Grantor or Grantee.

XIV. DISPUTES

- A. Except as otherwise provided in this Indenture, any dispute concerning a question of fact that is not disposed of by agreement between the Parties shall be submitted for decision by the Manager, U.S. Department of Energy, Richland Operations Office, or his successor in function ("Manager-RL). The Manager-RL shall, within twenty (20) days, mail or otherwise furnish a written decision to Grantee. The decision of the Manager-RL, shall be final and conclusive unless, within twenty (20) calendar days from the date of receipt of such copy, Grantee mails or otherwise furnishes to the Manager-RL, a written appeal addressed to the Associate Deputy Secretary for Field Management (FM-2). The decision of the Associate Deputy Secretary for Field Management (FM-2), this officer's successor, or the duly authorized representative for the determination of such appeals shall be presented in writing within twenty (20) calendar days from receipt of notice of appeal and shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this Section, Grantee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute under this Section, Grantee shall proceed diligently with the performance of this Indenture in accordance with the decision of the Manager-RL.
- B. This Section shall not preclude consideration of questions of law in connection with decisions provided for herein. Nothing in this Section, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

XV. PLANNING AND DEVELOPMENT

- A. Grantor is aware that Grantee is acquiring the Real Property and Railroad for development for industrial use. Accordingly, Grantor agrees that it shall cooperate reasonably with Grantee and sign such documents and undertake such other acts, without incurring costs or liability, that are necessary for Grantee to complete the planning, zoning, and development of the Real Property and Railroad, the resale and marketing of any portion of the Real Property, and the formation and operation of special districts, metropolitan districts, and other quasi-governmental entities organized for the purpose of providing infrastructure facilities and services to or for the benefit of

the Real Property and Railroad.

- B. Without incurring costs or liability, Grantor will cooperate reasonably with Grantee by signing such documents necessary for Grantee to apply to the Auditor and to the Treasurer of Benton County, Washington and to the Washington State Department of Revenue for tax valuation or abatement with regard to the Real Property that Grantee intends to sell. Upon request by Grantee, Grantor will execute and deliver to and in the name of Grantee one or more easements, accompanied by a legal description, for subsequent re-grant to local utility providers, for the purpose of installing new utility systems and relocating any existing systems, on any portion of the Real Property in which Grantor retains an interest. Other easements include, without limitation easements for ingress and egress and private utility lines required in connection with any portion of the Real Property and Railroad being conveyed. Such easement documents shall be in form and content satisfactory to Grantor and Grantee.

XVI. SUCCESSORS AND ASSIGNS

- A. The covenants, provisions, and agreements contained herein shall in every case be binding on and inure to the benefit of the Parties hereto and their respective successors. The rights and responsibilities under this Indenture may not be assigned by Grantee within ten (10) years of the date of this Indenture without the written consent of Grantor, said consent not being unreasonably withheld.
- B. Grantee shall not enter into any transaction that would deprive it of any of the rights and powers necessary to perform or comply with any or all of the terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions set forth herein, and if an arrangement is made for management or operation of the Real Property and Railroad by any agency or person other than Grantee, it shall reserve sufficient rights and authority to ensure that said Real Property and Railroad shall be operated and maintained in accordance with the terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions.

XVII. REVERSIONARY INTEREST

- A. For the ten (10) years next following the effective date of this Indenture, in the event that any of the aforesaid terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions are not met, observed, or complied with by Grantee, whether caused by the legal inability of said Grantee to perform any of the obligations herein set out, or otherwise, the title, right of possession, and all other rights conveyed by the Deed to Grantee, or any portion thereof, shall at the option of Grantor revert to the UNITED STATES OF AMERICA in its then existing condition sixty (60) days following the date upon which demand to this effect is made in writing by Grantor or its successor, unless within said sixty (60) days such default or violation shall have been cured and all such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions shall have been met, observed, or complied with, in which event said reversion shall not occur, and title, right of possession, and all other rights conveyed, except those that have reverted, shall remain vested in Grantee.
- B. The Railroad shall be used and maintained for the purposes for which it was conveyed, and if said Railroad ceases to be used or maintained for such purposes, all or any portion of the Railroad shall, in its then existing condition, at the option of Grantor, revert to the UNITED STATES OF AMERICA. If Grantor notifies Grantee or its similarly situated successor(s) that rail service no longer is required, such reversionary interest shall terminate and Grantee shall be free to abandon or convert the use of any portion or all of the Railroad.

- C. Grantee agrees that in the event Grantor exercises its option to revert all right, title, and interest in and to any portion of the Real Property or Railroad to the UNITED STATES OF AMERICA or Grantee voluntarily returns title to said Real Property and Railroad in lieu of a reverter, then Grantee shall provide protection to, and maintenance of said Real Property and Railroad at all times until such time as the title actually reverts or is returned to and accepted by the UNITED STATES OF AMERICA. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in 41 U.S. Code of Federal Regulations § 101-47.4913 in effect as of the date of the conveyance.

XVIII. USE OF REAL PROPERTY AND RAILROAD

Grantee shall use and maintain the Real Property and Railroad on fair and reasonable terms without unlawful discrimination. In furtherance of this condition (but without limiting its general applicability and effect) Grantee specifically agrees that: (i) it will establish such fair, equal, and nondiscriminatory conditions to be met by all users of the Real Property and Railroad, provided that Grantee may prohibit or limit any given type and kind of use if such action is necessary to promote safe operations; (ii) in its operation and the operation of the Real Property and Railroad, neither it nor any person or organization occupying space or facilities thereupon shall discriminate against any person or class of persons by reason of race, color, creed, sex, age, marital status, political affiliation or non-affiliation, national origin, religion, handicap or sexual orientation in the use of any of the facilities provided for the public; and (iii) that in any agreement, contract, lease, or other arrangement under which a right or privilege granted to any person, firm or corporation to conduct or engage in any lawful activity, Grantee shall insert and enforce provisions requiring the party to: (i) furnish said service on a fair, equal and nondiscriminatory basis to all users thereof; and (ii) charge fair, reasonable, and nondiscriminatory prices for each unit for service; provided, that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

XIX. ACCESS

- A. Subject to the provisions of Section V.A. above, Grantee shall, insofar as it is within its powers and to the extent reasonable, adequately protect the land access routes to the Real Property and Railroad. Grantee shall, either by the acquisition and retention of easements or other interests in or rights for the use of land or by adoption and enforcement of zoning regulations, prevent the construction, erection or alteration of any structure in the access routes to and from the Real Property and Railroad.
- B. Grantor reserves the right of access to those portions of the Real Property and Railroad for the purpose of construction, installing, maintaining, repairing, operating, and/or removing utility, telecommunications, or well monitoring equipment over, under, across, and upon the Real Property and Railroad.

XX. SEVERABILITY

If the construction of any of the foregoing terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions recited herein as provisions or Attachments, or the application of the same as provisions in any particular instance is held invalid, the particular term, reservation, restriction, license, easement, covenant, equitable servitude, contract, lease, or condition in question shall be construed instead merely as conditions upon the breach of which Grantor may exercise its option to cause the title, interest, right of possession, and all other rights conveyed to Grantee, or any portion thereof, to revert to it. The application of such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions as provisions elsewhere in the Indenture and the construction of the remainder of such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions as provisions shall not be affected thereby.

XXI. GRANTEE'S STATUS

Grantee shall remain at all times a political instrumentality of Benton County, State of Washington.

XXII. ENVIRONMENTAL DISCLOSURES

A. Lead-Based Paint Conditions.

1. Prior to use of any Real Property by children under seven (7) years of age, Grantee shall remove all lead-based paint hazards and all potential lead-based paint hazards from the said Real Property in accordance with all federal, State of Washington, and local lead-based paint laws, rules, regulations, and ordinances.
2. Grantee agrees to indemnify Grantor and the UNITED STATES OF AMERICA to the extent allowable under applicable law from any liability arising by reason of Grantee's failure to perform Grantee's obligations hereunder with respect to the elimination of immediate lead-based paint health hazards, the prohibition against the use of lead-based paint, and Grantee's responsibility for complying with applicable federal, State of Washington, and local lead-based paint laws, rules, regulations, and ordinances.

B. Presence of Asbestos.

1. Grantee is informed that the Real Property may be improved with materials and equipment containing asbestos-containing materials. The Due Diligence Assessment Report (see Attachment I) prepared by R.E. Morgan for Fluor Daniel Hanford, Inc. on August 28, 1998, discloses the condition and probable locations of asbestos-containing materials. Grantee is cautioned that unprotected or unregulated exposure to asbestos in product manufacturing and building construction workplaces have been associated with asbestos-related diseases. Both the Occupational Safety and Health Administration ("OSHA") and the EPA regulate asbestos because the potential hazards associated with exposure to airborne asbestos fibers. Both OSHA and EPA have determined that such exposure increases the risk of asbestos-related diseases, which include certain cancers and which can result in disability or death.
2. Grantee is invited, urged, and cautioned to inspect the Real Property to ascertain the any asbestos content and condition and corresponding hazardous or environmental conditions relating thereto. Grantor shall assist Grantee in obtaining any authorization that may be required to carry out any such inspection. Grantee shall be deemed to have relied solely on its own judgement in assessing the overall condition of all or any portion of the Real Property, including without limitation, any asbestos hazards or concerns.

C. Presence of Polychlorinated Biphenyls. Except for the 1162 and 1163 facilities, buildings on the Real Property were constructed prior to the enactment of the Toxic Substances Control Act of 1976, as amended, (15 U.S. Code §§ 2601 - 2692) that banned the manufacture of polychlorinated biphenyls ("PCBs"). Fluorescent light fixtures may contain ballasts with trace amounts of PCBs. Spills from overheated ballasts and ballast management (e.g., removal from service) are subject to requirements found in 40 U.S. Code of Federal Regulations Part 761.

D. Grantor's Disclaimer.

1. No warranties, either express or implied, are given with regard to the condition of the Real Property including, without limitation, whether the Real Property does or does not

contain lead-based paint, asbestos, PCBs or petroleum residues attributable to past operations (see "Environmental Assessment for the Transfer of 1100 Area, Southern Rail Connection and Rolling Stock, Hanford Site, Richland, Washington," also contained in Attachment I) or is not safe for a particular purpose. The failure of Grantee to inspect or to be fully informed as to the condition of all or any portion of the Real Property shall not constitute grounds for any claim or demand for adjustment or noncompliance with the terms of this Indenture.

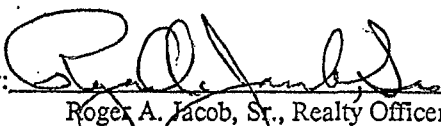
2. Grantor assumes no liability for damages for personal injury, illness, disability, or death to Grantee or to Grantee's successors, assigns, employees, invitees, or any other person subject to Grantee's control or direction or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity causing or leading to contact of any kind whatsoever with asbestos on the Real Property, whether Grantee has properly warned or failed to properly warn the individuals(s) injured.

XXIII. CULTURAL ARTIFACTS AND HISTORIC STRUCTURES

- A. Grantor conducted an inspection of the Real Property on February 3, 1998, in compliance with Part V, Paragraph C of the "Programmatic Agreement for the Built Environment," which states that the Grantor's Cultural Resources Program shall undertake a cultural assessment of the contents of historic buildings and structures to locate and identify artifacts that may have interpretive or educational value as exhibits for local, State of Washington, or national museums. Said assessment has been completed, and artifacts identified are listed in Attachment J.
- B. Grantor and Grantee shall jointly execute a Memorandum of Understanding ("MOU") with the Washington State Department of Community, Trade, and Economic Development, Office of Archeology and Historic Preservation that will address cultural resource issues associated with the Real Property and Railroad. After joint negotiation of an acceptable MOU, Grantee shall be bound by the terms of said MOU for the purposes of cultural artifacts disposition and care under the terms of this Indenture.

IN WITNESS WHEREOF, the Parties, by and through their authorized representatives, have executed the foregoing Indenture on the date first written above.

United States of America by and through the U.S. Department of Energy
GRANTOR:

By: 
Roger A. Jacob, Sr., Realty Officer, Richland Operations Office

Date: August 28, 1998

Witnessed by Notary Public: Wesley K. Krutner State of Washington, County of Ben

My Commission Expires: July 04, 2001

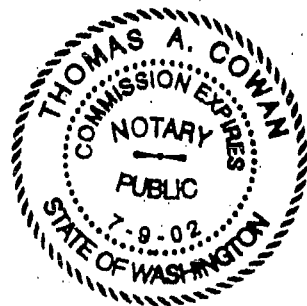
Port of Benton, Washington
GRANTEE:

By: *Ben Bennett*
Ben Bennett, Executive Director, Port of Benton, Washington

Date: September 25, 1998

Witnessed by Notary Public: Thomas A. Cowan

My Commission Expires: July 9, 2002



ATTACHMENTS

- A. 1100 Area Legal Description
- B. Department of Energy Railroad, Southern Connection, Legal Description
- C. Personal Property, 1100 Area Transfer, October 1, 1998
- D. Quitclaim Deed
- E. Easements
- F. Future Easements and Use Permit
- G. Licenses
- H. Leases (2) and Railroad Agreement and Permit
- I. Due Diligence Assessment Report and Environmental Assessment
- J. Historical Artifacts Assessment

APPENDIX 6



3100 George Washington Way
Richland, Washington 99352
(509) 375-3060
FAX (509) 375-5287

September 12, 2000

John Haakenson, President
Tri-City Railroad Company
P. O. Box 1700
Richland, Washington 99352

SUBJECT: Port of Benton Railroad

Dear Mr. Haakenson,

I am writing to you on behalf of the Port of Benton with regard to the Contract for Operation and Maintenance of the Railroad entered into between the Port and Livingston Rebuild Center, Inc. on October 1, 1998. This contract has now been assigned to Tri-City Railroad Company (TCRC).

The Port received the railroad property from the United States. The Port is currently paying TCRC to maintain the railroad. The contract with TCRC provides that you will develop revenue from the operation of the railroad and a portion of the income from operations will be paid to the Port to offset the cost of the maintenance.

The Port is aware that Union Pacific Railroad Company continues to use the Port of Benton railroad to service its customers in north Richland, but is not paying compensation for the use of the railroad, nor is it providing maintenance of the Port's railroad. Therefore, the Port hereby directs TCRC to give written notice to Union Pacific Railroad terminating its rights to use the Port of Benton track. The termination shall be effective sixty days after the date of the notice.

If you have any questions or if you need any further information, please contact me.

Sincerely,

Scott D. Keller
Assistant Executive Director

c: Port Commission and Counsel

APPENDIX 7

From: Scott Keller [keller@portofbenton.com]
Sent: Wednesday, August 24, 2011 11:50 AM
To: Randall, Chris M
Subject: RE: Track Usage Agreement

Thank you Sir.

Have a great week.

Scott

From: Randall, Chris M [mailto:Christopher.Randall@BNSF.com]
Sent: Wednesday, August 24, 2011 7:22 AM
To: Scott Keller
Subject: RE: Track Usage Agreement

I sent to Craig this morning.

This message may be confidential and should be read or retained only by the intended recipient. If you have received this transmission in error, please immediately notify the sender by replying to this message and then deleting it from your system.

Chris Randall
Shortline Development
817-352-6132 (office)
817-313-6415 (cell)

From: Scott Keller [mailto:keller@portofbenton.com]
Sent: Tuesday, August 23, 2011 9:59 AM
To: Randall, Chris M
Cc: Craig Levie; Tom Cowan (tcowan@cowanmoore.com); Stuart Dezember; John Haakenson
Subject: FW: Track Usage Agreement

Chris,

I had the last e-mail returned. I left out the s in your name.

Sorry.

Scott

From: Scott Keller
Sent: Tuesday, August 23, 2011 7:14 AM
To: chritopher.randall@bnsf.com
Cc: 'Craig Levie'; Kelly Thompson; Tom Cowan (tcowan@cowanmoore.com); John Haakenson; Diahann Howard
Subject: Track Usage Agreement

Chris,

I just received a voice mail from Craig Levie regarding the track usage agreement. The Port has contracted with Tangent Services to attempt to help us with future railroad issues. Please forward to Craig, the track usage agreement draft that you prepared for the Port of Benton.

Thank You.

On another note, I have contacted Tyler McCoy in your real estate division regarding our interest in purchase land in Prosser WA. Any help from you would be appreciated to accomplish this task in a timely manner. Tyler has been good to work with. The Port has hired an MAI appraiser to value the property. We should have a value within a few months.

Thanks for everything.

Scott

PORT OF BENTON

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-----Original Message-----

From: McCoy, Tyler (US) [mailto:Tyler.McCoy@am.jll.com]

Sent: Thursday, March 25, 2010 2:49 PM

To: Scott Keller; Kelly Thompson

Cc: Stuart Dezember; Sharman, Tim (US); christopher.randall@bnsf.com

Subject: BNSF Land Sale to Port of Benton

Scott:

I spoke with Stuart Dezember regarding the Port's land purchase from BNSF and he asked me to provide a synopsis as to where we stand:

- The area was submitted for operating approval in September of 2009. So far two of the four approvals have been received however I cannot offer a commitment as to when a decision will be made on the remaining ones.
- Attached is the Exhibit A that was prepared for this transaction as well as the aerial photos.
- The size of the sale area is approximately 808,687 square feet.
- While no price has been set, this transaction could be in the \$500,000.00 range, give or take, based up on the assessed value of the adjoining parcels. For a transaction of this size BNSF will require an appraisal be completed to help determine the purchase price. We would look to begin the appraisal once the site has been approved for sale.
- Per our discussion late last fall, it was my understanding the Port would not likely pursue this purchase in 2010 and instead look to purchase sometime the following year.

1

From: Rogalsky, Pete [mailto:PRogalsky@CI.RICHLAND.WA.US]

Sent: Tue 12/8/2009 11:37 AM

To: Scott Keller; Stuart Dezember

Subject: Meeting with T. Cowan about Railroad Lease

Stuart and Scott,

Thanks for a helpful update this morning, Stuart. This is just a tickler that when it seems appropriate could you coordinate a meeting with yourselves and Tom Cowan to help me understand the Port's lease with TCRR and how it may be impacted by the various changes the City would like to see in TCRR operations?

Looking forward to our next steps.

Pete Rogalsky

APPENDIX 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BNSF RAILWAY COMPANY,

Plaintiff,

UNION PACIFIC RAILROAD
COMPANY, and PORT OF BENTON,

Plaintiff-Intervenors,

v.

TRI-CITY & OLYMPIA RAILROAD
COMPANY LLC,

Defendant.

NO. CV-09-5062-EFS

**ORDER GRANTING BNSF'S MOTION
FOR SUMMARY JUDGMENT, DENYING
TCRY'S MOTION FOR SUMMARY
JUDGMENT, AND DENYING ALL
OTHER PENDING MOTIONS AS MOOT**

Before the Court, without oral argument, are Plaintiff BNSF Railway Company's (hereinafter "BNSF") Motion for Summary Judgment, ECF No. [267](#), and Defendant Tri-City & Olympia Railroad Company LLC's (hereinafter "TCRY") Motion for Summary Judgment, ECF No. [273](#). Also before the Court are BNSF's Motion to Compel Discovery Propounded to Defendant Tri-City & Olympia Railroad Company, L.L.C., ECF No. [305](#), and TCRY's Motion for Protective Order, ECF No. [316](#). After reviewing the submissions of the parties and applicable authority, the Court is fully informed. For the reasons discussed below, the Court grants BNSF's Motion for Summary Judgment, denies TCRY's Motion for Summary Judgment, and denies all other pending motions as moot.

1 **I. BACKGROUND¹**

2 **A. 1947 Agreement**

3 On November 6, 1947, the United States, acting through the U.S.
4 Atomic Energy Commission ("Commission"), entered into an agreement ("1947
5 Agreement") with several railroads to establish service to the Hanford
6 Nuclear Reservation ("Hanford site"). BNSF and Union Pacific Railroad
7 Company ("UP"), the undisputed successors-in-interest to the 1947
8 Agreement, were granted "equal joint" operating rights over trackage
9 beginning near Kennewick and extending north of Richland to the Hanford
10 site ("Richland Trackage").

11 The 1947 Agreement identifies the rights of the parties to railway
12 lines as shown on an August 25, 1947 map attached to the Agreement as
13 "Exhibit A." The 1947 Agreement acknowledges that "the Government has
14 constructed on its property a line of railway . . . extending from

15 _____
16 ¹ In connection with their motions, the parties submitted Joint
17 Statements of Uncontroverted Facts. ECF Nos. [281](#) & [294](#). The Court treats
18 these facts as established consistent with Federal Rule of Civil Procedure
19 56(d), and sets these forth in this "Factual Background" section without
20 reference to an ECF number. Any disputed facts are supported by a
21 citation to the record. The Court has reviewed the record supporting the
22 parties' cross-motions for summary judgment, and finds that there are no
23 issues of material fact precluding summary judgment. See *Fair Housing*
24 *Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136
25 (9th Cir. 2001) (discussing district court's duty to review the record
26 when ruling on cross-motions for summary judgment).

1 Hanford, Washington, southerly to a point near the north bank of the
2 Yakima River," and states as its purpose that "the Government desires to
3 have a direct rail connection to the south so as to interchange business
4 with [BNSF and UP's predecessors in interest]." To this end, Article V
5 of the 1947 Agreement grants BNSF and UP's predecessors in interest the
6 "equal joint right" to operate on the rail line and "to use said
7 interchange facilities and wye for the purpose of interchanging business
8 with the Government." Article VII of the Agreement states that BNSF and
9 UP's predecessors in interest "each of itself agrees to deliver and
10 receive at said interchange facilities all business which either is
11 obligated to transport as a common carrier railroad." Article IX of the
12 Agreement imposes an obligation on BNSF and UP's predecessors to "agree
13 from time to time upon rules and regulations covering the movement of
14 engines, cars and trains over the line B-E and on said interchange
15 facilities."

16 The map attached to the 1947 Agreement identifies several points,
17 labeled A through E. Point A is in Kennewick, and points B, C, and D
18 extend along the rail line in a northwesterly direction toward the Hanford
19 site. The map identifies point E as a location to the north of Richland
20 upon which interchange tracks were to be built. The government later
21 constructed an interchange facility at Point E, and today, Point E is
22 TCRY's rail yard and is still operated as an interchange facility. Though
23 the 1947 map identified a location to the south of the interchange tracks
24 for the wye, the wye was in fact later built to the north of the
25 interchange tracks.²

26 ² A wye is a triangular arrangement of rail tracks designed to allow
ORDER * 3

1 In 1948, the 1947 Agreement was the subject of a ruling by the
2 Interstate Commerce Commission (ICC). Because the government was the only
3 "customer" served by BNSF and UP's predecessors, the railroads sought
4 exemption from the required public convenience and necessity
5 certifications for common rail carriers. The ICC's Order held that a
6 certificate was required because the railroads would also provide common
7 carrier services to businesses in and around Richland. The ICC's Order
8 modified terms in the 1947 Agreement regarding payment and rights to
9 termination, but left the remainder of the Agreement undisturbed.

10 **B. 1961 Agreement**

11 In 1961, the Commission entered into a second agreement ("1961
12 Agreement") with the Railroads. Section 1 of the 1961 Agreement leased
13 three specified areas of track to the railroads. Section 2 of the
14 Agreement granted "the Railroads, and the industries served by them, the
15 right to construct additional industrial spur, set-out, and such other
16 tracks connecting with the Government's main tracks or classification
17 yards as may be required to provide rail service for industries." Section
18 3 of the 1961 Agreement states as follows:

19 The Commission hereby grants the Railroads the right to
20 operate with their employees and equipment over such segments
21 of the Government's tracks shown on Exhibit "A" as it may be
necessary to use for the purpose of moving freight shipments
to or from the tracks covered by this agreement.

22 Section 3's grant of authority was consistent with the agreement's stated
23 purpose of allowing the railroads to operate on the United States' tracks
24 "for the sole purpose of receiving and delivering shipments routed via the
25

26 _____
railway equipment to change direction by performing a "three-point turn."

1 Railroads and consigned by or to shippers and receivers located on said
2 spur or side tracks."

3 The rail line depicted in a 1960 map attached as Exhibit A to the
4 1961 Agreement begins south of Richland at the Yakima River Bridge, and
5 extends to a Department of Energy (DOE) "barricade" roughly one thousand
6 feet north of the wye tracks. The three segments of track leased in the
7 1961 Agreement are all south of the interchange facility and wye.

8 In 1979, the United States entered into an agreement with the
9 railroads converting the 1961 lease agreement into a permit so that the
10 tracks could be classified as surplus under the Federal Property and
11 Administrative Services Act of 1949. This agreement deleted Sections 1
12 and 4 of the 1961 Agreement, which detailed the terms of the lease and the
13 railroads' maintenance obligation, but left the 1961 Agreement's other
14 provisions "in full force and effect."

15 **C. 1998 Indenture**

16 In 1998, the United States, acting through the DOE, conveyed
17 ownership of a six-mile section of track to the Port of Benton ("Port")
18 through an Indenture, thereby assigning the DOE and Commission's rights
19 under the 1947 and 1961 Agreements to the Port. The indenture stated that
20 the 1947 and 1961 Agreements and the 1979 permit agreement governed access
21 to the Railroad. The Indenture also stated that the Port, as assignee,
22 agreed to be bound by the obligations and considerations in the United
23 States' permit. As a result of these agreements, the Port has the right
24 to terminate BNSF and UP's rights to use the Richland Trackage upon six
25 months notice.

26 /

1 **D. Interchange Agreement**

2 On October 1, 1998, the Port entered into a Maintenance and Operation
3 Agreement with TCRY's predecessor, Livingston Rebuild Center, Inc.
4 ("Livingston"), under which it agreed to pay Livingston \$325,000 per year
5 for the maintenance of the Richland Trackage. These contractual rights
6 and obligations were subsequently assigned to TCRY.

7 In May 2000, BNSF and TCRY contracted to interchange cars going into
8 the Richland Trackage ("Interchange Agreement"). They exchanged cars at
9 the Richland Junction, and TCRY served BNSF's customers along the Richland
10 Trackage. TCRY maintained the trackage at its own expense and began
11 charging a per-car fee for its services. This contract specifically
12 reserved BNSF's rights under the 1947 and 1961 Agreements.

13 In a September 12, 2000 letter to then-TCRY President John Haakenson,
14 the Port's Assistant Executive Director Scott Keller acknowledged that the
15 Port was paying TCRY to maintain the railroad under a contract that
16 allowed TCRY to charge a fee for its railroad operations, the revenue from
17 which would offset the cost of maintenance. Recognizing that UP was using
18 the Richland Trackage without paying a fee, the Port directed TCRY "to
19 give written notice to [UP] terminating its rights to use the Port of
20 Benton track." Beginning November 14, 2000, UP could no longer continue
21 its unauthorized use of the Richland Trackage: it would need to establish
22 an interchange agreement with TCRY.

23 From approximately April 2001 through November 2001, TCRY and BNSF
24 continuously disagreed about BNSF's right to operate on the Richland
25 Trackage. BNSF claimed the 1947 and 1961 Agreements allowed it to
26 directly operate on the Richland Trackage without interchanging; TCRY

1 maintained that BNSF could only operate on the Richland Trackage if it
2 operated under the Interchange Agreement. This disagreement about BNSF's
3 rights to operate on the Richland Trackage forms the essential controversy
4 before the Court today.

5 **E. Railroad Lease**

6 In 2002, TCRY and the Port negotiated a lease agreement ("Railroad
7 Lease") that authorized TCRY to provide rail and track maintenance
8 services on the Richland Trackage. Paragraph 7.4 of the lease agreement
9 states that TCRY "shall not take any actions which will amend, modify,
10 terminate or invalidate any existing contracts which the Port has with any
11 other railroad carrier, without the Port's prior written consent."

12 **F. Legal Action**

13 In 2009, BNSF informed TCRY that it intended to exercise its rights
14 to directly operate on the Richland Trackage. TCRY objected, and on July
15 20 and 21, 2009, TCRY erected a barrier which physically prevented a BNSF
16 locomotive from reaching BNSF customers along the Richland Trackage. A
17 few days later, TCRY requested that the Port terminate the Richland
18 Trackage agreements with BNSF. The Port refused.

19 BNSF filed this suit on July 20, 2009. ECF No. [1](#). UP moved to
20 intervene on August 4, 2009, ECF No. [26](#), and the Court granted UP's
21 motion. ECF No. [46](#). On August 12, 2009, the Court granted BNSF's motion
22 for a preliminary injunction, prohibiting TCRY from blocking BNSF's access
23 to the Richland Trackage and requiring TCRY to charge its customary fee.
24 ECF No. [46](#) & [93](#). TCRY filed an interlocutory appeal on September 9, 2009,
25 which was voluntarily dismissed. ECF Nos. [67](#), [101](#), [108](#) & [109](#). Since
26 August 15, 2009, BNSF and TCRY have been operating under the Proposed

1 Operating Plan created to comply with the Court's preliminary injunction.
2 ECF No. [52](#).

3 On March 8, 2010, the Court granted the Port of Benton's request to
4 intervene. ECF No. [121](#). On June 2, 2010, TCRY filed a separate but
5 related action in Benton County Superior Court against the Port, asserting
6 claims for inverse condemnation, breach of contract, breach of implied
7 covenant of good faith and fair dealing, promissory estoppel, and quantum
8 meruit. ECF No. 209-[1](#). By order dated August 20, 2010, the Superior
9 Court stayed the state court action pending resolution of the federal
10 claims in this Court. ECF No. 209-[2](#).

11 On September 29, 2010, the Port amended its complaint, asserting that
12 TCRY breached Railroad Lease Paragraph 7.4, which prohibits TCRY from
13 "amend[ing], modify[ing], terminat[ing], or invalidat[ing]" other
14 railroads' existing contractual relationships with the Port, when it
15 temporarily blocked BNSF Railroad Company (BNSF)'s access to the Richland
16 Trackage in July 2009. ECF No. [136](#). TCRY asserted several counterclaims
17 against the Port, including inverse condemnation, breach of contract,
18 breach of implied covenant of good faith and fair dealing, promissory
19 estoppel, quantum meruit, and tortious interference with contract. ECF
20 No. [165](#), ¶¶ 18-24.

21 TCRY filed a motion for summary judgment on October 20, 2010, seeking
22 dismissal of the Port's Amended Complaint. ECF No. [142](#). On November 24,
23 2010, the Port moved for summary dismissal of TCRY's counterclaims. ECF
24 No. [171](#). TCRY then moved on December 17, 2010, to remand the inverse
25 condemnation claims to state court for determination where they were
26 originally asserted. ECF No. [200](#). On July 1, 2011, the Court denied

1 TCRY's Motion for Summary Judgment and Motion for Remand. ECF No. [264](#).
2 The Court's Order granted the Port's Motion for Partial Summary Judgment,
3 dismissing TRCY's counterclaims against the Port. [Id.](#) In denying TCRY's
4 Motion for Summary Judgment, the Court found that under the 1947 and 1961
5 Agreements, BNSF and UP have "equal joint" rights to operate directly upon
6 the Richland Trackage, and that TCRY took its lease of the Richland
7 Trackage subject to BNSF and UP's rights. [Id.](#)

8 TCRY and BNSF now both move for summary judgment regarding the nature
9 and extent of BNSF and UP's rights to operate on the Richland Trackage.
10 ECF Nos. [267](#) & [273](#). TRCY asserts that BNSF and UP's rights under the
11 Agreements are limited to use of the trackage only up to the interchange,
12 or alternatively, the wye, and that BNSF may use those portions of track
13 for interchange purposes only. BNSF argues that their right to operate
14 directly extends to all Richland Trackage south of the old Department of
15 Energy barricade, and is subject only to the limitation that it be used
16 "for the purpose of moving freight shipments." After reviewing the record
17 in this matter, the arguments of the parties, and applicable authority,
18 the Court is fully informed. Because the 1947 and 1961 Agreements give
19 BNSF and UP the right to operate directly on the entirety of the Richland
20 Trackage, the Court denies TRCY's motion and grant BNSF's motion.

21 **III. DISCUSSION**

22 **A. Summary Judgment Standard**

23 Summary judgment is appropriate if the "pleadings, the discovery and
24 disclosure materials on file, and any affidavits show that there is no
25 genuine issue as to any material fact and that the moving party is
26 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once a

1 party has moved for summary judgment, the opposing party must point to
2 specific facts establishing that there is a genuine issue for trial.
3 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving
4 party fails to make such a showing for any of the elements essential to
5 its case for which it bears the burden of proof, the trial court should
6 grant the summary judgment motion. *Id.* at 322. When considering a motion
7 for summary judgment, the Court does not weigh the evidence or assess
8 credibility; instead, "the evidence of the non-movant is to be believed,
9 and all justifiable inferences are to be drawn in his favor." *Anderson*,
10 477 U.S. at 255. When ruling on cross-motions for summary judgment, the
11 Court has a duty to review the record supporting the parties' motions and
12 to determine whether there are issues of material fact precluding summary
13 judgment. *Fair Housing Council of Riverside Cnty., Inc.*, 249 F.3d at
14 1136.

15 Here, both TRCY and BNSF have moved for summary judgment. Both
16 parties agree that there are no genuine issues of material fact, and after
17 reviewing the record in this matter, the Court finds that there are none.
18 Summary judgment is thus appropriate if either party is entitled to
19 judgment as a matter of law.

20 **B. Applicable Law**

21 When interpreting a contract under Washington law, the Court attempts
22 to "ascertain the parties' intentions and give effect to their
23 intentions." *Taylor-Edwards Warehouse & Transfer Co. of Spokane, Inc. v.*
24 *Burlington N., Inc.*, 715 F.2d 1330, 1334 (9th Cir. 1983) (citing *Jones v.*
25 *Hollingsworth*, 88 Wn.2d 322, 326 (1977)). Under Washington law, extrinsic
26 evidence is only admissible "as to the entire circumstances under which

1 the contract was made, as an aid in ascertaining the parties' intent."
2 *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990). When a contract is
3 unambiguous and its formation is undisputed, the interpretation of the
4 contract is a question of law that is appropriate for resolution on
5 summary judgment. See, e.g., *Mfg'd Hous. Cmty. of Wash. v. St. Paul*
6 *Mercury Ins. Co.*, 660 F. Supp. 2d 1208, 1212 (W.D. Wash. 2009) (citing
7 *Mayer v. Pierce Cnty. Med. Bureau*, 80 Wn. App. 416, 420 (1995)).

8 **C. The Parties' Positions**

9 TCRY concedes that BNSF has the right to operate directly on a
10 portion of the Richland Trackage, but argues that language in the 1947
11 Agreement geographically restricts the United States' grant to BNSF and
12 UP's predecessors to direct service between points "C" and "E" on the map
13 attached as Exhibit A to the 1947 Agreement. Because point "E" on Exhibit
14 A to the 1947 Agreement is the present-day site of TCRY's interchange
15 facility, TCRY argues that BNSF and UP should be enjoined from directly
16 serving points north of the interchange facility, and should be required
17 to interchange with TCRY in order to serve customers north of the
18 interchange facility. Alternatively, TCRY argues that BNSF
19 and UP's operating rights should terminate at the wye built a short
20 distance north of the interchange facility.

21 TCRY also asserts, in an argument developed primarily in its reply
22 memorandum, that the 1947 Agreement only grants the railroads rights to
23 use trackage between points "C" and "E" on Exhibit A for the purpose of
24 interchanging rail traffic with the government, and not to provide direct
25 rail service to customers along that track. Finally, TCRY argues that it
26 would be unfair to allow BNSF and UP to directly service customers north

1 of the interchange facility because pursuant to the 1998 Maintenance and
2 Operation Agreement, it is charged with the sole responsibility for
3 maintaining the Richland Trackage. TCRY requests a permanent injunction
4 prohibiting BNSF and UP from traveling north of its interchange facility.

5 BNSF argues that because the wye pictured in Exhibit A to the 1947
6 Agreement was later built to the north of the interchange facility
7 (instead of to the south as represented in Exhibit A), the 1947 Agreement
8 does in fact grant the railroads operating rights north of the interchange
9 facility. BNSF further argues that Sections 2 and 3 of the 1961 agreement
10 extended the Railroads' operating rights to the entirety of the Richland
11 Trackage, limited only by the broad requirement that their operations be
12 for the purpose of "moving freight shipments."³ BNSF requests a

13
14 ³ BNSF also argues that TCRY's argument is foreclosed by the law of
15 the case. However, the Court's September 28, 2009 Order Granting BNSF's
16 Motion for Preliminary Injunction expressly stated that the Court's
17 preliminary injunction ruling was "not binding on the Court in future
18 proceedings in this case." ECF No. [93](#) at 2; see also *Sierra On-Line, Inc.*
19 *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984)
20 (recognizing that trial court's findings regarding a party's probability
21 of success on the merits are not binding on future stages of the case).
22 Furthermore, while the Court's July 1, 2011 Order held that TRCY leasehold
23 rights were "subject to UP and BNSF's continued use of the Richland
24 Trackage, as secured by the 1947 and 1961 Agreements," ECF No. [264](#) at 23,
25 the question of the exact nature and extent of the parties' rights over
26 the Richland Trackage was not then before the Court.

1 declaratory judgment recognizing its operating rights over the Richland
2 Trackage and a permanent injunction compelling TCRY to afford it equal
3 access to the Richland Trackage.

4 Intervenor-Plaintiff UP does not oppose BNSF's motion, but asks that
5 any ruling on the motion protect the "equal, just, and fair" operating
6 rights to the Richland Trackage that it was granted by the 1947 Agreement.

7 UP also asserts that BNSF does not have the right to provide direct rail
8 service to the Hanford site, but that BNSF's direct rail service rights
9 instead terminate somewhere between TCRY's interchange facility and
10 Hanford.

11 **D. Analysis**

12 **i. BNSF's Operating Rights on the Richland Trackage**

13 On close review of the underlying agreements, it is apparent that
14 BNSF's reading of the 1947 and 1961 Agreements is the correct one. While
15 the 1947 Agreement's grant to BNSF and UP's predecessors in interest is
16 explicitly limited to the "right to operate . . . between points B and E,
17 and to use said interchange facilities and wye for the purpose of
18 interchanging business with the government," ECF No. 32-[2](#) at 13, this
19 agreement was speculative and referenced trackage that had yet to be
20 built. See [id.](#) at 12 (the Commission shall lay track in "approximately
21 the location shown in yellow on said exhibit," and shall build an
22 interchange and wye "*in the vicinity* of point E." (emphasis added)). At
23 the time the 1947 Agreement was drafted, the United States was the only
24 shipper on this section of track, and security concerns prevented private
25 access to the Hanford site; thus, the Agreement's reference to point "E"
26 appears to be intended to demarcate a convenient place for interchange,

1 rather than to provide an affirmative limitation on the railroads' later
2 ability to service rail customers. But regardless of the exact intent
3 behind the 1947 Agreement, the 1961 Agreement greatly expands the United
4 States' grant to BNSF and UP.

5 The 1961 Agreement has the stated purpose of allowing the railroads
6 to "receiv[e] and deliver[] shipments routed via the Railroads and
7 consigned by or to shippers and receivers" located on spur or side tracks
8 connecting to the United States' tracks. ECF No. 32-3 at 62. As noted
9 above, Section 3 of the 1961 Agreement states as follows:

10 The Commission hereby grants the Railroads the right to operate
11 with their employees and equipment over such segments of the
12 Government's tracks shown on Exhibit "A" as it may be necessary
to use for the purpose of moving freight shipments to or from
the tracks covered by this agreement.

13 Id. at 63. Exhibit A to the 1961 Agreement is a detailed map depicting
14 the entirety of the Richland Trackage, minus the subsequently-built Port
15 trackage and spurs extending west from the wye. The above-quoted language
16 grants BNSF and UP broad operating rights over the Richland Trackage, and
17 bulwark's BNSF's position.

18 TCRY makes much of Section 3's limitation that the railroads may only
19 use such segments of the tracks as may be necessary to access "the tracks
20 covered by this agreement." TCRY argues that because Section 1 of the
21 agreement, which contains the operative language of the lease, lists only
22 sections of track *south* of the interchange facility, the "tracks covered
23 by this agreement" are all south of the interchange, and thus Section 3's
24 grant does not extend north of the interchange or wye. Section 2 of the
25 agreement, however, also grants "the Railroads, and industries served by
26 them," the right to construct additional "industrial spur, set-out, and

1 such other tracks connecting with the Government's main tracks or
2 classification yards as may be required to provide rail service for
3 industries." Id. It seems readily apparent that the Port's spur tracks
4 are "industrial spur, set-out, and such other tracks" that were
5 constructed by "the industries served by [the railroads]" as the phrase is
6 used in the 1961 Agreement. These subsequently-built tracks are thus
7 "tracks covered by" the 1961 Agreement, and it follows logically that
8 Section 3 also grants BNSF and UP the right to serve customers on these
9 later-built sections of Port trackage and spurs extending west of the wye.

10
11 TCRY also argues that Section 3's reference to "tracks shown on
12 Exhibit 'A'" precludes a reading of the 1961 Agreement that grants BNSF
13 and UP rights relating to tracks built after the Agreement, because they
14 by definition could not be shown on Exhibit A. But Section 3's reference
15 to "tracks shown on Exhibit 'A'" relates to the section of track over
16 which BNSF and UP are afforded rights, not the Section's later use of the
17 phrase "tracks covered by this agreement;" these tracks are precisely the
18 tracks over which BNSF and UP seek access. This interpretation of the
19 1961 Agreement is supported by its stated purpose of opening up the
20 Richland Trackage to common carrier rail service in order to promote
21 industrial development in the Richland area. Of course, BNSF and UP's
22 right to use the Richland Trackage may only be "for the purpose of moving
23 freight shipments."

24 /

25 Accordingly, the Court finds that the 1961 Agreement grants BNSF and
26 UP the right to operate directly on the Richland Trackage. This right

1 extends north of the TCRY interchange facility, and includes both the spur
2 tracks to the west of the wye and the main-line tracks north to Horn
3 Rapids Road. Neither BNSF nor UP has a right to serve the Hanford site
4 directly.

5 **ii. UP's Operating Rights on the Richland Trackage**

6 UP's position is clearly supported by the 1947 Agreement. The 1947
7 Agreement grants both BNSF and UP's predecessors in interest "the equal
8 joint right" to operate on the relevant section of track. ECF No. 32-[2](#)
9 at 13. This grant includes the future-looking assurance that "any right
10 or privilege at any time granted by the Commission to one of said
11 companies in respect to its operations shall be a right or privilege which
12 the other company may at its option exercise in respect to its
13 operations." [Id.](#) Furthermore, the Agreement requires BNSF and UP's
14 predecessors to "agree from time to time upon rules and regulations" for
15 the use of the Richland Trackage, and requires that such rules and
16 regulations "shall be equal, just, and fair," and "shall not unjustly
17 discriminate against either." [Id.](#) at 14. These portions of the 1947
18 Agreement have not been modified by later agreement, and remain in force
19 today. As such, the Court includes UP in any declaratory or injunctive
20 relief it affords BNSF.

21 **E. Relief Granted**

22 **i. Declaratory Judgment**

23 Under the Declaratory Judgment Act, 28 U.S.C. § 2201, declaratory
24 judgment is proper when one party has established that "there is a
25 substantial controversy, between parties having adverse interest, of
26 sufficient immediacy and reality to warrant issuance of a declaratory

1 judgment." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th
2 Cir. 2002) (quoting *Western Min. Council v. Watt*, 643 F.2d 618, 624 (9th
3 Cir. 1981)). Here, the factual background of this case unquestionably
4 demonstrates that such a controversy exists and that declaratory judgment
5 is proper.

6 BNSF requests a declaratory judgment recognizing its rights to
7 provide direct rail service over the Richland Trackage.⁴ For the reasons
8 discussed above, the Court grants BNSF's request in this regard, and
9 issues a declaratory judgment recognizing both BNSF and UP's rights to
10 provide direct rail service over the Richland Trackage.

11 **ii. Permanent Injunction**

12 BNSF also requests a permanent injunction compelling TCRY to allow
13 it access over the Richland Trackage and requiring TCRY to coordinate
14 train scheduling and dispatching with BNSF and UP.

15 Permanent injunctive relief is proper when a party can show "(1) that
16 it has suffered an irreparable injury; (2) that remedies available at law,
17 such as monetary damages, are inadequate to compensate for that injury;
18 (3) that, considering the balance of hardships between the plaintiff and
19 defendant, a remedy in equity is warranted; and (4) that the public
20 interest would not be disserved by a permanent injunction." *eBay Inc. v.*
21

22 ⁴ TCRY argues that BNSF's requested relief must be denied because BNSF
23 failed to name the Port and UP, who are necessary parties under Federal
24 Rule of Civil Procedure 19. However, any argument that BNSF has
25 improperly failed to join the Port and UP was rendered moot when they
26 intervened in this lawsuit.

1 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The first factor, the
2 existence of irreparable injury, is also satisfied by a continuing and
3 imminent threat of harm. *See, e.g., Bowler v. Home Depot USA Inc.*, No. C-
4 09-5523 JCS, 2011 WL 166140, at *3 (N.D. Cal. January 19, 2011) (citing
5 *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2760 (2010)). The
6 decision to grant or deny permanent injunctive relief is within the
7 Court's discretion. *See eBay Inc.*, 547 U.S. at 391 (citing *Weinberger v.*
8 *Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

9 Here, BNSF fulfills the first two factors because the percipient loss
10 of customer goodwill that will occur if TCRY again blocks it from
11 accessing the Richland Trackage is imminent; the loss of consumer goodwill
12 is an irreparable injury, and legal remedies are inadequate to compensate
13 for that injury. *See Rent-A-Center, Inc. v. Canyon Television & Appliance*
14 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Regents of Univ. of Cal.*
15 *v. Am. Broad. Cos.*, 747 F.2d 511, 519-20 (9th Cir. 1984). The balance of
16 hardships between BNSF and TCRY also runs in BNSF's favor: While TCRY is
17 currently tasked with maintaining the Richland Trackage under the 1998
18 Maintenance and Operation Agreement and the 2002 Lease, as the Court has
19 already found, TCRY took possession of the Richland Trackage subject to
20 BNSF and UP's pre-existing rights; the temporary hardship TCRY will suffer
21 under its contract with the Port is outweighed by the long-term hardship
22 BNSF and UP would suffer if their rights under the 1947 and 1961
23 Agreements were permanently abrogated. Finally, as the Court found in its
24 Order granting BNSF's motion for a preliminary injunction, ECF No. [93](#) at
25 10-11, it is in the public interest to encourage competition among the
26

1 railroads and to ensure that railroad service remains efficient.
2 Accordingly, a permanent injunction is proper.

3 TCRY argues that if such relief is granted, the injunction should not
4 be "asymmetrical." TCRY cites *Earth Island Inst. v. Carlton*, 626 F.3d
5 462, 469 (9th Cir. 2010), in support of this position, but this case
6 mentions no such consideration, and simply affirms a district court's
7 preliminary injunction issued under the *Winter* framework. TCRY asserts
8 that an order enjoining only it would be unfair because it would "give[]
9 only one party the asymmetric right to seek an order of contempt over any
10 claim of contract breach." ECF No. [283](#) at 15. However, only TCRY is in
11 breach of the 1947 and 1961 Agreements, and BNSF has committed no harm
12 that need be redressed with equitable relief. Furthermore, the Court's
13 contempt power will only be available for breach of the *injunction*, and
14 both parties will retain the ability to seek legal relief for breach of
15 the underlying contract. As such, the Court denies TCRY's request for a
16 "symmetrical" injunction.

17 For the reasons discussed above, the Court grants BNSF's request and
18 issues a permanent injunction requiring TCRY 1) to allow both BNSF and UP
19 to directly serve customers along the Richland Trackage, and 2) to
20 coordinate train scheduling and dispatching with both BNSF and UP. The
21 parties shall meet and confer to develop a comprehensive operational plan
22 as detailed below.

23 **F. Conclusion**

24 For all of the historical complexity surrounding the Richland
25 Trackage, the relative rights of the parties are actually quite simple:
26

1 The United States granted BNSF and UP's predecessors in interest full
2 rights to operate on the Richland Trackage, and TCRY took possession of
3 the Richland Trackage subject to these rights. Accordingly, the Court
4 issues a declaratory judgment recognizing BNSF and UP's operating rights,
5 and issues a permanent injunction protecting these rights.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. BNSF's Motion for Summary Judgment, **ECF No. [273](#)**, is **GRANTED**.
8 Both BNSF and UP shall have the right to operate directly on the Richland
9 Trackage. Representatives from BNSF, TCRY, and UP shall meet and confer
10 at a mutually-convenient time and place - either by phone or in person -
11 and draft a comprehensive operational plan (COP), consistent with the
12 Court's ruling, that is signed and agreed upon by all three parties. A
13 representative of the Port shall be permitted to attend and offer
14 comments. The COP shall cover trackage from the Richland junction to Horn
15 Rapids Road (and all spurs that spring therefrom). The proposed COP shall
16 be filed for Court approval **no later than 5:00 p.m. on December 23, 2011**
17 unless on or before that date, BNSF, TCRY, and UP file with the Court a
18 joint stipulation to a later date. The Port shall have seven (7) days
19 after the filing of the proposed COP in which to file a statement with the
20 Court stating its comments or objections to the proposed COP. The parties
21 shall have seven (7) days after the filing of the Port's statement in
22 which to file individual or joint reply to the Port's statement. No other
23 responsive or reply memoranda will be considered.

24 ///

25 //

26 /

1 2. All pending motions are **DENIED as moot**.

2 **IT IS SO ORDERED.** The District Court Executive is directed to enter
3 this Order and distribute copies to counsel.

4 **DATED** this 14th day of December 2011.

5
6 s/Edward F. Shea

EDWARD F. SHEA

7 United States District Judge
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APPENDIX 9

AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY

This Agreement for Purchase and Sale of Real Property (the "Agreement") is made and entered into this 8th day of May, 2008 between the **CITY OF RICHLAND**, a Washington municipal corporation ("Seller"), and **10 N. Washington Avenue, LLC**, a Washington limited liability company ("Purchasers").

1. Purchase and Sale of Property. Seller agrees to sell and Purchasers agree to purchase, on the terms hereafter stated, all of the following described property (collectively, the "Property"):

1.1. The Property. The land involved in this transaction is located in the City of Richland, Benton County, Washington, and is legally described as follows:

(See Exhibit A)

Legal Description to be provided upon approval by Council

In the event of an error in the legal description, the parties agree that either party or a scrivener may correct the error.

It is understood that the sale and conveyance to be made pursuant to this Agreement shall be subject to any and all applicable federal, state and local laws, orders, rules and regulations, and any and all outstanding rights of record or which are open and obvious on the ground.

The Property described in Section 1.1., shall be conveyed to Purchasers by a Statutory Warranty Deed (the "Deed") at the time of payment. The Deed shall be delivered to Purchasers at Closing.

2. Purchase Price. Purchasers shall pay to Seller as the Purchase Price for the Property the sum of approximately six hundred and sixty thousand dollars and no cents (\$660,000.00) computed on a price of twenty thousand dollars and no cents (\$20,000.00) per acre for thirty three acres of property (the "Purchase Price"). The Purchase Price shall be computed based on acreage identified in Exhibit A. The Purchase Price shall be paid by Purchasers to Seller in the form of all cash to be deposited in an escrow account with Chicago Title Company. The funds will be deposited in the following manner: fifteen-thousand dollars (\$15,000.00) earnest money upon execution of this Agreement. These funds will be deposited in escrow account with Chicago Title Company.

The Purchaser shall be entitled to any interest accrued on the earnest money deposit, in addition to the return of all earnest money as a result of any due-diligence determinations by either party that may prevent the purchase from proceeding.

3. Conditions Precedent to Sale. This Agreement is made and executed by the parties hereto subject to the following conditions precedent:

3.1. Title Review. Within ten (10) business days after the date of execution of this Agreement by both parties ("Execution Date"), Seller, at its sole cost and expense, shall obtain from Chicago Title Insurance Company (the "Title Company") a preliminary title report on the Property, and copies of all documents referred to therein, and furnish same to Purchasers.

3.2. Due Diligence. Upon execution of this Agreement by both parties, Purchasers are granted a due diligence period until and including forty (40) business days after receipt of the title report described in Section 3.1. The earnest money deposited under Section 2., shall be forfeited as liquidated damages should purchaser fail to notify seller of its intent to terminate this agreement upon expiration of the due diligence period. Said due diligence period may be extended upon written mutual agreement by both Purchasers and Seller but shall not be extended past September 5, 2008 without written amendment approved by both parties.

Purchaser may conduct, at its own expense, a full review of legal, title, environmental, archaeological and any other related issues. If the results of said review are unsatisfactory in Purchasers' opinion, Purchasers may, at its option, elect to terminate this Agreement by giving Seller written notice of termination prior to the end of the due diligence period. The Purchaser shall be entitled to any interest accrued on the earnest money deposit, in addition to the return of all earnest money as a result of any due-diligence determinations by either party that may prevent the purchase from proceeding. In the event of termination by Purchasers under this Section 3.2., this Agreement shall terminate and be without any further force and effect, and without further obligation of either party to the other.

During the Due Diligence period, Purchaser will provide to Seller a Rail Management Plan for Seller's review. Said plan shall identify feed stock and product requirements and corresponding rail traffic requirements, as well as mitigation measures that will be put in place to address impacts to vehicular and pedestrian traffic utilizing existing or planned public streets. If upon review the Seller determines that the Rail Management Plan insufficiently mitigates impacts to vehicular and pedestrian traffic, Seller may, at its option, elect to terminate this Agreement by giving Purchaser written notice of termination prior to the end of the due diligence period. The parties may, by mutual agreement, extend the Due Diligence period to allow for the editing, review and approval of the Rail Management Plan. If the Rail Management Plan is approved by the Seller it shall become binding on the Purchaser as a covenant of the Property and governing approval of development plans for the property in addition to other laws, rules or regulations that may be applicable. Both Parties will promptly provide to the other copies of all documentation and reports relating to the Property, including, for example, soils tests, environmental reports and similar reports.

3.3. Council Approval. The Closing of this transaction is contingent upon approval by the City Council of the City of Richland.

4. Closing. On or before the date of Closing, as described below, Purchasers shall deliver to the Escrow Company, Chicago Title Company, the Purchase Price for the Property in the form of a certified or cashier's check less the earnest money previously paid and interest on the earnest money deposit. Seller shall deliver the Deed, as approved by Purchasers, to the Title Company for placing in escrow. Title Company shall be instructed that when it is in a position to issue a standard owner's policy of title insurance in the full amount of the Purchase Price, insuring fee simple title to the Property in Purchasers, Title Company shall record and deliver to Purchasers the Deed; and issue and deliver to Purchasers the standard owner's policy of title insurance.

4.1. Closing Costs. Each party shall pay its own attorney's fees. Seller shall pay one half of all transfer taxes, recording costs, escrow Closing costs, if applicable, and *the full* premium for a standard owner's policy of title insurance. Purchaser shall pay one half of all transfer taxes, recording costs and escrow closing costs.

4.2. Closing Date. The Closing of the transaction and delivery of all items shall occur at Chicago Title Company and shall have occurred on a date specified by Sellers by written notice to Purchaser.

5. Title. Upon Closing of escrow as set forth in Section 4., title to the Property shall be conveyed by Seller to Purchasers by a duly executed Statutory Warranty Deed. Closing Agent shall record on the deed the Buyers agreement to develop within the Conditions Covenant and Restrictions described in this agreement.

6. Covenants, Representations and Warranties.

6.1. Seller's Covenants. Seller hereby covenants and agrees as follows:

6.1.1. From the date of this Agreement through the Closing Date (the "Contract Period"), the Seller shall not make any material alterations to the Property or to any of the licenses, permits, legal classifications or other governmental regulations relating to the Property, nor enter into any leases or agreements pertaining to the Property without the Purchasers' prior written consent.

6.1.2. During the Contract Period, Seller shall not voluntarily cause to be recorded any encumbrance, lien, deed of trust, easement or the like against the title to the Property without Purchasers' prior consent.

6.1.3. Seller shall use its best efforts to remove all disapproved exceptions identified in the Preliminary Title Report and/or the Due Diligence Period.

6.1.4. During the Contract Period, Seller will operate and maintain the Property in a manner consistent with Seller's past practices relative to the Property and so as not to cause waste to the Property.

6.1.5. Seller shall reasonably cooperate with Purchasers to obtain City issued approvals and permits for the development of the Property, in accordance with City Municipal Code and development standards.

6.2. Seller's Representations and Warranties. Seller hereby makes the following representations and warranties to Purchasers, each of which shall be true on the date hereof and on the date of Closing.

6.2.1. Seller has full power and authority to enter into and carry out the terms and provisions of this Purchase Agreement and to execute and deliver all documents which are contemplated by this Agreement, and all actions of Seller necessary to confer such authority upon the persons executing this Purchase Agreement and such other documents will have been taken.

6.2.2. Seller is a Washington municipal corporation, duly formed and organized, validly existing and in good standing under the laws of the State of Washington.

6.2.3. As of the date hereof, to the best of Seller's knowledge, during the Contract Period:

6.2.3.1. Seller has not received any written notice from any governmental authorities or regulatory agencies that eminent domain proceedings for the condemnation of the Property are pending or threatened.

6.2.3.2. Seller has not received any written notice of pending or threatened investigation, litigation or other proceeding before a local governmental body or regulatory agency which would materially and adversely affect the Property.

6.2.3.3. Seller has not received any written notice from any governmental authority or regulatory agency that Seller's use of the Property is presently in violation of any applicable zoning, land use or other law, order, ordinance or regulation affecting the Property.

6.2.4. No special or general assessments have been levied against the Property except those disclosed in the Preliminary Title Report and Seller has not received written notice that any such assessments are threatened.

6.2.5. Seller is not a "foreign person" for purposes of Section 1445 of the Internal Revenue Code.

Seller shall immediately give Purchasers written notice of any event which would make any representation or warranty set forth in Section 6.2 incorrect or untrue.

6.3. Purchaser's Representations: Purchaser hereby makes the following

representations to Seller, each of which shall be true on the date hereof and on the date of closing.

6.3.1. Purchaser represents that it has sufficient funds to close this transaction. The purchaser represents that it is a limited liability company in good standing, under the laws of its formation.

6.3.2. Purchaser's intended use of this property is for the development of railroad and related industrial development associated with bulk feed stock rail to truck transload operation and biofuel production. Purchaser agrees that the site will not be utilized for the importation of waste products without prior written consent of Seller. Purchaser further acknowledges that this agreement does not alleviate the Purchaser from obtaining the necessary approvals, authorizations or permits required for the development of property.

6.3.3. Purchaser recognizes that the property is not served by utilities or by a paved city street. Purchaser further recognizes that, under Richland Municipal Code and development standards, the developer of this Property is required to construct public utility and street infrastructure, and dedicate said infrastructure for public use, as part of the development. Purchaser and Seller agree to make best efforts to pursue state and federal grant funds that may be available to fully or partially offset costs to extend utilities and develop the proposed Logston Boulevard per the Horn Rapids Master Plan.

6.4. Survival of Covenants. The Covenants, Representations, and Warranties contained in Section 6., of this Agreement shall survive the delivery and recording of the Deed from the Seller to the Purchasers.

7. Casualty and Condemnation.

7.1. Material Casualty or Condemnation. If prior to the Closing Date (i) the Property shall sustain damage caused by casualty which would cost ten thousand dollars (\$10,000.00) or more to repair or replace, or (ii) if a taking or condemnation of any portion of the Property has occurred, or is threatened, which would materially affect the value of the Property, either Purchasers or Seller may, at its option, terminate this Agreement by written notice to the other party given within two (2) days after notice of such event. If prior to the Closing Date neither party provides said termination notice within such two (2)-day period, the Closing shall take place as provided herein with a credit against the Purchase Price in an amount equal to any insurance proceeds or condemnation awards actually collected by Seller and an assignment to Purchasers at Closing of all Seller's interest in and to any insurance proceeds or condemnation awards which may be due but unpaid to Seller on account of such occurrence.

7.2. Immaterial Casualty or Condemnation. If prior to Closing Date, the Property shall sustain damage caused by casualty which is not described in Section 7.1., or a taking or condemnation has occurred, or is threatened, which is not described in Section 7.1.,

neither Purchasers nor Seller shall have the right to terminate this Agreement. Closing shall take place as provided herein with a credit against the Purchase Price equal to (i) the cost to repair that portion of the Property so damaged by insured casualty, or (ii) an amount equal to the anticipated condemnation award, as applicable. At Closing, Purchasers shall assign to Seller all rights or interest in and to any insurance proceeds or condemnation awards which may be due on account of any such occurrence.

8. Purchasers' Remedies. In the event of material breach of this Agreement by Seller, Purchasers shall have, as their sole remedies (a) the right to pursue specific performance of this Agreement, (b) the right to terminate this Agreement and (c) all remedies presently or hereafter available at law or in equity. Purchasers hereby waive all other remedies on account of a breach hereof by Seller.

9. Liquidated Damages. IN THE EVENT OF MATERIAL DEFAULT BY PURCHASERS IN THE PERFORMANCE OF THEIR OBLIGATIONS HEREUNDER, SELLER SHALL HAVE THE RIGHT TO TERMINATE THIS AGREEMENT FORTHWITH AND WITHOUT FURTHER OBLIGATIONS TO PURCHASERS AND KEEP THE EARNEST MONEY DEPOSIT AS LIQUIDATED DAMAGES. PURCHASERS AGREE THAT IT IS DIFFICULT TO ASSESS THE AMOUNT OF DAMAGES INCURRED BY THE SELLER, IN THE EVENT OF A DEFAULT BY THE PURCHASERS. AS OF THE ENTRY OF THIS CONTRACT, THE AMOUNT OF THE EARNEST MONEY DEPOSIT IS A REASONABLE ESTIMATE OF THE DAMAGES.

10. Miscellaneous.

10.1. Finders Fee. Purchasers and Seller each agree that a real estate finder's fee (collectively, "Real Estate Compensation") is not due to any third party or to each other. Each party hereby agrees to indemnify and defend the other against and hold the other harmless from and against any and all loss, damage, liability or expense, including costs and reasonable attorneys' fees, resulting from any claims for Real Estate Compensation by any person or entity other than provided herein. The provisions of this Section 10.1., shall survive the Closing.

10.2. Time of the Essence. Time is of the essence of every provision of this Agreement.

10.3. Notices. Whenever any party hereto shall desire to give or serve upon the other any notice, demand, request or other communication, each such notice, demand, request or other communication shall be in writing and shall be given or served upon the other party by personal delivery (including delivery by written electronic transmission) or by certified, registered or Express United States Mail, or Federal Express or other commercial courier, postage prepaid, addressed as follows:

TO PURCHASERS:

10 N. Washington Avenue, LLC
PO Box 6106
Kennewick, WA 99336
(509) 371-1410

TO SELLER:

City of Richland
505 Swift Boulevard
Richland, WA 99352
ATTENTION: Community Development
Phone: (509)942-7583
FAX: (509)942-5666

Any such notice, demand, request or other communication shall be deemed to have been received upon the earlier of personal delivery thereof or two (2) business days after having been mailed as provided above, as the case may be.

10.4. Assignments and Successors. Purchasers, without being relieved of any liability hereunder, may not assign this Agreement without Seller's consent, for any purpose.

10.5. Captions. Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement.

10.6. Exhibits. All exhibits attached hereto shall be incorporated herein by reference as if set out herein in full.

10.7. Binding Effect. Regardless of which party prepared or communicated this Purchase Agreement, this Purchase Agreement shall be of binding effect between Purchasers and Seller only upon its execution by an authorized representative of each such party.

10.8. Construction. The parties acknowledge that each party and its counsel have reviewed and revised this Purchase Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Purchase Agreement or any amendment or exhibits hereto.

10.9. Counterparts. This Purchase Agreement may be executed in several counterparts each of which shall be an original, but all of such counterparts shall constitute one such Agreement.

10.10. Further Assurances. Purchasers and Seller shall make, execute and deliver such documents and undertake such other and further acts as may be reasonably necessary to carry out the intent of the parties hereto.

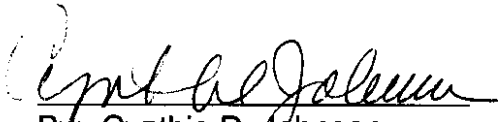
10.11. Merger. The delivery of the Deed and any other documents and instruments by Seller and the acceptance and recordation thereof by Purchasers shall effect a merger, and be deemed the full performance and discharge of every obligation on the part of Purchasers and Seller to be performed hereunder, except those clauses, covenants, warranties and indemnifications specifically provided herein to survive the Closing.

10.12. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Washington.

10.13. Reversionary Clause and Option to Repurchase/Reclaim. This Property is being sold to Purchasers in anticipation of establishing railroad and related industrial infrastructures associated with bulk feed stock rail to truck transload operations and biofuel production. If Purchasers fail to submit an application to Seller for approval of improvement plans within twenty (24) months of Closing, the Seller reserves the right to reclaim title to this Property. If Purchasers do not initiate improvements within thirty (30) months of Closing, Seller reserves the right to reclaim title to this Property. The Seller shall reclaim this Property by refunding the original Purchase Price of six hundred and sixty thousand dollars and no cents (\$660,000.00), without interest. Neither the Purchaser nor the Seller will assume any liability for expenses incurred by the other Party in conducting this transaction. Purchasers agree to reconvey title to the Seller within sixty (60) days of receipt of notification of Seller's decision to seek reconveyance of Property. This reversionary right is exclusive to the Seller and shall be exercised in at the sole discretion of the Seller. This reversionary right survives thirty-six (36) months after closing or until such time as improvement commences, whichever is earlier. The Seller shall be under no obligation to exercise this reversionary right. Purchasers agree that Seller must grant approval to any resale of the Property by Purchasers to any third party within the thirty-six month (36)-month reversionary period. This reversionary clause shall survive the delivery of the Deed.

IN WITNESS WHEREOF, the Purchasers have executed this Agreement on the date shown next to its signature and Seller has accepted on the date shown next to its signature.

CITY OF RICHLAND - SELLER



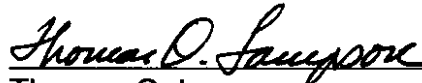
By: Cynthia D. Johnson
Its: City Manager

**10 N. WASHINGTON AVENUE, LLC -
PURCHASER**



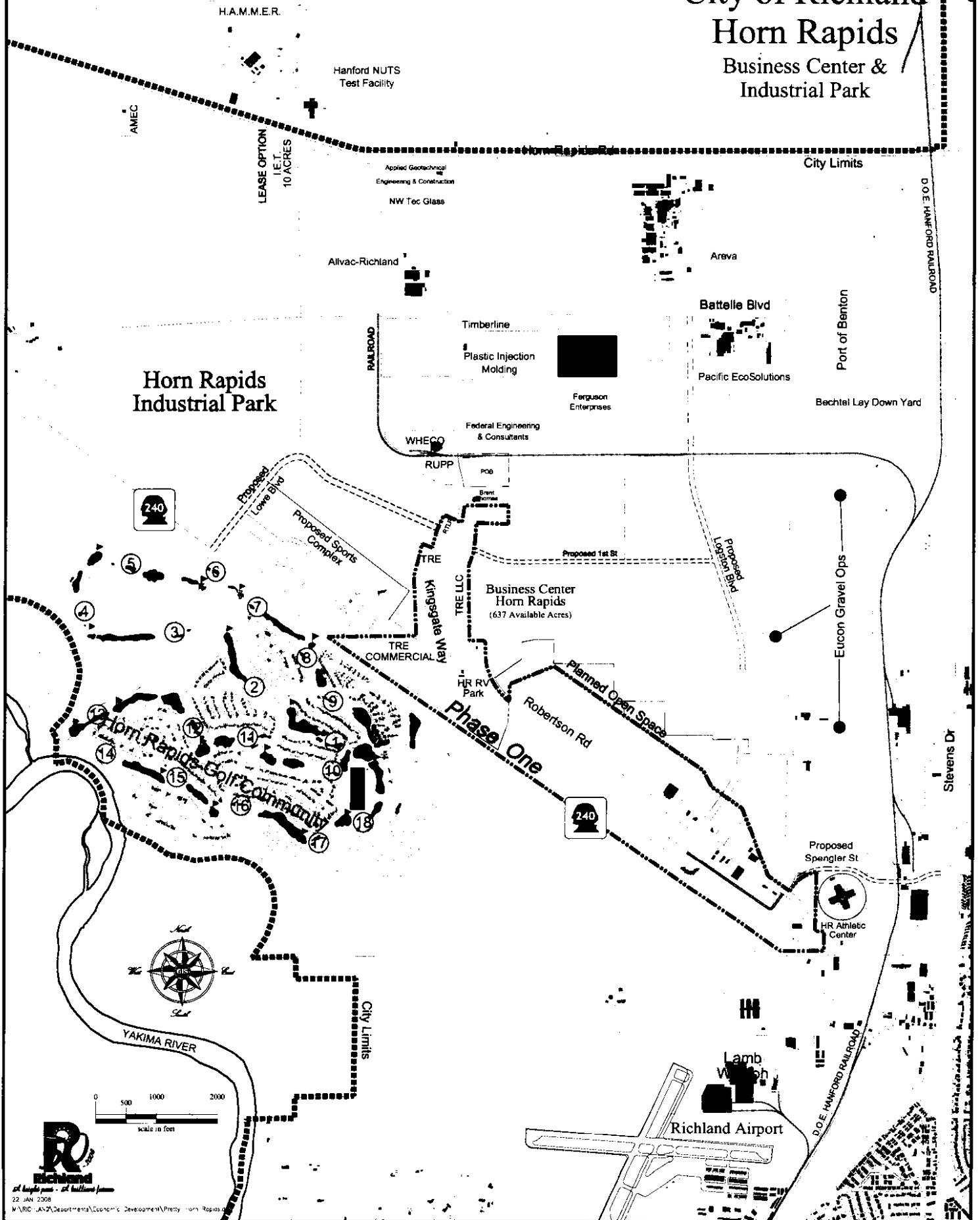
By: Randolph V. Peterson
Its: Managing Member

APPROVED AS TO FORM:



Thomas O. Lampson
City Attorney

City of Richland
Horn Rapids
Business Center &
Industrial Park



APPENDIX 10

Temporary Service Agreement

This Agreement ("Agreement") made this 7 day of December, 2001, between the TRI-CITY RAILROAD COMPANY, a ~~Washington~~ corporation ("Railroad"), and the CITY OF RICHLAND, a municipality of the State of Washington ("City").

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WHEREAS, City is owner of the Horn Rapids Spur ("HRS"), an industrial lead track designed to offer the opportunity of rail service to a number of current and potential users, which connects to trackage (Station Number 00400) owned by the Port of Benton County ("POB"); and

WHEREAS, City desires to enter into a Temporary Service Agreement ("TSA") with Railroad, the operator of POB's trackage, to provide rail service as required as soon as possible between customers located on HRS and the line haul carriers, The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"); and

WHEREAS, Railroad desires to provide such service, subject to the terms of this Agreement

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree to be governed by the following terms and conditions:

1. The purpose of this TSA is to permit rail service to begin for City's HRS customers on or before December 20, 2001. This Agreement shall be for thirty (30) days and continuing thereafter until terminated upon ten (10) days written notice by either party.
2. Railroad shall inspect the trackage to be utilized during the term of this Agreement prior to operating over same to ensure that it is in a safe operating condition. This inspection shall include the grade crossing signal system to the extent it is to be utilized. This inspection shall be done within two business days of the effective date of this Agreement so that there will be time to correct any deficiencies prior to December 20, 2001. Railroad shall immediately advise City with respect to any repairs required prior to operation, including an estimate of time and expense to make said repairs. During the term of this Agreement, Railroad shall make any additional inspection(s) required by the Federal Railroad Administration ("FRA"), the State of Washington, other competent authority or prudent judgment. Railroad shall bear the expense of all inspections.
3. City may ask Railroad to make any required repairs based on Railroad's estimate of time and expense. City shall pay for any repairs it requests Railroad to make.
4. City shall permit Railroad to operate over the HRS to serve City's customers requesting rail service by Railroad for any cars between said customers and BNSF and/or UP. Railroad's service shall be prompt and efficient as well as essentially

WKR RP

equivalent as between BNSF and UP. Railroad's current tariff (Supplement 1 to Freight Tariff TCRY 8000, Effective December 1, 2001) charges shall provide its compensation for this service. The tariff charge for Railroad's service to the HRS will be as provided for in Supplemental 1 to Freight Tariff TCRY 8000 for rail service to Station Number 00400, the City of Richland Lead, described in item 5 of applicable charges and in Section 3, Station Names and Numbers. Railroad shall not assess any additional charges to the City or customers located on the HRS who utilize Railroad's services except as provided for in paragraph 3 above.

5. Each party hereto shall release, indemnify, defend and hold the other harmless from all claims, liabilities, costs or damages arising out of this Agreement to the extent caused by said party.
6. City and Railroad shall negotiate on a good faith basis to agree on an Industrial Track Agreement ("ITA") to replace this TSA.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and effective in duplicate the day and year first herein above written.

THE TRI-CITY RAILROAD COMPANY

Mailing address...

Randolph Peterson

name...

CEO + Managing Partner

title...

CITY OF RICHLAND

Mailing address....

William K.

name...

DCM - C & DS

title...

uk RP

APPENDIX 11



City of Richland
Public Works Administration & Engineering
840 Northgate Drive
Richland, WA 99352
(509) 942-7500

July 22, 2010

Mr. Randolph V. Peterson, Manager
Tri-City and Olympia Railroad
10 N. Washington Avenue
PO Box 6106
Kennewick, WA 99336

**SUBJECT: HORN RAPIDS INDUSTRIAL TRACK USE AGREEMENT
TERMINATION NOTICE FOR TEMPORARY SERVICE AGREEMENT**

Dear Mr. Peterson:

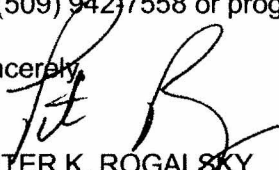
Enclosed with this letter is the City's Standard Form Railroad Track Use Agreement that will describe the terms of use and operations on the City-owned track in the Horn Rapids Industrial Park. This agreement was developed over the past nine months with input from your company and other potential railroad operators. It is the City's intent through this agreement to establish a safe and fair operating environment on which multiple railroads may serve client businesses. The City also intends to use this agreement to create a clear path to its goal of completing Center Parkway.

The City intends that railroad operations on its track under the new agreement will begin no later than September 15, 2010. This letter is notice that the Temporary Service Agreement executed in December, 2001, is hereby terminated as of September 15, 2010.

As reflected in the Agreement any prior permission or agreement for rail operations on the City's track is superseded, and therefore terminated on September 15, 2010, and is reestablished by execution of the new Agreement. Enclosed are two (2) original copies of the Track Use Agreement. Please execute both copies and send them back to me. The City will then send one (1) fully executed copy of the agreement back for your files.

Please contact me to discuss any issues related to the Track Use Agreement. The Agreement will be formalized only after signature by the Tri-City and Olympia Railroad and action by the City Council. Prior to September 15, action by the City Council could occur at any of its regular meetings, scheduled for August 3rd, August 17th and September 7th. Thank you for your attention to this matter. I may be reached at (509) 942-7558 or progalsky@ci.richland.wa.us

Sincerely,


PETER K. ROGALSKY
Public Works Director

c: Cindy Johnson
Bill King
Tom Lampson
Gary Ballew
Craig Levie, Tangent Services

Enclosure

APPENDIX 12

CITY OF RICHLAND
STANDARD FORM RAILROAD TRACK USE AGREEMENT

THIS RAILROAD TRACK USE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into as of this 6th day of April, 2011 (hereinafter referred to as the "Effective Date") by and between the **CITY OF RICHLAND**, a municipal corporation in the State of Washington (hereinafter referred to as "City") and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation and a duly licensed corporation in the State of Washington (hereinafter referred to as "Railroad").

WITNESSETH

WHEREAS, City is the owner of a railroad industrial spur track, commonly known as the Horn Rapids Rail Spur, located at the Horn Rapids Industrial Park in the City of Richland and connected to the Southern Connection of the Hanford Railroad (owned by the Port of Benton, Washington (hereinafter referred to as the "Port"), successor in interest to the United States Department of Energy), as shown on Exhibit A attached hereto (hereinafter referred to as the "Track"); and

WHEREAS, Railroad operates pursuant to separate agreement(s) over tracks owned by the Port which tracks connect with the Track near Milepost B 37 on the Port's trackage and a portion of which tracks have been used for the interchange of traffic between rail carriers at or near Richland Junction, Washington (hereinafter referred to as "Richland Junction"); and

WHEREAS, Railroad desires to use the Track for the purpose of providing railroad freight service thereon and thereover to industries located on or adjacent to the Track (hereinafter referred to individually as "Industry" and collectively as "Industries"); and

WHEREAS, City desires that all railroad interchange operations at Richland Junction be permanently eliminated to facilitate commercial development and improve vehicular traffic movement in the area; and

WHEREAS, City is willing to allow Railroad to use the Track on a non-exclusive basis but only on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties, intending to be bound, do hereby agree as follows:

SECTION 1
GRANT OF USE

Section 1.1. City hereby grants to Railroad non-exclusive permission to operate its trains, locomotives, cars and equipment with its own crews over the Track for the purposes set forth herein. Railroad's use of the Track shall be in common with such other user or users of the Track as City has heretofore admitted, or may at any time in the future admit, to use of all or any

portion of the Track, provided that City shall require such user or users to comply with all Legal Requirements (as defined in Section 9.1) applicable to such user's or users' use of the Track. Subject to the foregoing, City shall retain the exclusive right to grant to other persons the right to use all or any portion of the Track, provided that such use does not unreasonably interfere with the rights granted to Railroad herein.

Section 1.2. The Track shall include, without limitation, the right-of-way, tracks, rails, ties, ballast, other track materials, switches, bridges, grade crossings and any and all other improvements or fixtures affixed to the right-of-way.

Section 1.3. Railroad shall take the Track in an "AS IS, WHERE IS" condition subject to all rights, interests and estates of third parties in and to the Track.

Section 1.4. City represents that it owns or controls the land underlying the Track and that there are no existing easements or encumbrances affecting such land that would interfere with Railroad's rights under this Agreement.

SECTION 2

PERMITTED USE

Section 2.1. Railroad's use of the Track shall be limited to the movement of goods by rail to and from an Industry via tracks of such Industry that connect to the Track.

Section 2.2. Railroad shall not knowingly and intentionally permit the loading or unloading of railcars on the Track by any party within its control, and shall not enter into agreements or arrangements with any person for the storage of empty or loaded railcars on the Track or any portion thereof, without the prior written consent of City.

Section 2.3. Neither party shall use the Track or any portion thereof, for the storage, transload or disposal of any hazardous substances, as defined by the Comprehensive Environmental Response, Compensation and Liability Act, as amended (hereinafter referred to as "CERCLA"), or petroleum or oil as defined by CERCLA, the Resource Conservation and Recovery Act, as amended (hereinafter referred to as "RCRA"), the Clean Water Act, the Oil Pollution Act, and the Hazardous Materials Transportation Act (hereinafter collectively referred to herein as the "Environmental Laws"), provided however, that nothing herein shall preclude Railroad or any other admittee of City from using the Track for the movement of hazardous substances in railcars in the normal course of providing rail transportation service to or from an Industry.

Section 2.4. Neither party shall use nor allow the use of the Track for the transportation of passengers thereon or thereover, provided however, that nothing herein shall preclude Railroad or any other admittee of City from operating a hi-rail vehicle over the Track for the purpose of inspecting the Track.

Section 2.5. Railroad shall not cause to be filed or knowingly and intentionally permit persons within its control to file any liens against the Track. In the event any such liens

are filed, Railroad shall cause such liens to be released within thirty (30) days of Railroad's receipt of notice of any such lien.

Section 2.6. Railroad shall not create or store any waste or nuisance on the Track. Railroad shall neither use nor occupy the Track or any part thereof in violation of Legal Requirements (as defined in Section 9.1). City shall not cause or allow the Track to be blocked, obstructed or used in any manner that would impair or diminish Railroad's ability to use the Track for the purposes set forth in this Agreement, provided however, that use of the Track by any user in the ordinary course of providing rail service to any Industry on the Track, shall not be deemed a violation of the requirements of this sentence.

SECTION 3 **MAINTENANCE**

Section 3.1. City, at its cost and expense, shall be solely responsible for, and shall have exclusive direction and control over, the maintenance of the Track which shall include, but not be limited to, maintenance of tracks, subgrade, track drainage, grade crossings, grade crossing warning signs and devices, signal boxes, bridges and abutments, culverts, drainage ditches, retaining walls and any fences or barriers that City may erect. City shall also be solely responsible for litter and vegetation control and for keeping the Track sufficiently free and clear of snow and ice to permit railroad operations thereover.

Section 3.2. City shall maintain the Track to not less than Federal Railroad Administration (hereinafter referred to as "FRA") Class 2 track safety standards with a maximum gross weight limitation of not less than 286,000 lbs. per car and City shall maintain the Track in such condition and in compliance with all Legal Requirements (as hereinafter defined below). City shall also maintain all grade crossing signal equipment on the Track in accordance with all applicable Legal Requirements (as defined in Section 9.1).

Section 3.3. City, in its sole discretion, may contract with a third party to perform City's maintenance obligations hereunder, provided, however, City shall remain responsible for any obligations of City under this Agreement that may be performed by any such contractor.

Section 3.4. Railroad shall notify City in writing of any deficiencies in City's maintenance of the Track when such deficiencies are reasonably discovered by Railroad, and City shall, as soon as practicable, but in any event not more than thirty (30) days after its receipt of such notice, or in the case of an imminent safety hazard and/or condition which renders the Track impassable, within forty-eight (48) hours, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence.

Section 3.5. If the use of the Track is at any time interrupted or traffic thereover is delayed for any cause whatsoever, City shall, with reasonable diligence, restore the Track for the passage of trains. Railroad shall not have nor make any claim against City for loss, damage, loss of business or expenses of any kind resulting from such interruption or delay.

Section 3.6. City shall be bound to use only reasonable and customary care, skill and diligence in the maintenance, repair and renewal of the Track and, Railroad shall not, by reason of City's performing or failing, or neglecting to perform any maintenance, repair or renewal of the Track, have or make against City, its officers, agents or employees, any claim or demand for loss, damage, destruction, injury or death whatsoever resulting from any defect in the Track or City's performance, failure or neglect, except as provided otherwise in Section 11 herein.

Section 3.7. Subject to the provisions of Section 8.1 herein, Railroad shall have the right to enter upon the Track and make inspections to determine compliance with the terms of this Agreement. In no event shall Railroad be obligated to make any such inspections, and Railroad shall not be liable for any failure to make any such inspections or failure to identify any matters that are not in compliance with this Agreement. In no event shall Railroad's conducting of inspections be deemed to result in a waiver of City's compliance with any terms of this Agreement.

Section 3.8. City shall be responsible for reporting of grade crossings and structures inventory and any other similar information as may be required by the FRA or any other governmental body having jurisdiction over such matters.

SECTION 4 **COMPENSATION**

Section 4.1. For so long as City permits Railroad reasonable use of the Track, as compensation for Railroad's use of the Track, Railroad shall pay to City annually at the beginning of each calendar year a fee of Fifteen Thousand Dollars (\$15,000) (hereinafter referred to as the "Annual Fee") which shall be payable regardless of Railroad's use of the Track during that year.

Section 4.2.

A. The Annual Fee shall be subject to adjustment on January 1 of each year beginning January 1, 2011 in accordance with changes in the Consumer Price Index for Wage Earners and Clerical Workers, series CWUR0000SA0 (hereinafter referred to as "CPI-W"). The Annual Fee set forth in Section 4.1 shall be revised by calculating the percentage of increase or decrease for the year to be revised based on the final index of the most recent July as related to the final index of the previous July and applying this percentage of increase or decrease to the current Annual Fee to be revised. The resulting adjusted Annual Fee shall hereinafter be referred to as "the Revised Annual Fee."

By way of example, assuming "A" to be the CPI-W final index figure for July 1, 2009; "B" to be the CPI-W final index figure for July, 2010; and "C" to be the current Annual Fee to be escalated; the Revised Annual Fee effective January 1, 2011 would be determined by the following formula:

$$B/A \times C = \text{Revised Annual Fee, Rounded to Nearest Whole Cent}$$

B. In the event that publication of the CPI-W is discontinued, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the matter shall be submitted to arbitration in accordance with Section 16 herein.

C. Under no circumstances shall the Revised Annual Fee paid by Railroad to City be less than the Annual Fee in effect on the date of this Agreement.

Section 4.3.

A. Railroad agrees that as part of the consideration for obtaining City's permission to use the Track herein, Railroad shall, subject to Legal Requirements, as of the Effective Date and during the term of this Agreement, permanently relocate any interchange receipt operations between Railroad and another rail carrier at Richland Junction to an alternate interchange location except that Railroad may, in emergency situations only, interchange cars at Richland Junction. For purposes of this provision, an emergency situation includes, but is not limited to, the following: Force Majeure events or other Acts of God; movement of High or Wide loads; movement or handling of rail security-sensitive materials (as such term is defined in 49 CFR Part 1580, as amended, supplemented or replaced) in compliance with Legal Requirements or other safety requirements; track or other mechanical conditions necessitating a change in interchange location. Except as required by law or as provided in this Section 4.3.A, Railroad shall not, during the term of this Agreement, enter any agreement to deliver cars in interchange to any other railroad at Richland Jct.

B. City intends to construct a public street, called Center Parkway, at the location of Richland Junction. Railroad further agrees to provide easements and rights of way necessary to complete Center Parkway in exchange for compensation as defined in Section 18.

C. Railroad further agrees that if the design of Center Parkway requires an at-grade crossing of a track owned or used by Railroad, Railroad shall not oppose installation of a crossing designed in compliance with the current version of the Manual on Uniform Traffic Control Devices or any other applicable Legal Requirements, with the appropriate traffic control system to be used at the crossing to be determined by an engineering study involving both the City and Railroad representatives. In the event that both City and Railroad representatives jointly agree as to the appropriate traffic control system to be used at the crossing, Railroad shall execute a waiver of hearing document to the Washington State Utilities and Transportation Commission regarding the proposed crossing.

Section 4.4. City acknowledges that the compensation provided for in this Section 4 shall be the sole consideration for the right to use the Track, and in no event shall City impose any additional charges, tariffs, or surcharges on Railroad or any customer or receiver of Railroad as a condition of use of the Track for the provision of rail transportation service except to the extent expressly set forth below. Notwithstanding the foregoing, City may assess additional charges, tariffs, or surcharges for maintenance, operating and dispatching costs associated with the Track if all of the following conditions are satisfied: (i) City provides Railroad with ninety (90) days advance written notice of the proposed charges, tariffs or

surcharges and detailed information concerning City's costs, including the deficit not covered by the then current Annual Fee; and (ii) City, Railroad and any other users of the Track are not able to negotiate, within sixty (60) days of City providing notice in (i) above, an updated Annual Fee in lieu of the proposed charges to the mutual satisfaction of the parties. The increase in the updated Annual Fee as provided in this Section 4.4, shall not exceed Railroad's proportionate share of the deficit not covered by the Annual Fee prior to update. Railroad's proportionate share shall be calculated by comparing the total number of cars handled by Railroad over the Track to the total number of cars handled by all users over the Track for the twelve (12) full months prior to City's notification to Railroad of its intent to increase the Annual Fee.

SECTION 5

BILLING AND PAYMENT

Section 5.1. City shall render to Railroad a bill for the Annual Fee.

Section 5.2. Upon reasonable request by City, Railroad shall furnish to City, within sixty (60) days of receiving such request, a statement of the number of loaded and empty cars handled by Railroad over all or any portion of the Track during the previous twelve (12) months. Notwithstanding the foregoing, City shall only be entitled to make one request for such car information each calendar year during the term of this Agreement.

Section 5.3. All payments called for under this Agreement shall be made by Railroad within thirty (30) days after receipt of a bill therefor except for any claims or demands for payment pursuant to Section 11 of this Agreement. No payment shall be withheld because of any dispute as to the correctness of items in any bill rendered and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. In the event that Railroad shall fail to pay any monies due to City within thirty (30) days after the invoice date, Railroad shall pay interest on such unpaid sum of twelve percent (12%), or the maximum rate permitted by law, whichever is less.

Section 5.4. The records of each party, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of billing.

Section 5.5. For purposes of this Agreement, the terms "cost," "costs," "expense" and "expenses" shall include actual labor and material costs together with the surcharges, overhead percentages and equipment rentals as specified by City at the time any work is performed for Railroad, which surcharges, overhead percentages and equipment rentals shall be reasonable and consistent with City's then-current standard billing practice, procedures, rates and schedules. City's overhead percentages shall not exceed sixty percent (60%) during the term of this Agreement without Railroad's review and approval.

SECTION 6

ADDITIONS, RETIREMENTS AND ALTERATIONS

Section 6.1. City, from time to time, and at its sole cost and expense, may make such changes in, additions and improvements to, and retirements from the Track as shall, in its

judgment, be necessary or desirable for the economical or safe operation thereof, or as shall be required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction. Such additions and improvements shall become part of the Track and such retirements shall be excluded from the Track.

Section 6.2. If Railroad requests City to make changes in or additions or improvements to the Track required to accommodate Railroad's operations thereover, and Railroad agrees to reimburse City therefor, and City determines that the requested improvements will not adversely impact City's economic development goals, then City shall make such changes, additions or improvements to the Track and Railroad shall pay to City the cost thereof, including the annual expense, if any, of maintaining, repairing and renewing such additional or altered facilities. Any facilities other than the Track, which are exclusively funded by Railroad as provided for herein, shall be for the exclusive use of Railroad and City shall not allow any other party access to the facility without Railroad's prior written agreement.

SECTION 7

TERM

Section 7.1. This Agreement shall take effect on the date hereof and shall continue in full force and effect for three (3) years from the date hereof (hereinafter referred to as the "Initial Term") and shall automatically renew for successive one (1) year periods thereafter, absent termination as provided in Section 14.

SECTION 8

OPERATIONS

Section 8.1. Railroad agrees that entry to and exit from the Track shall be controlled by City or any contractor or admittee designated by City. City shall require that any entity allowed by City to control operations thereover shall be required to ensure that the trains, locomotives and cars of all users of the Track shall be operated thereon and thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track. Except to the extent prohibited by law, City reserves the right at any time by sixty (60) days prior written notice to Railroad and any other user or users of the Track to assume coordination of operations over the Track consistent with the terms of this Section 8.1.

Section 8.2. Railroad shall provide, at its sole cost and expense, all locomotives, railcars, other rolling stock and transportation equipment, personnel, fuel and train supplies necessary for Railroad to provide safe and adequate rail transportation to the Industries. Railroad shall also provide, at its sole cost and expense, all radios and other communication facilities as necessary to comply with the regulations of the FRA. Railroad shall be solely responsible for all car hire charges and mileage allowances on cars in Railroad's account handled over the Track.

Section 8.3. City, at its sole cost and expense, shall provide all necessary switch locks for use in the operation of the Track. City shall provide at no charge a reasonable number of keys for such switch locks to Railroad and any other user or users of the Track.

Section 8.4. Railroad, at its sole cost and expense, shall perform or cause to be performed any repairs required to make locomotives, cars or other equipment in the custody or control of Railroad on the Track comply with Legal Requirements (as defined in Section 9.1).

Section 8.5. City shall not place, permit to be placed or allow to remain, any permanent or temporary material, structure, pole, or other obstruction within eight and one-half (8-1/2) feet laterally from the centerline of straight track (nine and one-half (9-1/2) feet on either side of the centerline of curved track) or within twenty-three (23) feet vertically from the top of the rail of any track (hereinafter referred to as "Minimal Clearances"), provided that if any Legal Requirements (as defined in Section 9.1) require greater clearances than those provided for in this Section 8.5, City shall comply with such Legal Requirements. However, vertical or lateral clearances which are less than the Minimal Clearances but are in compliance with Legal Requirements shall not be a violation of this Section, so long as City complies with the terms of any such Legal Requirements.

Section 8.6. Railroad shall not place or allow to be placed any rail car within two hundred fifty (250) feet of either side of any at-grade crossing on the Track. Railroad shall not place or permit to be placed on the City's right-of-way any permanent or temporary structure of any kind whatsoever without the prior written consent of City, which consent may be withheld at City's sole discretion. City shall require any other user or users of the Track to comply with the requirements of this Section 8.6.

Section 8.7. Railroad and City agree that with respect to the at-grade road crossings on the Port of Benton's track between the proposed Center Parkway crossing at Richland Junction and SR 240 (Vantage Highway) inclusive, Railroad shall use reasonable efforts to minimize its operations over such crossings during peak highway traffic times Monday through Friday. City acknowledges and understands that Railroad's compliance with its common carrier obligations may, from time to time, require operations over such crossings during peak highway traffic times. Railroad agrees to use reasonable efforts to meet its obligations under this Section 8.7.

Section 8.8. In the event that any user of the Track, including Railroad, provides notice to the City of any violation of Legal Requirements by any user of the Track, including Railroad, or any violation of the terms of this Agreement or the applicable agreement between such user and City (including without limitation, any applicable obligation to control entry to and exit from the Track or operations thereon or thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track), City shall conduct an investigation into such alleged violation, and if, in the reasonable judgment of City, Railroad or such user shall be in violation of applicable Legal Requirements or the terms of this Agreement or such user's agreement with the City, City shall require Railroad or such user as the case may be to cure such conduct in accordance with this Agreement or the applicable agreement, and unless and until same shall be cured in compliance with this Agreement or the applicable agreement, City shall bar Railroad or such user as the case may be from use of the Track.

SECTION 9

COMPLIANCE WITH LAWS

Section 9.1. The parties agree to comply with all applicable provisions of law, statutes, regulations, ordinances, orders, covenants, restrictions and decisions of any governmental body or court having jurisdiction (hereinafter collectively referred to as “Legal Requirements”) relating to this Agreement and/or use of the Track. Each party hereto shall indemnify, protect, defend and hold harmless the other party and its officers, agents and employees from and against all fines, penalties, and liabilities imposed on the other party under such laws, rules and regulations by any such public authority or court having jurisdiction when attributable to the failure of the first party to comply with its obligations in this regard.

Section 9.2. It is the understanding of the City and the Railroad that the Track is industry track. Unless otherwise required by law, Railroad does not intend to and will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

SECTION 10

CLEARING OF WRECKS

Section 10.1. If trains, locomotives, cars or equipment of Railroad are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, Railroad shall be responsible for the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if Railroad fails to restore the Track to service within a reasonable period of time, not to exceed forty-eight (48) hours, after such wreck or derailment, City, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and Railroad shall reimburse City for the cost and expense thereof in accordance with Section 5 herein. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be determined in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by Railroad at the time of such wreck shall be promptly delivered to Railroad.

Section 10.2. If trains, locomotives, cars or equipment of any admittee of City, other than Railroad, are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, City shall ensure the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if City fails to have the Track restored to service within a reasonable period of time, not to exceed seventy-two (72) hours, after such wreck or derailment, Railroad, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and City shall reimburse Railroad for the cost and expense thereof in accordance with Section 5 herein. In order for Railroad's costs to be eligible for reimbursement, Railroad shall provide at least twenty-four (24) hours written notice to City and all other users of the Track of Railroad's intent

to mobilize resources to complete the work. City will be responsible for coordinating resources of various entities to complete the repair and avoid duplication of effort. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be determined in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by City or its admittee at the time of such wreck shall be promptly delivered to City or its admittee, as the case may be.

SECTION 11 **LIABILITY**

Section 11.1

A. TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CITY AND CITY'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "**CITY INDEMNITEES**"), FROM AND AGAINST ANY AND ALL CLAIMS AND LIABILITIES OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, INCLUDING, WITHOUT LIMITATION, PERSONAL INJURIES, DEATHS, DAMAGE OR DESTRUCTION OF PROPERTY AND DAMAGE TO OR DESTRUCTION OF THE ENVIRONMENT WHATSOEVER, INCLUDING WITHOUT LIMITATION LAND, AIR, WATER, WILDLIFE, AND VEGETATION (HEREINAFTER COLLECTIVELY REFERRED TO AS "**CLAIMS**"), TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY RAILROAD AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF RAILROAD OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

B. TO THE FULLEST EXTENT PERMITTED BY LAW, CITY SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD AND RAILROAD'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "**RAILROAD INDEMNITEES**"), FROM AND AGAINST ANY AND ALL CLAIMS OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY CITY AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF CITY OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

C. UPON WRITTEN NOTICE FROM RAILROAD OR CITY, THE OTHER PARTY AGREES TO ASSUME THE DEFENSE OF CLAIMS OR ANY LAWSUIT OR OTHER PROCEEDING BROUGHT AGAINST ANY INDEMNITEE OF THE OTHER PARTY BY ANY ENTITY, RELATING TO ANY MATTER COVERED IN THIS AGREEMENT FOR WHICH THE OTHER PARTY HAS AN OBLIGATION TO ASSUME

LIABILITY FOR AND/OR SAVE AND HOLD HARMLESS SUCH INDEMNITEE. THE OTHER PARTY SHALL PAY ALL COSTS INCIDENT TO SUCH DEFENSE, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES, INVESTIGATOR'S FEES, LITIGATION AND APPEAL EXPENSES, SETTLEMENT PAYMENTS, AND AMOUNTS PAID IN SATISFACTION OF JUDGMENTS.

D. NOTWITHSTANDING ANY PROVISION TO THE CONTRARY HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF THE CONDUCT OF AN INDEMNIFIED PARTY OR THE EMPLOYEES, AGENTS, OFFICERS, OR CONTRACTORS OF AN INDEMNIFIED PARTY.

SECTION 12 **INSURANCE**

Section 12.1.

A. Railroad shall, at its sole cost and expense, procure and maintain during the term of this Agreement the following insurance coverage:

1. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post-1998 ISO occurrence form or equivalent and include coverage for, but not limited to:
 - Bodily Injury and Property Damage
 - Personal Injury and Advertising Injury
 - Fire legal liability
 - Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- The employee and workers compensation-related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within fifty (50) feet of the Track.
- Any exclusion related to explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy with regard to Railroad's use of the Track under this Agreement.

2. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to:
 - Bodily injury and property damage
 - Any and all vehicles owned, used or hired
3. Workers' Compensation and Employers Liability insurance including coverage for, but not limited to:
 - Railroad's statutory liability under the worker's compensation laws of the State of Washington. If optional under State law, the insurance must cover all employees anyway.
 - Employers' liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.
4. Excess Liability insurance in an amount not less than \$10,000,000 each occurrence and \$10,000,000 aggregate limit.

B. Railroad shall also comply with the following requirements:

1. Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.
2. Railroad agrees to waive its right of recovery against City and Indemnites under its Commercial General Liability, Automobile Liability, and Workers' Compensation/Employers Liability insurance coverages.
3. Railroad's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by City. The certificate of insurance must reflect that the above wording is included in evidenced policies.
4. All policy(ies) required above (excluding Workers' Compensation) shall include a severability of interest endorsement and shall name City as an additional insured by endorsement using additional insured form CG 26 07 04 with respect to Railroad's use of the Track under this Agreement. Severability of interest and naming City as an additional insured shall be indicated on the certificate of insurance.

5. Except if Railroad is a Class I rail carrier as defined under the regulations of the STB, Railroad is not allowed to self-insure without the prior written consent of City. If granted by City, any deductible, self insured retention or other financial responsibility for claims shall be paid directly by Railroad. Any and all City liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by Railroad's insurance shall be paid by Railroad as if Railroad elected not to include a deductible, self-insured retention or other financial responsibility for claims.
6. Prior to entering upon the Track, Railroad shall furnish to City an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify City in writing at least thirty (30) days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving City arising out of this Agreement, Railroad will make available any required policy covering such claim or lawsuit.
7. Any insurance policy shall be written by a reputable insurance company acceptable to City or with a current Best's Guide Rating of A and Class VII or better, and authorized to do business in the State of Washington.
8. Railroad represents that this Agreement has been thoroughly reviewed by Railroad's insurance agent(s)/broker(s), who have been instructed by Railroad to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.
9. Not more frequently than once every five (5) years, City may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.
10. Failure to provide evidence as required by this section shall entitle, but not require, City to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Railroad's obligations hereunder.
11. The fact that insurance (including, without limitation, self-insurance) is obtained by Railroad shall not be deemed to release or diminish the liability of Railroad including, without limitation,

liability under the indemnity provisions of this Agreement. Damages recoverable by City shall not be limited by the amount of the required insurance coverage.

C. City shall waive in writing the above insurance requirements if Railroad is a Class I rail carrier as defined in the regulations of the STB.

SECTION 13

ENVIRONMENTAL

Section 13.1

A. Railroad shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Track, including, but not limited to Environmental Laws. Railroad shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws, anywhere on the Track. Railroad shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws, anywhere on the Track. Any such release shall not be considered a default of this Agreement but shall be remedied as described below.

B. In the event of any such release described in Section 13.1.A., then Railroad shall provide immediate notice to City's Contract Officer at (509) 942-7327 of any release of hazardous substances on or from the Track, violation of Environmental Laws, or inspection or inquiry by government authorities charged with enforcing Environmental Laws with respect to Railroad's use of the Track. Railroad shall use reasonable efforts to promptly respond to any release on or about the Track. Railroad also shall give City immediate notice of all measures undertaken on behalf of Railroad to investigate, remediate, respond to or otherwise cure such release or violation.

C. In the event that City receives notice from Railroad or otherwise learns of a release or violation of Environmental Laws on the Track which occurred or may occur during the term of this Agreement for which Railroad is responsible pursuant to this Agreement, City may require Railroad, at Railroad's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure or prevent such release or violation affecting the Track.

D. Railroad shall promptly report to City in writing any known conditions or activities on the Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Railroad's reporting to City shall not relieve Railroad of any obligation whatsoever imposed on it by this Agreement. Railroad shall promptly respond to City's request for information regarding said conditions or activities.

SECTION 14

TERMINATION

Section 14.1. Railroad may terminate this Agreement at any time after one year from the Effective Date, by giving City not less than six (6) months' written notice of

termination. Upon expiration or termination of this Agreement consistent with the terms herein, all rights of Railroad to use the Track shall cease.

Section 14.2. Notwithstanding any other provision of this Agreement except Section 14.3, at any time after the Effective Date, City may terminate this Agreement if Railroad shall default on or breach any of its material obligations hereunder, including but not limited to timely payment of compensation to City pursuant to Section 4.1, and Railroad fails to cure such default or breach within thirty (30) days of receipt of written notice from City specifying such default or breach.

Section 14.3. Notwithstanding any other provision of this Agreement, at any time after the Effective Date, City may terminate this Agreement if Railroad fails to comply with its material obligations under Section 4.3 herein and Railroad does not cure such failure within thirty (30) days of receipt of written notice from City specifying such failure.

Section 14.4. Termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to the termination hereof. The Annual Fee paid by Railroad to City pursuant to Section 4.1 shall be non-refundable if termination of this Agreement becomes effective after June 1 of the year to which the Annual Fee applies.

SECTION 15

NOTICES

Section 15. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice for such change in address:

If to City:	Community Development Services Attn: Horn Rapids Rail Spur City of Richland 975 George Washington Way P.O. Box 190, MS #18 Richland, WA 99352 (509) 942-7593
-------------	--

If to Railroad:

General Manager Joint Facilities
1400 Douglas Street
MS 1180
Omaha, Nebraska 68179
(402) 544-2292

SECTION 16 **ARBITRATION**

Section 16.1. Any dispute arising between the parties hereto with respect to any of the provisions of this Agreement which cannot be settled by the parties themselves shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as such rules may be amended from time to time, and as shall be applied with reference to the customs and practices of the railroad industry. Any such arbitration shall be held in Richland, Washington or at such other location as may be mutually acceptable to the parties hereto. The decision of the arbitrator or arbitration panel shall be final and conclusive upon the parties hereto. A final decision and award of the arbitration panel shall be enforceable in any court of competent jurisdiction in the United States of America. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own arbitrator, witnesses, exhibits and counsel. The compensation, costs and expenses of any neutral arbitrator, if any, shall be borne equally by the parties hereto. The arbitrator or arbitration panel shall not have the power to (a) award punitive or consequential damages, (b) determine violations of antitrust or criminal laws, or (c) reform the terms of this Agreement, in whole or in part.

SECTION 17 **MISCELLANEOUS**

Section 17.1. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, provided however, no modification of this Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

Section 17.2. This Agreement shall be binding upon and inure to the benefit of City and Railroad, and shall be binding upon the successors and assigns of Railroad, subject to the limitations hereinafter set forth. Railroad may not assign its rights under this Agreement or any interest therein, or attempt to have any other person assume its obligations in whole or in part under this Agreement, without the prior written consent of City which consent may be withheld; in City's sole discretion; provided, however, no such consent shall be required where assignment occurs as a result of a sale or transfer of all or substantially all of the assets of Railroad pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority.

Section 17.2.1. Notwithstanding Section 17.2 of this Agreement, UP shall have the right, at its sole discretion and upon ten (10) days advance written notice to the City, to name an agent to handle UP rail traffic to and from Industries located along the Track. While handling

such UP traffic, for the purposes of this Agreement, any agent so named by UP shall be considered to be UP, and City may enforce the provisions of this Agreement against UP for the acts of such agent. Regardless of whether or not UP names an agent as provided for in this Section 17.2.1, UP shall continue to have the right to handle part or all of its own traffic to Industries.

Section 17.3. If fulfillment of any provision hereof shall be declared invalid or unenforceable under applicable law, such provision shall be ineffective only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable the remainder of such provision or the remaining provisions of this Agreement, which shall remain in full force and effect.

Section 17.4. Section headings used in this Agreement are inserted for convenience of reference only and shall not be deemed to be a part of this Agreement for any purpose.

Section 17.5. This Agreement shall be governed and construed in accordance with the laws of the State of Washington. It is expressly agreed that no party may sue or commence any litigation against the other party unless such legal proceeding is brought in state court in Washington.

Section 17.6. No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is in writing and signed by the parties hereto. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 17.7. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

Section 17.8. The parties each represent and warrant to each other that neither has employed a broker in connection with this transaction. In the event there is a claim against either party hereto with respect to any broker whatsoever other than as set forth in this Section 17.8, the party whose action gives rise to the claim for commission shall indemnify the other party against any liability, damage, cost or fee in connection with such claim, including, without limitation, attorneys' fees and costs.

Section 17.9. The failure of either of the parties hereto in one or more instances to insist upon strict performance or observation of one or more of the covenants or conditions hereof, or to exercise any remedy, privilege, or option herein conferred upon or reserved to such party, shall not operate and shall not be construed as a relinquishment or waiver for the future of such covenant or condition or of the right to enforce the same or to exercise such privilege, option, or remedy, but the same shall continue in full force and effect.

Section 17.10. Railroad shall, on the last day of the term, or upon any earlier termination of this Agreement, peaceably and in an orderly manner vacate the Track free of any property of Railroad or third parties placed by Railroad thereon. Railroad shall, if not in default

hereunder, remove its equipment, goods, trade fixtures and effects and those of all persons claiming by, through or under it, provided that such removal does not cause irreparable damage to the Track. Any personal property not used in connection with the operation of the Track and belonging to Railroad, if not removed at the termination hereof, and if City shall so elect, shall be deemed abandoned and become the property of City without any payment or offset therefor. City may remove such property from the Track and store it at the risk and expense of Railroad if City shall not so elect. Railroad shall repair and restore all damage to the Track caused by the removal of any of Railroad's equipment and personal property. Railroad, if requested by City, shall remove all signs placed on the Track by Railroad and restore the portion of the Track on which they were placed substantially to the same condition as immediately prior to installation thereof.

Section 17.11. The failure of Railroad to vacate the Track on the expiration or termination of this Agreement as required pursuant to the terms of this Agreement and the subsequent holding over by Railroad, with or without the consent of City, shall result in the creation of a tenancy at will at a monthly fee equal to one hundred fifty percent (150%) of the then-applicable Annual Fee divided by twelve (12), for each month or portion thereof in which the Railroad holds over, payable on the tenth (10th) day of the following month. This provision does not give Railroad any right to hold over at termination of this Agreement, and all other terms and conditions of this Agreement shall remain in force during any tenancy at will created by any holding over by Railroad.

SECTION 18

RELOCATION AND COMPENSATION

Section 18.1. Railroad has secured all agreements necessary with Tri-City Railroad Company, LLC ("Tri-City Railroad") to permanently relocate the UP/Tri City Railroad interchange ("Interchange") from Richland Junction and the path of the Center Parkway. Pursuant to the Tri-City Railroad agreements, Railroad shall relocate its Interchange with Tri-City Railroad within thirty (30) days of the effective date of this Agreement.

Section 18.2. Within sixty (60) days after relocation of the Interchange, City shall pay to Railroad \$2,100,000 (which constitutes \$2,000,000 for the relocation of the Interchange and offset for Railroad's increased operating expense and \$100,000 for the easement, as described below).

Section 18.3. The payment described in Section 18.2 provides compensation to the Railroad for the following:

- a. The Railroad's estimated cost of increased operating expense and to replace rail assets lost due to the relocation of the Interchange.
- b. A roadway and utility easement conveyed by the Railroad to the City of Kennewick for the completion of Center Parkway across Railroad's property at Richland Junction as described below.

- c. Salvage by the City of all Railroad Track Materials (defined below) located on Railroad's property at Richland Junction west of the Richland Junction switch between MP 18.8 and the end of track at MP 19.5.

Section 18.4 Railroad shall convey an easement in width not to exceed eighty (80) feet to City for the Center Parkway across Railroad's right of way. The easement shall allow for curb cuts on each side of the road to serve Railroad's adjacent property. The easement shall be delivered to City no later than the date upon which the Interchange operations are relocated away from the Center Parkway.

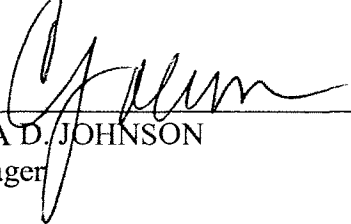
Section 18.5 As of the date Interchange operations are relocated away from Richland Junction and the Center Parkway, the City will assume ownership and control of the Railroad Track Materials. Railroad Track Materials is defined to include rail, ties, switches and other track materials which make up the current interchange track between MP 18.8 and the end of track at MP 19.5 of Railroad's Kalan Industrial Lead west of the Richland Junction switch. At its sole risk, cost and discretion the City may remove, salvage or reuse all Railroad Track Materials; provided, however, that the City first obtains a right of entry to Railroad's property from Railroad.

Section 18.6 Subsequent to relocation of the Interchange, Railroad shall not reestablish an interchange operation at Richland Junction or the Center Parkway location, or any portion thereof, or sell or lease property at Richland Junction or the Center Parkway location to another railroad for the purposes of establishing a switching or interchange operation.

Section 18.7 Notwithstanding any termination of this Agreement, Section 18.6 above shall remain in full force and effect until City, at its sole election, shall agree to any proposed change.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first herein above written.

**CITY OF RICHLAND,
WASHINGTON**


CYNTHIA D. JOHNSON
City Manager

**UNION PACIFIC
RAILROAD COMPANY**

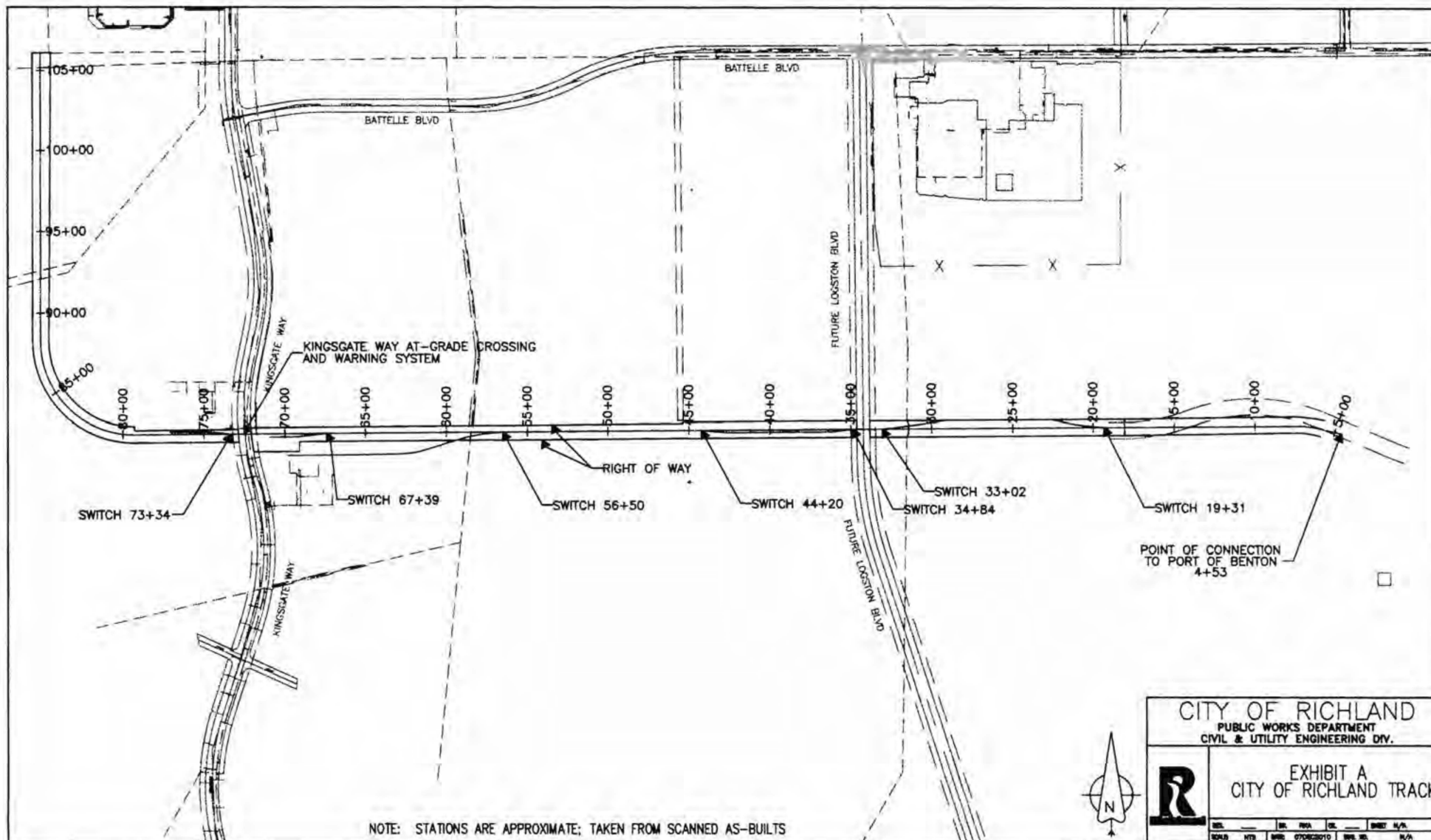

George M. Sturm
General Manager Joint Facilities

ATTEST:


MARCIA HOPKINS
City Clerk

APPROVED AS TO FORM:


THOMAS O. LAMPSON
City Attorney



APPENDIX 13

From: Rydel Peterson rydel@tcry.com 
Subject: Fwd: Richland Track Use Agreement
Date: September 14, 2017 at 8:09 AM
To: rvpeterson rvpeterson@me.com, William C Schroeder wcs@ksblit.legal
Cc: William J Schroeder william.schroeder@Ksblit.legal, Lisa Anderson lisa@tcry.com, Anne Schroeder aschroeder@ksblit.legal

PR

Sent from my iPhone

Begin forwarded message:

From: "George Sturm" <GSTURM@up.com>
Date: March 17, 2011 at 10:41:46 AM MDT
To: "Ballew, Gary" <gballew@CLRICHLAND.WA.US>
Cc: "John Rebersdorf" <JREBERSD@up.com>, "Paul E. Hammes" <PEHAMMES@UP.COM>, "John M. Newman" <JMNEWMAN@up.com>, "Paul F. MacDonald" <PFMACDON@up.com>, "Dan J. McGregor" <DJMCGREG@up.com>, "Elisa B. Davies" <EBDAVIES@up.com>, "Rogalsky, Pete" <PROGALSKY@CLRICHLAND.WA.US>, "Rydel Peterson" <Rydel@tcry.com>, "Paul Petit" <paulpetit@tcry.com>, "Rhett" <rhettwater@mac.com>, "Randy Peterson" <rvpeterson@mac.com>
Subject: RE: Richland Track Use Agreement

Gary,
Thanks for getting this back to me. Based on the attached agreement, UP wishes to name the Tri City Railway (TCRY), which currently serves the Port of Benton, as UP's agent for service over and along the Horn Rapids Spur until further notice from UP. Pl

▼ "Ballew, Gary" <gballew@CLRICHLAND.WA.US>

"Ballew, Gary" <gballew@CLRICHLAND.WA.US>

03/17/2011 10:33 AM

To: George Sturm <GSTURM@up.com>
cc: Myrle C. Giersch <MGIERSCH@UP.COM>, "Rogalsky, Pete" <PROGALSKY@CLRICHLAND.WA.US>
Subject: RE: Richland Track Use Agreement

George,
The executed letter is attached.
Thanks,
Gary

Gary Ballew, CEcD
Economic Development Manager
City of Richland
(509) 942-7763
www.richlandbusiness.com

From: George Sturm [mailto:GSTURM@up.com]
Sent: Tuesday, March 08, 2011 11:16 AM
To: Ballew, Gary
Cc: Myrle C. Giersch; Rogalsky, Pete; John J. Miller
Subject: RE: Richland Track Use Agreement

Gary,
I hope the attached will work for the City of Richland. I modeled it as close as possible to the one used by BNSF and the City. I am also attaching the Word document just in case the C please sign and Email back a copy of the letter agreement. Thanks for all yours and Pete's assistance in getting this long over due issue on its way to conclusion.

Let me know if you have any questions. (402) 544-2292.

(See attached file: UP-City of Richland Temp track Use Agmnt 3-8-2011.pdf) (See attached file: City of Richland Temp Track Use Agmnt 3-8-11.doc)

▼ "Ballew, Gary" <gballew@CLRICHLAND.WA.US>

"Ballew, Gary" <gballew@CLRICHLAND.WA.US>

03/07/2011 05:02 PM

To
"Rogalsky, Pete" <PROGALSKY@CLRICHLAND.WA.US>
cc
"Myrle C. Giersch" <MGIERSCH@UP.COM>
Subject
RE: Richland Track Use Agreement

George,
Attached is the letter from BNSF regarding a delivery prior to entering into a Track Use Agreement. A similar letter from Union Pacific should suffice. I'm not an expert on this but I'm a
Thanks,
Gary

Gary Ballew, CEcD
Economic Development Manager
City of Richland
(509) 942-7763
www.richlandbusiness.com

From: Rogalsky, Pete
Sent: Friday, March 04, 2011 2:54 PM
To: George Sturm
Cc: Ballew, Gary; Myrle C. Giersch
Subject: RE: Richland Track Use Agreement

Thanks, George.

Your suggestions seem reasonable to me. I will forward them to the City of Kennewick so that both Cities can consider them in developing our funding program.

I'm going to suggest that you and Gary Ballew, my counterpart at the City, consider whether the interim access by TCRP prior to the agreement being signed should be documented in involved an exchange of letters.

Thanks again. I'll keep you posted on developments here.

Pete Rogalsky

Public Works Director

City of Richland

840 Northgate Avenue

P.O. Box 190, MS-26

Richland, Washington 99352

Phone - (509) 942-7558

Fax - (509) 942-7468

E-mail - progalsky@ci.richland.wa.us

From: George Sturm [<mailto:GSTURM@up.com>]

Sent: Friday, March 04, 2011 2:25 PM

To: Rogalsky, Pete

Cc: Ballew, Gary; Myrle C. Giersch

Subject: RE: Richland Track Use Agreement

Pete,

Thanks for the update. As you might expect, UP would much rather get this contract completed in all respects within 60 days of execution. That said agreement:

1. Agree that the interchange track will not be removed and no work will commence on building of the Center Parkway until UP receives full payment.
2. UP, at its sole discretion, will continue the current interchange arrangement with TCRY until such time as full payment is made.
3. If the Cities delay full payment, the amount not paid to UP within 60 days of execution will accrue interest at an annual rate of 5% beginning 61 days after the 1st anniversary of execution.
4. Beginning March 15, 2011 the City will allow TCRY to handle UP traffic, as UP's agent, to locations on the Horn Rapids Spur as provided for in the attached notice..

Pete, let me know if this will work for the City. Thanks.

▼ "Rogalsky, Pete" <PRogalsky@CLRICHLAND.WA.US>

"Rogalsky, Pete" <PRogalsky@CLRICHLAND.WA.US>

03/03/2011 05:44 PM

To
George Sturm
cc
"Myrle C. Giersch"
Subject
RE: Richland Track Use Agreement

George,

Another update. As I think I've mentioned Richland and the City of Kennewick are partners on the Center Parkway issue. Funds will be coming from the sale of the old millage. Both Cities have mobilized processes to authorize and disperse the funds.

In Kennewick this will require discussion of the matter with their City Council on Tuesday, March 22 and potential formal authorization on Tuesday, March 29, subject to positive action by Kennewick.

There is a pretty good chance that one of both Cities is going to ask that the compensation be paid in multiple (likely two) installments. Will it cause a problem and the remaining 50% is paid within twelve months? If this works for UPRR would you want to adjust some of the other terms?

If the delayed approval of the track use agreement causes you any operational problems with handling pending shipments the City will authorize the necessary liability coverage and the intent to complete the Track Use Agreement.

Thank you again for all your work on this matter.

Pete Rogalsky

Public Works Director

City of Richland

840 Northgate Avenue

P.O. Box 190, MS-26

Richland, Washington 99352

Phone - (509) 942-7558

Fax - (509) 942-7468

E-mail - progalsky@ci.richland.wa.us

From: George Sturm [<mailto:GSTURM@up.com>]

Sent: Thursday, March 03, 2011 6:22 AM

To: Rogalsky, Pete

Cc: Myrle C. Giersch

Subject: Re: Richland Track Use Agreement

Pete,

Thanks for the update.

▼ "Rogalsky, Pete" <PRogalsky@CI.RICHLAND.WA.US>

George and Myrle,

I haven't forgotten about you and our agreement. The process of getting Richland and Kennewick together on concrete news on this by the middle of next week at the latest.

Pete Rogalsky

Public Works Director

City of Richland

840 Northgate Avenue

P.O. Box 190, MS-26

Richland, Washington 99352

Phone - (509) 942-7558

Fax - (509) 942-7468

E-mail - progalsky@ci.richland.wa.us

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** (See attached file: 20100322124120.pdf)

(See attached file: 20100522127120.jpg)

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** (See attached file: UP TUA.PDF)

**

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**

APPENDIX 14

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

August 25, 2017

Via Email

Jeremy M. Berman
Assistant General Attorney
Union Pacific Railroad Company
2540 N. 52nd Street
Omaha, NE 68104

Dear Mr. Berman:

 Thank you for providing the City of Richland (the "City" or "Richland") with a timely response on behalf of your client, Union Pacific Railroad ("UP"), to our outreach on issues surrounding Tri-City Railroad Company, LLC ("TCRY"); Horn Rapids Spur ("HRS") access; and the City's efforts to extend Center Parkway. Richland is encouraged to learn that UP will pursue TCRY's non-opposition to the Center Parkway extension, and that, barring successful efforts with TCRY, UP would restore its own operations over the HRS in place of TCRY. We appreciate UP's intention to avoid a dispute with the City over the terms of UP's access to the HRS, and UP's cooperative stance on the Center Parkway project.

As I gather from our recent conversation, UP will be reaching out to TCRY again to discuss the Center Parkway project and the City's proposal to reconfigure Richland Junction trackage. I believe you now have the current Richland Junction track reconfiguration plans and Richland's PowerPoint presentation to the Port of Benton (whose trackage the City proposes to modify) addressing TCRY's past concerns and objections. The Port of Benton distributed the City's Richland Junction plans to UP, BNSF and TCRY in early June (evidence of which you've now seen), so TCRY has had nearly three months to evaluate the City's current proposal.

You have indicated that UP plans to discuss the Richland Junction proposal with TCRY in the interest of securing constructive, cooperative input. As I have explained before, the City is willing to consider modifying its proposal, within reason, to accommodate legitimate operating concerns, bearing in mind, however, that the City and its operating expert believe that the proposed track modifications would, on balance, benefit railroad operations.

My earlier email and discussions with you were not terribly specific, and so I am writing now to be precise about what the City would expect to consider TCRY's non-objection to the Center Parkway project to be meaningful in light of TCRY's past conduct. Completion of

FLETCHER & SIPPEL LLC

Jeremy M. Berman
August 25, 2017
Page 2

the steps discussed below would resolve to the City's satisfaction that UP is fulfilling its obligations under the Standard Form Railroad Track Use Agreement ("SFRTUA") as the City interprets that agreement, and would allow TCRY to continue as UP's agent on the HRS without a dispute over the future of UP's commercial access. I am also providing deadlines for UP/TCRY action in order to avoid issuance of a formal notice of default under the provisions of the SFRTUA.

If TCRY is willing to assure the City of TCRY's non-opposition to the Center Parkway extension and grade crossing, desires to continue as UP's agent for purposes of HRS service, and will help avert a possible Richland-UP contract dispute, then TCRY must do as follows:

1. TCRY will execute an easement deed to facilitate the construction of Center Parkway across the main line of the Port of Benton and the contemporaneous removal of the siding/passing track at the crossing location (over which line TCRY currently possesses a non-exclusive leasehold interest). This step assumes and requires that the City, TCRY, UP, BNSF, and the Port of Benton consent to City-funded track modifications, which consent the City understands all but TCRY have thus far supplied;
2. TCRY will withdraw, and will forgo any further pursuit of, any claim against Richland stemming from the City's Center Parkway plans, the crossing of Port of Benton-owned trackage, and/or the reconfiguration of ancillary track in the vicinity of Richland Junction. (In exchange for this commitment, Richland would withdraw its petition for review of the Surface Transportation Board's September 14, 2016 decision in Docket No. FD 35915, currently pending before the U.S. Court of Appeals for the Ninth Circuit); and
3. TCRY will provide written assurance that it will not oppose Richland's Center Parkway plans in any venue, and that it will not file any claim against the City in any venue based upon any allegation of harm to TCRY resulting from either or both of the following: (1) the installation of the Center Parkway at-grade crossing of the Port of Benton railroad main line at Richland Junction; (2) modification of Port of Benton ancillary (yard and siding) track in the vicinity of Richland Junction.

For UP to assure itself of continued use of TCRY as its agent on the HRS, TCRY must, by no later than September 15, 2017, either demonstrate to the City that it has met all three conditions above or commit in writing to satisfy each of these requirements by no later than

FLETCHER & SIPPEL LLC

Jeremy M. Berman
August 25, 2017
Page 3

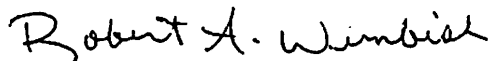
September 30, 2017. In the alternative, UP will advise me by no later than **September 15, 2017**, that it will resume operations over the HRS in place of TCRY. Richland's Center Parkway plans have already been delayed for quite some time at considerable cost to taxpayers due to TCRY's obstruction, which never should have occurred had the parties remained mindful of UP's commitments under the SFRTUA. A September 15 deadline is necessary because the City must decide in the next few weeks whether to commit to the expenses of briefing the Ninth Circuit (which favorable developments with UP indicate may be unnecessary), and whether it may need to budget for a possible legal dispute with UP over HRS access (a possibility that the City cannot yet rule out entirely).

The City realizes that UP and TCRY may need additional time beyond September 15 to provide constructive and reasonable input on the City's Richland Junction track modification proposal. Accordingly, the City would allow until **September 30, 2017**, for UP and TCRY to recommend modifications to the Richland Junction plan.

Finally, should UP advise the City on September 15 that UP will replace TCRY on the HRS, the City requests – (1) UP's express written consent to the current Richland Junction track modifications as currently proposed (or confirmation that such modifications are unnecessary to support UP's operations); (2) that UP advise whether it will also resume direct service to customers located on the Port of Benton trackage in addition to customers on the HRS; and (3) that UP provide for a reasonable time frame, not to exceed 60 days from September 15, to restore its own operations over the HRS.

I look forward to UP's report or TCRY's three-part commitment as set forth above by or before September 15, 2017. As always, I am available to discuss the above matters informally, should you wish to contact me.

Sincerely,



Robert A. Wimbish *by sm*

RAW/ekf

cc: Heather Kintzley
Pete Rogalsky

APPENDIX 15

SERVICE DATE – SEPTEMBER 14, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35915

TRI-CITY RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER

Digest:¹ The Board finds that the condemnation and acquisition by Kennewick, Wash., and Richland, Wash., of a portion of a railroad right-of-way for an at-grade crossing that would bisect both a line of railroad and a railroad siding is preempted under 49 U.S.C. § 10501(b).

Decided: September 12, 2016

On March 19, 2015, Tri-City Railroad Company, LLC (TCRY), filed a petition for declaratory order requesting that the Board find that the efforts of Kennewick, Wash., and Richland, Wash. (together the Cities), to condemn and acquire a portion of a railroad right-of-way for an at-grade street crossing are preempted by 49 U.S.C. § 10501(b). TCRY claims that the proposed at-grade crossing would unreasonably interfere with its current and future railroad operations. In response, the Cities argue that their condemnation action is not preempted because this dispute involves a routine crossing that would not impede railroad operations or pose undue safety risks.

For the reasons discussed below, the Board concludes that an at-grade crossing at the proposed location would unreasonably interfere with TCRY's present and future railroad operations on one of the tracks at issue and that, therefore, condemnation of the railroad right-of-way to permit construction of an at-grade crossing at that location pursuant to state law is preempted under § 10501(b).

BACKGROUND

Course of Proceedings. TCRY filed its petition on March 19, 2015, and the Cities filed their notice of intent to participate on March 20, 2015. Subsequently, on April 7, 2015, TCRY filed an affidavit to notify the Board that the city councils for both Kennewick and Richland had scheduled separate hearings to consider and vote upon the proposed condemnation ordinance. In a decision served on May 21, 2015, the Board instituted a proceeding and set a procedural schedule. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2 (STB served May

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

21, 2015). The Cities filed their reply to TRCY's petition on June 15, 2015, and TCRY filed a rebuttal on June 24, 2015.

On June 30, 2015, the Cities requested leave to file a reply to TCRY's rebuttal. The Board granted that request and allowed TCRY to rebut the Cities' additional filing. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2-3 (STB served Aug. 31, 2015). In addition to allowing the supplemental filings, the Board noted that the record in this docket would close on September 30, 2015. Id. at 3. The Cities filed their supplemental reply on September 15, 2015, and TCRY filed its supplemental rebuttal on September 30, 2015.

On June 17, 2016, the Cities submitted a June 16, 2016, decision by the Washington State Court of Appeals concerning an appeal of a Washington State Utilities and Transportation Commission (UTC) decision referenced by the parties in their earlier pleadings. On the same day, TCRY filed a letter in opposition noting that the Cities' pleading was filed after the closing of the record in this docket. (TCRY Letter 1, June 17, 2016.)

On June 27, 2016, TCRY filed a letter requesting that the Board expedite its decision. On June 29, 2016, the Cities filed a response in opposition to TCRY's characterization of the issues before the Board in its June 27, 2016, letter.

On July 25, 2016, the Cities submitted two decisions issued by the Washington State Court of Appeals concerning proceedings referenced by the parties in their previous pleadings.

While the record in this docket closed on September 30, 2015, the Board will accept these additional pleadings in the interest of a more complete record.²

The Controversy at Issue. TCRY is a Class III railroad with its headquarters and principal place of business in Benton County, Wash. (TCRY Pet. 4.) TCRY states that it operates as a handling carrier over, and serves as the dispatching carrier on, approximately 16 miles of track (the "line" or "mainline") and that its primary rail yard is located in Richland.³ (Id. at 4-5, 7.) The line is owned by the Port of Benton, and TCRY conducts its rail operations pursuant to a written lease agreement. (TCRY Pet. 4.) TCRY states that it moves carloads for its own customers and operates as the handling carrier for UP. (Id. at 4-5.) BNSF Railway (BNSF) also operates on the line. (Id. at 5.)

² The Board is also accepting the letter submitted on July 26, 2016, by Senator Maria Cantwell requesting an expeditious review of TCRY's petition. TCRY has moved to strike the letter on the grounds that it was not served on all parties and that it could violate the ex parte contact prohibitions of 49 C.F.R. § 1102.2. But here the Board followed its longstanding practice of posting Congressional letters on our website. Therefore, the motion to strike is denied.

³ TCRY states that it has additional operating rights on approximately 37 miles of Department of Energy-owned track and operates on 8 miles of Union Pacific Railroad (UP) track in order to facilitate interchange with UP at Kennewick. (TCRY Pet. 6.)

According to TCRY, the Cities are attempting to use Washington State law to condemn and acquire a right-of-way for a public street which would bisect TCRY's tracks. TCRY explains that the crossing, at the location being proposed, would cross both TCRY's mainline and a 1900-foot parallel track with switches at both ends, which, according to TCRY, "is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south." (Id. at 6-7.) TCRY has exclusive use of the parallel track. (Id. at 6.)

TCRY states in its petition that the proposed crossing would unreasonably interfere with current and future railroad transportation. (Id. at 24-25, 27, 41-43.) Specifically, TCRY argues that the proposed crossing would compromise the railroad's ability to use the parallel track for passing and staging operations, eliminate railcar storage and staging in the vicinity of the southern switch, limit its switching operations generally, and reduce its ability to use the parallel track for over-capacity storage that will be needed in light of expected volume increases. (Id. at 1, 24, 41-43.) In particular, TCRY states that because multiple carriers use the mainline, it is critical from an operational standpoint that it have unfettered access to the parallel track in order to set out or hold a train while another train uses the mainline. (TCRY Pet. 7, 41.) Moreover, TCRY states that it needs the parallel track for storing rail cars when the main TCRY yard reaches capacity, and it uses the switches on both ends on a daily basis. (Id. at 7.)

TCRY states that it lacks any alternative facility or location at which the rail activities performed on the parallel track could take place. (TCRY Pet. 24-25, 41-43; TCRY Rebuttal at 4, 27, 33.) Moreover, it presents evidence that it expects an increase in rail traffic, and as a result, is exploring expanding the length of the parallel track to 10,000 feet to accommodate unit trains on both the mainline and parallel tracks. (TCRY Pet. 7-8.) As for the mainline, it argues that the portion of the line that this crossing would bisect is one of the only locations where a unit train can be stopped to wait for operations to clear along the track or for other safety reasons. (Id. at 7.)

TCRY states that it handled 2,247 carloads (or two 9-car trains per day) in 2013, and that it handled 2,626 carloads (or two 10-car trains per day) in 2014. (Id. at 6.) TCRY expected its 2015 numbers to rise to 4,175 carloads, or two 16-car trains per day. (Id.) In addition, TCRY states that need for its service should continue to grow because the Preferred Freezer Plant, the largest frozen food plant in the world, was scheduled to begin operations in 2015. (Id. at 8.) TCRY also notes that the City of Richland has approved a development plan to construct a rail loop in the Horn Rapids Industrial Park and has entered an agreement with ConAgra Foods to develop an automated cold storage warehouse in the Horn Rapids area. (Id. at 16.)

In their reply to TCRY's petition, the Cities state that the proposed at-grade crossing is part of a regionally important project that extends a public street, Center Parkway, between the cities of Kennewick and Richland. (Cities Reply 1, 15.) The Cities note that they have received

state and federal funds for the project and that the proposed at-grade crossing received unanimous approval from the UTC.⁴ (Id. at 1-2, 15, 17-19.)

The Cities assert that the use of the trackage at issue for rail transportation would not be compromised by the Cities' grade crossing project.⁵ (Id. at 1.) They cite a field study that they conducted, which they claim shows no instance in which TCRY had actually used the full 1900-foot parallel track for its current operations. (Id. at 8-11.) The Cities also contend that TCRY's primary use of the parallel track is for the storage of rail cars, which would not require the blocking of the crossing. (Id. at 33.) The Cities acknowledge the new rail loop in the Horn Rapids Industrial Park and the new Preferred Freezer Plant in the area, but nevertheless claim that TCRY's carload projections are speculative and too high. (Id. at 8-11.)

The Cities argue that regardless of increased track usage, a crossing at the proposed location would not impact railroad operations because TCRY will continue to have right-of-way access over the crossing. (Cities Reply 32.) They also claim that any concerns of undue safety risks are unfounded because gates would prevent vehicular access when a train occupies the track within the limits of the crossing. (Id. at 11, 31-33.)

On rebuttal, TCRY provides additional evidence to document its need for all of its rail infrastructure to perform its current and potential future operations. TCRY states that it has begun serving as the rail services manager for the Preferred Freezer Plant, responsible for the management and dispatch of all railroads providing services to the plant. (TCRY Rebuttal 24.) TCRY states that UP sent TCRY 142 empty rail cars for storage in June 2015, prior to the opening of the Preferred Freezer Plant in July 2015, and that after this shipment, additional rail cars arrived, which resulted in both its yard and nearby industrial lead being over capacity. (Id. at 24-25.) TCRY also states that prior to the opening of the Preferred Freezer Plant, it staged several hundred refrigerated cars in its rail yard. (Id. at 25.)

TCRY further claims that if the crossing is built, it would have to comply with Kennewick Municipal Code (KMC) § 11.80.090, a local ordinance governing grade crossings, and that doing so would result in a loss in capacity to use the parallel track. (TCRY Pet. 23-24.) That ordinance provides, in relevant part, that trains must be left clear of road crossing signal

⁴ The UTC did not address § 10501(b) preemption. Following the second UTC decision issued on June 24, 2014, TCRY filed an action in Washington state court that raised preemption claims. (TCRY Pet. 21.) Subsequently, the state court proceeding was "voluntarily dismissed, without prejudice, by TCRY" so that TCRY could seek a Board determination on whether the proposed condemnation objected to by the railroad to permit this crossing is preempted under federal law. (Id. at 23.)

⁵ The Cities' pleadings refer to the Board as having jurisdiction over crossings. In fact, the Board has exclusive jurisdiction over "transportation" by "rail carriers," see 49 U.S.C. § 10501(b), and therefore, federal law preempts any state action, including a condemnation action for a crossing, that would unreasonably interfere with rail transportation under the Board's jurisdiction.

circuits and that, when it can be avoided (1) cars or engines must not be left standing nearer than 250 feet from a road crossing and (2) public crossings must not be blocked for more than five minutes. (*Id.* at 24.)

TCRY also argues that in addition to the KMC, the General Code of Operating Rules (GCOR) — which is a set of operating and safety rules used by most western railroads⁶ — requires that railroads should avoid (1) leaving cars, engines, or equipment standing closer than 250 feet from road crossings when there is an adjacent track and (2) blocking public crossings for more than 10 minutes. (TCRY Rebuttal 4.) TCRY claims that, given the provisions of the KMC and the GCOR and the configuration of the track, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks. (TCRY Rebuttal 30.)

The Cities respond that KMC § 11.80.090 and the GCOR are not mandatory and therefore would not reduce the railroad’s capacity to conduct current and future rail operations. (Cities Supplemental Reply 11-14.) The Cities argue that, in fact, these two provisions support the Cities’ position that the crossing does not interfere with railroad operations, stating that “the plain language of the provisions establish that TCRY has the flexibility to maintain its railway operations on the 1900-foot siding when the siding is needed for railway operations.” (*Id.* at 12.) The Cities also note that BNSF and UP, which operate over TCRY’s mainline, have not opposed the location of the proposed crossing.⁷ (Cities Supplemental Reply 7-8.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. We find it appropriate to issue a declaratory order addressing the grade crossing controversy here. As discussed below, we conclude that the proposed at-grade crossing bisecting TCRY’s mainline and parallel tracks would unreasonably interfere with TCRY’s current and future railroad operations on the parallel track, and therefore any state or local regulation requiring a crossing at the proposed location is preempted under § 10501(b).

The Interstate Commerce Act is “among the most pervasive and comprehensive federal regulatory schemes.” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The Board’s jurisdiction over “transportation by rail carriers” is “exclusive,” and “the

⁶ According to the Federal Railroad Administration, at present, most Class I railroads in the U.S. use one of two “standard” rulebooks: the Northeast Operating Rules Advisory Committee (NORAC) rulebook or the GCOR. Conrail, Amtrak, and several commuter and short line railroads in the northeastern United States use the NORAC rulebook. The GCOR is used by every Class I railroad west of the Mississippi River, most of the Class II railroads, and numerous shortline railroads. See FRA report “Compliance with Railroad Operating Rules and Corporate Culture Influences,” Oct. 1999, at 2.

⁷ TCRY responds that BNSF and UP have not intervened because they were able to reach separate agreements with the Cities to access the Horn Rapids Industrial Park. (TCRY Rebuttal 2-3.)

remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The Board’s governing statute defines “transportation” expansively to encompass not only railroad operations over the Nation’s rail network but also a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include “a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard, [or] ground used or necessary for transportation.” 49 U.S.C. § 10102(6). The purpose of § 10501(b) is to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Thomas Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff’d 812 F.3d 1141 (8th Cir. 2015); U.S. Env’tl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995). As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp. Inc. v. Ga. Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

It is well settled that the provisions of § 10501(b) preempt permitting or other laws and legal processes that would regulate rail transportation directly or that could be used to deny a railroad’s ability to conduct rail operations. See Wichita Terminal Ass’n—Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015). Courts and the Board have found that state or local actions that “have the effect of managing or governing,” and not merely incidentally affecting, rail transportation are preempted under § 10501(b). Tex. Cent. Bus Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc) (“[L]aws that have the effect of managing or governing rail transportation will be expressly preempted.”); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005) (actions by a state or local entity that directly conflict with the “exclusive federal regulation of railroads” are preempted). Federal preemption applies without regard to whether the Board actively regulates the railroad operations or activity involved. 49 U.S.C. § 10501(b)(2); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008).

The Board has stated that “routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks.” Maumee & W. R.R.—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004); see also E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012) (finding that an easement across a railroad’s property for subterranean water and sewer pipes would not unreasonably interfere with rail operations). The right to proceed under state law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks Inv. Co., 593 F.3d at 414 (rejecting railroad’s preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation) with Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (finding state property law ownership

claims preempted where such claims would directly affect the amount and type of maintenance that could be performed on a railroad right-of-way and limit the capacity of the line of railroad should it be needed for potential future active rail service); see also Maumee & W. R.R., FD 34354, slip op. at 2 (noting that preemption may shield a railroad from state eminent domain laws where the effect of those laws is an unreasonable interference with railroad operations).

The Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available, including condemnation to take property used for rail transportation for another, conflicting use that would unreasonably burden or interfere with rail use, present or future. Wichita Terminal Ass'n, FD 35965, slip op. at 5 (finding that a state court order forcing a railroad to accept a crossing at a certain location would unreasonably burden interstate commerce because it would have the effect of managing or governing property that is part of the national rail network, but that a court-ordered crossing at another location might not have such effects, in which case it would not be preempted); see also Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way preempted by § 10501(b) even if the city's proposed use of the property would have been coextensive with a prior lease); City of Lincoln v. STB, 414 F.3d 858, 861 (8th Cir. 2005) (finding a city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way preempted); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196 (STB served March 1, 2010) (finding a condemnation action to take property on which the railroad was not actively operating trains preempted when proposed condemnation would unreasonably interfere with railroad's future plans); 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (finding claims of adverse possession and prescriptive easement preempted); Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015) (finding an attempt to evict a railroad from property used as part of the interstate rail network preempted).

The Board engages in a fact-specific analysis to consider whether a proposed condemnation action would prevent or unduly interfere with railroad operations and interstate commerce. See Franks Inv. Co., 593 F.3d at 414; Wichita Terminal Ass'n, FD 35965, slip op. at 6. In conducting this analysis, the Board considers both the railroad's current and future plans. City of Lincoln, 414 F.3d at 862 (railroad's future plans can be considered because "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses."); Norfolk S. Ry., FD 35196 (finding preemption based on anticipated impact a condemnation action would have on railroad's future plans for the property).

Here TCRY asks the Board to find that state law condemnation of the right-of-way at the location of the proposed crossing is preempted by federal law. The Cities argue that takings of railroad right-of-way in circumstances such as these are not unusual or controversial and that the Board should not interfere with what they view as a routine crossing that has local support and, in their opinion, would not impinge on TCRY's operations.

The Board's decision here hinges on whether the Cities' attempt to condemn TCRY's property to create an at-grade road crossing would unreasonably interfere with and burden rail

transportation by limiting TCRY's capacity to conduct its current and future operations on the parallel track.

The Board finds that TCRY has demonstrated that the proposed at-grade crossing, which would bisect the mainline and parallel tracks, would unreasonably interfere with and burden both current and future rail transportation on the parallel track. Therefore, state law condemnation of the right-of-way for a crossing at that location is federally preempted.

With respect to current operations, the record makes clear that installation of a crossing at the proposed location would make as much as 600 feet of the 1900-foot long parallel track unusable for TCRY's switching, storage, and interchange operations. The parallel track is the only location along the 16-mile line where these essential railroad operations can be performed. TCRY, as the dispatcher for the entire length of the mainline (including UP and BNSF traffic), has demonstrated that a loss of useable parallel track would impinge on TCRY's ability to conduct its current operations. For example, TCRY explains that the current configuration of the 1900-foot track, with switches at both ends, allows TCRY to spot and store cars for various lengths of time at one end of the track while using the other end for moving and holding trains. (TCRY Rebuttal 26-28.) However, the location of the proposed crossing would require TCRY to relocate switching operations from the southern switch to the northern switch for interchange with UP at Kennewick. (TCRY Rebuttal, V.S. Foster Peterson 15.) TCRY's experts have stated that this would be an inefficient way to operate. (*Id.*) Accordingly, federal preemption applies. See Wichita Terminal Ass'n, FD 35965, slip op. at 9 (finding a crossing is federally preempted because it would unreasonably burden or interfere with the interchange of railcars).

The Cities take issue with TCRY's June 24, 2015 rebuttal testimony from TCRY's President and CEO, Randolph Peterson. They note that Mr. Peterson's statement that the proposed crossing would "drastically interfere with [TCRY's] railroad operations" is inconsistent with prior statements before the UTC in 2013 that there would be no operational interference. (Cities Supplemental Reply 9-11.) We recognize that Mr. Peterson's testimony on rebuttal could be viewed as inconsistent with prior statements made before the UTC in 2013. However, the statements to the UTC were made several years ago and do not reflect the subsequent increase in carloads handled that has taken place since 2013, or the existence of the Preferred Freezer Plant or the new rail loop. Thus, notwithstanding this testimony, the weight of the evidence demonstrates that the proposed crossing bisecting the mainline and parallel tracks would unreasonably interfere with TCRY's current and planned future operations.

TCRY has established a need for full access to the parallel track for its future operations. See City of Lincoln, 414 F.3d at 862; Norfolk S. Ry., FD 35196, slip op. at 3-4; Jie Ao & Xin Zhou, FD 35539, slip op. at 6 (finding plans for the future use of a railroad right-of-way, which were less concrete than TCRY's, an acceptable basis on which to find preemption). It is undisputed that the new Preferred Freezer Plant has begun operating and that a rail loop to support this facility has been, or soon will be, constructed in the Horn Rapids Industrial Park (located on the northern end of TCRY's line). While the parties differ on whether TCRY currently uses the entire length of the 1900-foot parallel track and how much additional rail traffic there will actually be, there is no doubt that an increase in rail capacity (i.e., the rail loop) and an additional large customer (i.e., the Preferred Freezer Plant) are likely to lead to an

increase in traffic on TCRY's line and the number of cars that will need to be staged, stored, and interchanged on the parallel track. TCRY's evidence demonstrates that unrestricted use of the entire length of the parallel track will be needed to handle the future expected influx of rail cars from new customers and to stage, pause, or hold manifest trains approaching the rail loop. (See TCRY Pet. 7, 24, 41-43; TCRY Rebuttal 26-28.) TCRY has limited capacity and system infrastructure. As TCRY notes, it received a large influx of cars in preparation for the opening of the Preferred Freezer Plant commencing operations, and this influx caused its yard and the parallel track to reach capacity. (TCRY Rebuttal 23.) While TCRY states that it has begun to explore its options for extending the parallel track (which itself suggests that the railroad cannot do with less than the entire length of the parallel track), it is unclear from the record that TCRY actually would be able to do so under the terms of its lease with the Port of Benton. In these circumstances, TCRY has shown that it needs the ability to continue full, unimpeded use of the entire parallel track to carry out its current and future operations and that losing any part of the parallel track would leave insufficient room for these operations.

The Cities also suggest that federal preemption does not apply here because the mainline and parallel tracks that the crossing would bisect are owned by the Port of Benton, and TCRY operates over the tracks pursuant to a lease. (Cities Reply 1, 41-42.) It is common, however, for railroads to hold various types of property interests in the land that constitutes their right-of-way. See, e.g., Cayuga Cty. Indus. Dev. Agency—Acquis. Exemption—Finger Lakes Ry., FD 36011 et al. (STB served July 14, 2016) (acquisitions and subleases). The Cities have proffered no evidence showing that TCRY lacks the property interest it needs to perform its current and future rail operations. As the Board explained in Norfolk S. Ry., FD 35196, slip op. at 6, the Board has jurisdiction over rail transportation regardless of whether the property on which that transportation is being conducted is owned, leased, or held in easement by the operating railroad. See also § 10102(9) (defining transportation expansively to encompass facilities of any kind related to the movement of property by rail “regardless of ownership or an agreement concerning use”).

Similarly, whether or not the parallel track is considered “siding” track, as the Cities argue (Cities Reply at 12-13), federal preemption would still apply. Under 49 U.S.C. § 10906, side track is excepted from Board licensing, but is still within the Board's jurisdiction. Id. The Board and the courts have consistently found that because the Board's jurisdiction over transportation is “exclusive,” § 10501(b) preempts state law remedies without regard to whether or not the Board actively regulates activities on the particular track involved. See Pace, 613 F.3d at 1068-69 (finding state law claims related to side track preempted); Port City Props., 518 F.3d at 1188 (finding state law claims preempted even though the Board does not actively regulate spur and side track). Here TCRY has shown that the parallel track is used to support rail operations subject to the Board's jurisdiction, §§ 10102(6), 10102(9), and that the proposed crossing would unduly interfere with TCRY's ability to perform its current and future operations on that track. Accordingly, federal preemption applies.

The Cities fail to show that TCRY erred in relying on the GCOR provisions providing that cars generally should not be spotted less than 250 feet from each side of the crossing. TCRY claims that, given these provisions, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks, given the configuration of the track. (TCRY

Rebuttal 30.). The record here shows that TCRY has adopted the GCOR. (See TCRY Pet., V.S. Peterson 12.) Despite the Cities' contention that the GCOR provisions are not mandatory for TCRY, the provisions of the GCOR represent industry best practices. Thus, as TCRY states, failure to establish operating rules consistent with the GCOR standards could open the railroad to potential liability it would not otherwise face. (TCRY Supplemental Rebuttal at 12-13.) In any event, federal preemption would apply here without regard to whether TCRY's operations on the parallel track comply with the GCOR standards. The courts and the Board have found that even minimal loss of railroad right-of-way is too much where, as here, the railroad objects and shows that full use of the property (e.g., the parallel track) is needed in connection with its current and future rail transportation plans. See City of Lincoln, 414 F.3d at 861 (involving loss of 20-foot longitudinal strip at the edge of a railroad's right-of-way); Norfolk S. Ry., FD 35196, slip op. at 4 ("it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses"). Having found persuasive TCRY's argument that compliance with the GCOR limits its use of the parallel track, the Board need not address the parties' arguments regarding the effect of § 11.80.090 of the KMC on railroad operations.

For the reasons discussed above, we find that the efforts of the Cities to condemn and acquire a right-of-way for an at-grade crossing at the proposed location, bisecting both the parallel and main tracks, are preempted by § 10501(b).

It is ordered:

1. TCRY's petition for declaratory order is granted to the extent discussed above.
2. TCRY's motion to strike Senator Cantwell's letter is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

VICE CHAIRMAN MILLER, commenting:

I agree that today's decision reaches the correct legal outcome, though unfortunately, I do not think it is the best possible outcome. I would have preferred that the Board require the parties to engage in mediation to determine if there was a solution that would have been mutually acceptable to both sides.

The Cities have a significant interest in building a road that will connect the two cities. The project is identified as an essential capital improvement in the Cities' Comprehensive Plan and in the Regional Transportation Plan and, if completed, would promote important public benefits, such as reducing traffic congestion, increasing access by emergency responders, and promoting economic development. The Cities have also expended a significant amount of resources in planning. The record shows that it involved years of work, including extensive

hearings and review. The project has also received federal and state funding, and appears to be supported by all state, regional, and local planning and transportation agencies.

Our decision today basically negates all of this. In my view, the Board should have exhausted all options to keep this important public project alive before reaching today's winner-take-all decision, including mediation. Mediation would have been particularly useful here. The record indicates that the Cities successfully negotiated with both UP and BNSF to obtain their consent to the proposed at-grade crossing, suggesting that a negotiated solution was not outside the realm of possibility. It also appears that the two sides, despite having been involved in years-long litigation, have never really sat down with one another to discuss a mutually-agreeable solution. In fact, the Cities state that TCRY chose not to engage in the Cities' extensive planning process for the crossing, despite being invited to participate; that TCRY submitted no comments in the planning process; and that TCRY did not attend the Washington Utilities and Transportation Commission's diagnostic meeting for the crossing. (Cities Reply 19.) The Cities also note that it was not until TRCY's rebuttal in this case that they became aware of TRCY's plans to extend the parallel track. (Cities Supplemental Reply, V.S. Rogalsky 5.) It disappoints me that TRCY did not try to work with the Cities, particularly when there might have been a way for it to protect its own interests while looking for a way to help them accomplish their goal. Perhaps had the Board required the parties to communicate, with the assistance of a Board-appointed mediator, they could have reached a solution that would have met both sides' needs.

When the Board enabled itself to force parties to engage in mediation, it stated that it "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, *wherever possible*." Assessment of Mediation & Arbitration Procedures, Docket No. EP 699, slip op. at 2 (STB served May 13, 2013) (emphasis added). However, since then, the Board has only used this power in two instances (or less than one case per year).¹ The Board needs to consider using all the tools in its toolbox, including mediation where it makes sense. This proceeding is one where it would have made sense.

This case also highlights yet again what I believe is the Board's inability to handle cases quickly under its current processes.² Today's decision comes nearly a year after the last significant filing in the case, which was made on Sept. 30, 2015. (Although there were recent filings, they merely provided updates in the related state proceeding – updates that would not

¹ The two proceedings in which the Board ordered the parties to mediate were Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141 and BNSF Ry.—Terminal Trackage Rights—Kansas City S., Docket No. FD 32760 (Sub-No. 46).

² See Petition for Rulemaking to Adopt Revised Competitive Switching, Docket EP 711, et al., (STB served July 27, 2016) (Miller comment); CSX Transp., Inc.—Acquis. of Operating Easement—Grand Trunk W. R.R., Docket No. FD 35522 (STB served June 22, 2016) (Miller comment) ("The fact that parties in even the most urgent cases must still wait months before a decision is issued demonstrates the need for the Board to reconsider our internal decision-making process.").

have been necessary had the Board ruled sooner). The proceeding had been pending for so long that one party felt compelled to write a letter to the Board expressing urgency³ and a U.S. Senator felt it necessary to make an inquiry.⁴

As I have previously noted, I am frustrated by the Chairman's unwillingness to consider changes that I think would help improve timeliness.⁵ The resistance is particularly puzzling given that Congress has already had to step in and require the agency to begin filing quarterly reports on unfinished regulatory proceedings (i.e., rulemakings), forcing the agency to create deadlines for next actions and to provide explanations if those deadlines are not met. All three Board Members have expressed a belief that this reporting requirement is having a positive impact on the pace of those proceedings.⁶ If that is the case, then the Chairman should be willing to apply those same principles to our other proceedings – and we should not wait for a directive from Congress to do so.

³ See TRCY's June 27, 2016 letter.

⁴ See Senator Maria Cantwell's July 26, 2016 letter.

⁵ Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 9 (2016) (statement of Vice Chairman Deb Miller, Surf. Transp. Bd.) ("During my time as Acting Chairman, I began two initiatives to try to address these problems: setting target dates for the completion of all pending matters in our formal proceedings and creating a set of internal performance metrics to measure how the Board is performing in terms of managing its docket. It was my hope that these initiatives would be continued, but they were not."). Commissioner Begeman has also expressed frustration with the Board's pace and a desire to improve the functioning of the agency. See Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 1-2 (2016) (statement of Commissioner Ann Begeman, Surf. Transp. Bd.).

⁶ Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. (2016), video archive, at 01:47:00, available at: <https://www.youtube.com/watch?v=J9Sv9Ggpfpg&feature=youtu.be&t=19m51s>, testimony of Chairman Daniel Elliott, Surf. Transp. Bd. ("First of all, I would like to start off by saying that as far as the unfinished regulatory proceeding[s] reports themselves, I think they've been excellent, I think the results speak for themselves, and you've seen things coming out of the agency at a pace that didn't occur in the past. Personally, I very much appreciate that transparency and it's created, I think, some great efficiencies at the Board that didn't exist before. So, you know, all and all, I think it's been great."). See also statement of Commissioner Begeman, at 3, and statement of Vice Chairman Miller, at 3.

APPENDIX 16

UNION PACIFIC RAILROAD
1400 Douglas Street Omaha, Nebraska 68179

November 8, 2017

Tri-City Railroad Company
ATTN: Mr. Randolph Peterson
10 N. Washington St.
Kennewick, WA 99336

RE: Notice of CMA Termination

Dear Mr. Peterson:

This letter is being sent to Tri-City Railroad Company (TCRY) by Union Pacific Railroad Company (UP) as formal written notification of UP's intent to terminate the Cooperative Marketing Agreement (CMA) between TCry and UP dated February 1, 2001. Per Section 1 of the CMA, this termination will be effective at the end of the 30 day notice period, or December 08, 2017. On December 08, 2017, Union Pacific will assume rail operations that are currently conducted by TCry as UP's handling carrier.

UP requests TCry's assistance and cooperation to assure a smooth transition of service. Please acknowledge receipt of this letter upon receipt.

Regards,



Jesse Miller
Mgr: Short Line Development
Union Pacific Railroad

CC:

Jill Newell
Mike Fernen
Rob Russell



APPENDIX 17

- Bob (and Bill)

- [Learn More](#)

APPENDIX 18

SERVICE DATE – OCTOBER 31, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1270

PORT OF BENTON COUNTY, WASH.—ADVERSE DISCONTINUANCE OF RAIL
SERVICE—TRI-CITY RAILROAD COMPANY, LLC

Digest:¹ The Board grants an application filed by the Port of Benton, Wash., for “adverse” discontinuance of the operating authority of Tri-City Railroad Company, LLC, over a rail line in Richland, Wash.

Decided: October 30, 2019

On February 27, 2019, the Port of Benton, Wash. (Port), filed an application under 49 U.S.C. § 10903 asking the Board to find that the public convenience and necessity require or permit the “adverse” discontinuance of operating authority held by Tri-City Railroad Company, LLC (Tri-City), a Class III carrier, over approximately 10.89 miles of main line track (16 miles including sidings and connecting spur tracks), extending between milepost 18.84 at Richland Junction, and milepost 29.73 at Horn Rapids Road in Richland, Wash. (the Line).² Notice of the application was served and published in the Federal Register on March 19, 2019 (84 Fed. Reg. 10,169). On April 15, 2019, Tri-City filed a reply in opposition to the Port’s application.³ On April 29, 2019, the Port filed its rebuttal. For the reasons set forth below, the Board will grant the Port’s application.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

² Prior to filing the application, the Port filed a petition seeking exemptions from several statutory provisions as well as waivers of certain Board regulations that were not relevant to its adverse discontinuance application or that sought information not available to the Port; the Board granted the Port’s petition in part on October 31, 2018. See Port of Benton Cty., Wash.—Adverse Discontinuance of Rail Serv.—Tri-City R.R. (October 2018 Decision), AB 1270 (STB served Oct. 31, 2018). On February 6, 2019, the Port filed a petition for an additional waiver, which the Board also granted. Port of Benton Cty., Wash.—Adverse Discontinuance of Rail Serv.—Tri-City R.R., AB 1270 (STB served Feb. 21, 2019).

³ On May 8, 2019, Tri-City filed a letter supplementing its April 15 reply.

(continued . . .)

BACKGROUND

According to the Port, the Line was constructed in 1947 by the Atomic Energy Commission (AEC), now the U.S. Department of Energy, to provide rail service to the Hanford Nuclear Reservation. (Appl. 4.) The AEC granted predecessors of BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) operating rights to serve that facility and other customers that would locate on the Line. (*Id.*) The Port acquired the Line in 1998⁴ and simultaneously entered into an agreement with Tri-City's predecessor for the latter to maintain the Line at the Port's expense; meanwhile, BNSF and UP remained as operators on the Line. (*Id.* at 4-5.) Tri-City has been operating over the Line pursuant to a lease agreement with the Port dated August 1, 2002 (the Lease),⁵ which requires Tri-City to maintain the Line at its own expense.⁶ (*Id.* at 5.) At the end of its initial 10-year term in 2012, the lease automatically renewed for a second 10-year term. (*Id.*, V.S. Keck at 2, Attachment 1.)

The Port states that, in the past several years, numerous disagreements have developed between the Port and Tri-City, resulting in litigation between Tri-City and the Port as well as between Tri-City and BNSF. (Appl. 5.) According to the Port, the parties have been unable to resolve these disagreements through negotiation, and the Port has provided Tri-City with notice that Tri-City has committed material breaches of its Lease obligations and is in default. (*Id.*) The Port alleges that Tri-City has failed to maintain the Line and its bridges as required by the Lease, has failed or refused to provide the Port with plans to address deferred track maintenance, and has failed or refused to provide the Port with requested financial information showing maintenance costs or supporting its claims for the need to impose maintenance surcharges (surcharges Tri-City purportedly attempted to impose without first obtaining the Port's consent, as is required by the Lease). (*Id.* at 5-6.) The Port further states that on one or more occasions, Tri-City has erected blockades to prevent BNSF or UP from serving customers on the Line. (*Id.* at 6.) As a result, the Port has decided to terminate Tri-City's Lease and evict Tri-City from the Line. (*Id.*) According to the Port, service to customers will not be affected because both BNSF and UP hold operating rights to serve all customers and have stated their willingness to provide all service once Tri-City ceases operations. (*Id.*)

The Port submitted letters from two shippers that support the Port's application: DelHur Industries, Inc., which describes an instance when Tri-City used locomotives to block BNSF from delivering freight to its facility, (Appl., Ex. B); and Central Washington Corn Processors,

⁴ See Port of Benton—Acquis. & Operation Exemption—U.S. Dept. of Energy Rail Line in Richland, Wash., FD 33653, slip op. at 1 (STB served Oct. 6, 1998).

⁵ See Tri-City R.R.—Lease & Operation Exemption—Rail Line of the Port of Benton in Richland, Wash., FD 33888, slip op. at 1 (STB served June 23, 2000).

⁶ As the Board noted in the October 2018 Decision, the mileposts used to identify the Line in this proceeding differ from the mileposts used in Docket No. FD 33653, see October 18 Decision, AB 1270, slip op. at 2 n.2, and in Docket No. FD 33888. While the Port has not explained the discrepancy, Tri-City also states in its reply that the Line extends from milepost 18.84 at Richland Junction to milepost 29.73 at Horn Rapids Road. (Tri-City Reply 1.) Accordingly, the adverse discontinuance authority granted herein applies only to Tri-City's operation of the Line from milepost 18.84 to milepost 29.73.

Inc., which states that its relationship with Tri-City deteriorated to a point where it refuses to allow Tri-City to serve its facility and instead built a facility that would be served directly by BNSF and UP (Appl., Ex. C). The Port also submitted letters from BNSF and UP in support of the application, which also describe concerns with Tri-City's maintenance and operation of the Line. (Appl., Ex. D & Ex. E.)

Tri-City opposes the Port's application, arguing that § 10903, viewed in light of the rail transportation policy of 49 U.S.C. § 10101, requires denial of the application, (Tri-City Reply 4-6), and that the Port has failed to satisfy its burden of proof under § 10903, (*id.* at 7-14). According to Tri-City, it maintains the Line in accordance with the Lease, and there are no grounds for terminating the Lease, the validity of which is currently being litigated in court. (Tri-City Reply 2, 4); U.S. ex rel., Peterson v. Port of Benton Cty., Case No. 2:17-cv-00191-TOR (E.D. Wash.). Tri-City further asserts that, because the Port's application is based on the claim that Tri-City breached the Lease, which Tri-City believes was not lawfully terminated, granting the application would require the Board to interpret the Lease and decide issues of state contract law that are currently before a federal court. (Tri-City Reply 8-10.) Tri-City also argues that it provides superior rail service to its shippers and that the statements of six shippers in support of Tri-City's continued operations make it clear that shippers would be seriously harmed by loss of Tri-City's service, which would not be adequately replicated with the inherent local service limitations of Class I carriers like BNSF and UP.⁷ (*Id.* at 4, 11, Apps. 9-14.)

Tri-City also argues that the application should be denied on equitable grounds which, it asserts, can be considered under § 10903. (*Id.* 14-16.) Tri-City asserts that BNSF, UP and the Port unfairly deprived Tri-City of interchange revenues while at the same time making no contributions to the extensive maintenance costs associated with using Tri-City's lease track. (*Id.* 3-4, 14-16.) According to Tri-City, based on 2018 maintenance costs and traffic, the failure of BNSF and UP to pay a fair share of maintenance costs left Tri-City with \$492,672⁸ in track and bridge maintenance costs that should have been paid by BNSF and UP. (*Id.* at 4, 16.)

On rebuttal, filed April 26, 2019, the Port argues that it has satisfied its burden of proof under the public convenience and necessity test, and that there is no basis for denying its application on equitable grounds. (Rebuttal 5-6, 13-14.) The Port also argues that it is seeking adverse discontinuance in order for the Board to remove its preemptive shield so the Port can seek a remedy under state law, not for the Board to enforce a private contract. (*Id.* at 10.)

⁷ The statements consist of emails from: Calbag Resources LLC; Columbia River Carbonates; Cost Less Carpet; A&K Railroad Materials, Inc.; Bio-Gro, Inc.; and Great Northwest Transport, LLC. (Tri-City Reply, Apps. 9-14.)

⁸ In calculating this amount, Tri-City states that it transported only 119 cars in 2018, compared to approximately 4,500 cars transported by UP and approximately 3,500 cars transported by BNSF. (Tri-City Reply 15-16.)

PRELIMINARY MATTERS

The Board received several filings after the record closed in this proceeding. On April 26, 2019, BNSF requested leave to late-file comments consisting of a verified statement of Christopher Randall, Shortline Market Development Director, in response to Tri-City's reply. The verified statement addresses allegations in Tri-City's reply regarding BNSF and the responsibility to pay for maintenance costs on the Line.

On August 9, 2019, Tri-City filed a petition for leave to supplement the record with information that updates Tri-City's traffic and maintenance evidence. The petition asserts that Tri-City has moved 95 cars in the first seven months of 2019, compared to 119 cars in all of 2018, and describes new and potential shippers and traffic that are not yet moving over the Line. (Pet. to Supp. 1.) The petition also states that, in the first seven months of 2019, BNSF and UP transported 11,544 cars over the Line, including 24 unit trains, and that the Line experienced record volume in July 2019. (*Id.* at 2.) According to Tri-City, the increased traffic volume could not have taken place if the Line was not adequately maintained or if maintenance had entirely ceased. (*Id.*)

On August 15, 2019, the Port filed a reply in opposition to Tri-City's petition to supplement. The Port argues that the record closed on April 29, 2019, and that Tri-City has neither provided a good cause justification for allowing the submission of the additional information nor shown that the information is necessary to provide a complete factual record. (Port Reply 1.) According to the Port, allowing Tri-City to supplement the record with traffic updates would open the door to either party continuing to present the Board with never-ending updates. (*Id.* at 2.) The Port further argues that the supplemental information offered by Tri-City does not constitute proper evidence under the Board's rules. (*Id.* at 1-2 (citing 49 C.F.R. § 1114.1).)

In the interest of compiling a more complete record, the Board will grant both BNSF's request and Tri-City's petition for leave to supplement.

DISCUSSION AND CONCLUSIONS

The statutory standard governing discontinuances of operations is whether the present or future public convenience and necessity require or permit the proposed discontinuance. 49 U.S.C. § 10903(d). The Board may consider an "adverse" application to discontinue operations so long as the applicant establishes that it has a proper interest in the proceeding. See Bos. & Me. Corp.—Adverse Discontinuance—New Eng. S. R.R., AB 32 (Sub-No. 100), slip op. at 3 (STB served Apr. 30, 2010).⁹

⁹ The Port, as the owner of the Line, has a proper interest in the proceeding. See State of S.D.—Adverse Discontinuance of Operating Auth.—Napa Platte Reg'l R.R. Auth., AB 1253, slip op. at 2 (STB served June 27, 2018) (granting an adverse discontinuance application filed by the line's owner).

In implementing the public convenience and necessity standard, the Board balances the competing benefits and burdens of discontinuance or abandonment on all interested parties, including the railroads involved, the shippers on the line, the communities involved, and interstate commerce generally. Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. in Aroostook Cty., Me., AB 124 (Sub-No. 2) et al., slip op. at 4 (STB served May 3, 2004); City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry., AB 878, slip op. at 7 (STB served Aug. 10, 2005). The Board must also consider whether the discontinuance would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d).

Many of the arguments the parties present revolve around whether Tri-City’s maintenance and operation of the Line constitute material breaches of the Lease that would warrant the notice of termination of the Lease that the Port sent to Tri-City in late 2018. However, as the cases cited by Tri-City explain, the Board does not undertake to interpret or enforce contracts, as such issues are for an appropriate court to decide.¹⁰ See City of Peoria, AB 878, slip op. at 6.

Therefore, the Board makes no findings on the merits of the competing claims concerning the Lease asserted by the Port and Tri-City. However, unless the Board removes its exclusive and primary jurisdiction, a court may not evict or remove a rail carrier under state law. City of Peoria, AB 878, slip op. at 5-6 (and cases cited therein). Thus, by filing for adverse discontinuance, the Port properly seeks to have the Board remove its exclusive and primary jurisdiction with respect to Tri-City’s operating authority so that it may pursue eviction under state law.

The Board finds that the public convenience and necessity supports granting the Port’s application for adverse discontinuance as it would preserve the interests of the shippers on the Line, the communities involved, the other railroads involved, and interstate commerce generally.¹¹ This is not a case in which a property owner is seeking to oust a railroad to put the property to a non-rail use. Because BNSF and UP already transport nearly all of the traffic moving over the Line and have indicated that they would serve those customers currently served by Tri-City if an appropriate court finds Tri-City breached and/or defaulted on the Lease,

¹⁰ See Tri-City Reply 9 (citing Kansas City S. Ry. Co.—Adverse Discontinuance Application—a line of Arkansas & Missouri R.R. Co., AB 103 (Sub-No. 14), slip op. at 7 (STB served Mar. 26, 1999) (denying adverse discontinuance based on balancing the interests and stating the Board will not interpret or enforce operating agreements or contracts); Tacoma E. Ry.—Adverse Discontinuance—a line of City of Tacoma, in Pierce, Thurston & Lewis Ctys., AB 548, slip op. at 7 & n.12 (STB served Oct. 16, 1998) (granting adverse discontinuance based on balancing the interests and stating that disputes about contract obligations and termination can be resolved in other appropriate forums)). Moreover, because the Board is not deciding any contract issues that are pending in the court proceeding, granting the application will not result in “piecemeal litigation.” (Tri-City Reply 9-10.)

¹¹ Tri-City suggests that the Port did not directly address the balancing test under § 10903 (See Tri-City Reply 8); however, the record presented in the parties’ filings provides more than sufficient evidence for the Board to weigh the factors that it considers under the statute.

enabling the Port to evict Tri-City, rail service and rural and community development should not be adversely affected by Tri-City ceasing its operations over the Line. Indeed, given the service already provided by BNSF and UP, there should be little impact on the shipping public if Tri-City is ultimately evicted.

The Board recognizes that Tri-City has submitted (unverified) communications describing generally positive experiences with Tri-City's service, but none of those shippers state that they oppose the application for adverse discontinuance, let alone "make it clear that shippers would be seriously harmed by loss of [Tri-City's] personalized local service," as Tri-City claims. (See Tri-City Reply 11.) Granting discontinuance adversely affects Tri-City only to the extent that it allows the Port to pursue eviction of Tri-City in court. Tri-City would be able to defend its interests in the Lease in that forum. To be clear, the granting of the Port's application for adverse discontinuance alone does not prevent Tri-City from continuing to operate; there would also have to be, for example, an adverse court judgment evicting Tri-City from the Line. See Bos. & Me. Corp., AB 32 (Sub-No. 100), slip op. at 3; City of Peoria, AB 878, slip op. at 6.

Tri-City's argument that § 10903 dictates denial of the application is not persuasive. Tri-City argues that its active operation of the Line in and of itself brings this case in line with Board precedent generally denying adverse abandonment when the carrier is operating over the line. (Tri-City Reply 5 (citing Salt Lake City Corp.—Adverse Aban.—in Salt Lake City, Utah, AB 33 (Sub-No. 183) (STB served Mar. 8, 2002); N.Y.C. Econ. Dev. Corp.—Adverse Aban.—New York Cross Harbor R.R. in Brooklyn, N.Y., AB 596 (STB served Nov. 23, 2004)).) Those adverse abandonment cases, however, are inapposite, as they involve requests to end all service over the subject lines. Here, the Port seeks to discontinue only Tri-City's service, while BNSF and UP currently operate on the Line (providing the vast majority of the service) and will continue to do so.

Tri-City argues that equitable considerations—in particular the actions of the Port, BNSF, and UP allegedly seeking to discontinue Tri-City's service on a "de facto" basis by leaving Tri-City with less revenues to pay for maintenance costs without contribution from BNSF and UP, (see Tri-City Reply 14-15)—compel the denial of the application. The Board makes no findings on those allegations, as claims relating to any party'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.

In approving this application, the Board must ensure that affected railroad employees will be adequately protected. 49 U.S.C. § 10903(b)(2). Accordingly, any employee adversely affected by the discontinuance of service shall be protected under Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

In the October 2018 Decision, the Board exempted this transaction from the offer of financial assistance (OFA) statute at 49 U.S.C. § 10904 and waived the corresponding OFA regulations at 49 C.F.R. § 1152.27; therefore, OFAs will not be entertained. The October 2018

Decision also waived compliance with environmental review requirements;¹² accordingly, no environmental assessment was prepared in this proceeding. See 49 C.F.R. § 1105.6(c), 1105.8(b).

For the reasons discussed above, the Board finds that the Port, as the owner of the Line, has a proper interest in this proceeding; the present or future public convenience and necessity require or permit the discontinuance of operations by Tri-City over the Line; and discontinuance of operations by Tri-City would not result in a serious, adverse impact on rural and community development. Accordingly, the Board will grant the Port's application for adverse discontinuance.

It is ordered:

1. BNSF's request for leave to late-file comments is granted.
2. Tri-City's petition for leave to supplement the record is granted.
3. The Port's application for adverse discontinuance of rail service by Tri-City is granted, subject to the employee protective conditions set forth in Oregon Short Line.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹² Because there will be an environmental review during any future abandonment, this discontinuance does not require an environmental review.

APPENDIX 19



PROUDLY SERVING OUR COMMUNITY **10** years

PO BOX 6000
KENNEWICK, WA 99336

TCRY.COM
lisaanderson@TCRY.COM

P 360.239.9067
F 509.582.4964

August 29, 2018

David Billetdeaux
Port of Benton
3250 Port of Benton Blvd.
Richland, WA 99354

via Email and USPS

David,

In accordance with Section 7.1 of the Railroad Lease, please find attached to this letter, TCRY Supplement 1 to our Miscellaneous Tariff effective July 11, 2015 to allow for the Port to review it.

The Railroad Lease states in Section 7.1 "Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States."

The Railroad Lease also states in Section 8 "Throughout the term of this Lease, Tenant at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear, and in accordance with all applicable covenants, laws, rules, ordinances, and regulations of governmental agencies applicable to the maintenance and operation of the railroad, provided, however, that the Port shall be responsible for the maintenance of the roof and the exterior walls of the 1171 Building."

The Railroad Lease further states in Section 1 "The Tenant agrees to take the Property in its present condition without warranties."

The railroad was built in 1940s using mostly rounded river rock for ballast rather than railroad industry standard ballast and mostly 90 lb. light rail. The traffic on the railroad at the time of signing the Railroad Lease in 2002 consisted of several hundred cars a year to the Lamb Weston potato facility south of the railroad yard. Today, the traffic has increased to over 8,000 cars loaded and another 8,000 cars empty totaling over 16,000 cars annually. The projections for additional use of the railroad indicate the traffic will increase substantially and will exceed 20,000 cars per year within the next two years.

The Port has attempted to rewrite the Railroad Lease to place the burden of Capital Improvements on TCRY. TCRY adamantly disagrees with the Port doing this. The Capital Improvements issue will be sorted out in the Federal Case in due course.

In the meantime, the maintenance work required for the railroad to keep it in a safe and useable condition has substantially increased over the sixteen years since 2002 in line with the increased use of it.

In accordance with "*subject to reasonable wear and tear*" as applied to the maintenance of the railroad, TCRY has significant latitude provided by the Railroad Lease. However, TCRY has always placed safety as its number one priority and has one of the best safety records of any Class 3 railroad in the country.

TCRY believes that Supplement 1 to the 2015 TCRY Miscellaneous Tariff is "*reasonable in light of the use of the railroad*" and that it does not interfere with keeping the Port's "*compliance with the Port's agreements with the United States*".

The Port's non-objection is requested so that maintenance of the railroad can continue without interruption and so the railroad can continue to be used safely.

Regards,



Lisa Anderson
Executive Vice President

Attachment:
Supplement 1 to the 2015 TCRY Miscellaneous Tariff



MISCELLANEOUS CHARGES

Supplement 1

Dated August 28, 2018 Effective September 18, 2018

GENERAL APPLICATION

- A. TCRY shall mean TRI-CITY RAILROAD COMPANY, LLC
- B. TCRY railroad shall mean approximately sixteen (16) miles of TCRY railroad trackage extending from the RICHLAND CONNECTION in Kennewick, Washington to the Port of Benton's MANUFACTURING MALL in Richland, Washington and generally bordered by Horn Rapids Road on the North, formerly known as the 1100 Area.
- C. All cars are subject to this Supplement 1 and to the MISCELLANEOUS CHARGES Tariff effective July 11, 2015
- D. Contact for TCRY is: TCRY attention Tariff Department, PO Box 6000, Kennewick, WA 99336, telephone 509-371-8313 or 360-239-9067.
- E. TCRY Rules, Tariffs and Accessorial Charges apply when cars are on the TCRY.
- F. The responsible party is the entity subject to this Supplement 1 to the Miscellaneous Charges Tariff.

7. Item 1. Storage Restrictions in TCRY tariff "Miscellaneous Charges" effective July 11, 2015 is **deleted** in its entirety and replaced with:

1. Railcar Storage

Railcar storage is available on TCRY tracks for cars of any ownership when track space is available in the sole judgment of TCRY. Contact TCRY for track availability. Storage of railcars requires a written Agreement between TCRY and the responsible party for payment of storage charges.

8. Item 2. Intra-Plant & Intra-Line Switching in TCRY Miscellaneous Tariff effective July 11, 2015 is **deleted** in its entirety and replaced with:

2. Switch Charge

The switch charge of Six Hundred Dollars (\$600.00) per car per switch will be charged for switching of cars. TCRY reserves the right to switch any car while that car is on approximately sixteen (16) miles of TCRY railroad trackage extending from the RICHLAND CONNECTION in Kennewick, Washington to the Port of Benton's MANUFACTURING MALL in Richland, Washington and generally bordered by Horn Rapids Road on the North, formerly known as the 1100 Area. A Fuel Surcharge is in addition to the Switch Charge and added to the Switch Charge. The Fuel Surcharge is calculated in accordance with the current "United States Department of Energy on Highway Diesel Fuel Price U.S. Average plus surcharge".

9. Item 5. UP Circular 16-E Governing Rules in TCRY Miscellaneous Tariff effective July 11, 2015 is **deleted** in its entirety and replaced with:

5. Railroad Maintenance Charge

A track maintenance charge of Ninety-Five Dollars (\$95.00) per car will be charged by TCRY on all cars that enter the TCRY railroad at RICHLAND CONNECTION in Kennewick, Washington.

This charge will be collected by and accrue solely to the TCRY. This charge will be in addition to all other applicable charges.

10. Payment of Charges

The responsible party must pay TCRY in accordance with the payment terms identified on the TCRY invoice.

Cars on the TCRY system line shall be deemed acceptance of responsibility for payment of all charges accruing on the cars. Such payment shall be in U.S. money and cannot be reduced to offset claims, damages to property, or for any other reasons.

LATE FEES & FINANCE CHARGES: The TCRY will assess a Five (5%) Late Fee plus a finance charge of 1.5% per month (18% per annum) on all unpaid bills that are past due. If TCRY, at its sole discretion, uses a collection agency or attorneys to collect delinquent bills for freight or other charges and TCRY is successful in collecting such charges, the responsible party shall reimburse TCRY for its reasonable collection costs, including reasonable collection agency fees and reasonable attorneys' fees.

END

APPENDIX 20

CLARK HILL Strasburger

John D. Heffner
T (202) 742-8607
F (202) 742-8697
Email: John.Heffner@clarkhillstrasburger.com

Clark Hill Strasburger
1025 Connecticut Avenue, N.W.
Suite 717
Washington, D.C. 20036-4104
T 202 742 8600
F 202 742 8699

clarkhill.com

September 4, 2018

Ms. Lisa Anderson
c/o Tri-City Railroad Company
P.O. Box 6000
Kennewick, WA 99336

Dear Ms. Anderson:

I am writing on behalf of the Port of Benton. David Billetdeaux has asked me to reply to your letter dated August 29, 2018. I interpret your letter as a request for the Port of Benton to review and approve the attached TCRY Supplement 1 to TCR's Miscellaneous Tariff dated July 11, 2015.

Your letter seeks to justify certain switching and maintenance charges and a fuel surcharge because without those fees it can no longer afford to maintain a railroad built to standards common at time of construction in the 1940's. More specifically, you note that traffic levels were fairly modest at the inception of your initial lease in 2002. Since then traffic has increased to over 16,000 cars per year with 20,000 cars per year forecast within two years. Accordingly, these higher traffic levels have increased the cost of your maintenance that TCR is required to bear as per its lease. Moreover, you claim that the Port has attempted to rewrite the lease to place the burden of making capital improvements on TCR.

As you will recall, TCR published a new tariff earlier this Summer intended to collect fees to pay for these obligations. TCR undertook that action without seeking Port approval as the lease specifically requires. To the extent that your need for additional fees needed to cover these costs may have some justification, you have not complied with the Port's request to provide it with maintenance

Ms. Lisa Anderson
September 4, 2018
Page 2

records and invoices for operating expenses that support your request.
Accordingly, your tariff cannot be approved.

Sincerely yours,

CLARK HILL STRASBURGER

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long horizontal flourish extending to the right.

John D. Heffner
Attorney

cc: David Billetdeaux, Esq.



July 16, 2018

Ms. Lisa Anderson
C/o Tri-City Railroad Company
P.O. Box 6000
Kennewick, WA 99336

Re: Proposed Tariff

Dear Ms. Anderson:

I am writing in connection with the maintenance tariff dated June 5, 2018, which would be effective June 25, 2018, according to its terms. The tariff proposes to impose a "maintenance toll fee" on all railroad traffic traversing the Port's rail line. The stated basis for the fee is the lack of transportation revenue because the Union Pacific Railroad has decided to perform local service on the line in lieu of those previously provided by Tri-City Railroad.

The Port held its regularly scheduled Commission meeting yesterday, and the maintenance tariff was discussed. The Commissioners directed me to send follow-up correspondence to you.

As you will recall, the lease granting Tri-City railroad the right to operate over the Port's line specifically provides at section 8 that the tenant is responsible for maintenance of the property at its sole cost and expense. The lease also specifically provides at section 7.1 that "any tariffs imposed upon the use of the railroad by the Tenants shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port..." Simply imposing this tariff without prior Port approval is contrary to the Lease and a material default.

A key piece in determining the reasonableness, fairness, and equitability of this proposed tariff is to determine the necessity of additional funds for current maintenance, future maintenance, and deferred maintenance. In other words, we need to know that the tariff is both necessary and that the amount of the tariff is reasonable, fair, and equitable.

In order to make that determination we need for you to provide your maintenance records and invoices for all maintenance done over the past five years. In the past, TCRY has occasionally provided cursory maintenance records. Such cursory records will not

suffice for this request. In order for the Port to review and approve the proposed tariff, the Port will need to see the following:

- 2012-2017 IRS Tax Returns for TCRY/Tri-City Railroad, LLC/TCOR, et al.
- 2012-2017 General Ledger Detail Reports for all repairs, maintenance supplies, and payroll expenditures relating to maintenance for all entities listed above
- 2012-2017 Maintenance Records and Invoices for services provided and supplies purchased

This documentation is needed to establish the level of maintenance that has occurred on an annual basis. Please feel free to redact any personal information from such provided documentation. Further, any additional financial information you can provide would be helpful in determining TCRY's current need for additional maintenance funds above those funds already received from the Port through the sublease of your building and land as provided for in the 2002 Lease between TCRY and the Port of Benton.

If you have any questions or would like to discuss any of the items asked for above, please contact our regulatory attorney John Heffner at:

Clark Hill Strasburger
1025 Connecticut Avenue, N.W., Suite 717
Washington, D.C. 20036
Phone: 202-742-8607
John.heffner@clarkhillstrasburger.com

Please provide the necessary documents on or before August 17, 2018.

Best regards,



DAVID J. BILLETDEAUX
Port Attorney

Encl. Proposed "Maintenance Toll Fee"

APPENDIX 21

From: Lisa Anderson lisaanderson@tcry.com 
Subject: Fwd: Update - Tariff
Date: January 17, 2020 at 10:07 AM
To: Jose@tcry.com, Hanley Quentin quentin@tcry.com, Robison Jamie jamie@tcry.com

FYI

Lisa Anderson
Executive Vice President
Tri-City Railroad Company, LLC
(360) 239-9067
Lisaanderson11@mac.com

Begin forwarded message:

From: David Billetdeaux <david@portofbenton.com>
Date: January 16, 2020 at 2:37:24 PM PST
To: Rydel Peterson <rydel@tcry.com>, Randolph Peterson <rvpeterson@me.com>, Rhett <rhettwater@mac.com>, Lisa Anderson <lisaanderson@tcry.com>
Subject: Re: Update - Tariff

Rydel,

Attached, please find the Port's response to your tariff request. A hard copy will follow via USPS.

Best regards,

David J. Billetdeaux | Port of Benton, Attorney

3250 Port of Benton Blvd. | Richland, WA 99354
509. 375. 3060 | Office
509. 375. 5287 | Fax
509. 578. 6189 | Mobile
Email: david@portofbenton.com

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-----Original Message-----

From: Rydel Peterson <rydel@tcry.com>
Sent: Thursday, January 16, 2020 7:16 AM
To: David Billetdeaux <david@portofbenton.com>
Cc: Lisa Anderson <lisaanderson@tcry.com>; rvpeterson <rvpeterson@me.com>; Rhett <rhettwater@mac.com>
Subject: Update - Tariff

David,

It has been two weeks since I first emailed you regarding the tariff approval.

We continue to perform our duties under the lease.

In order to continue to perform our duties under the lease we need revenue.

A source of revenue outlined by the lease is the establishment of tariffs.

Those tariffs are subject to review and approval by the Port to “insure” their compliance with the Port’s agreements with the United States.

TCRY has been operating and maintaining the railroad since December of 2017 with little to no railroad revenue. This cannot continue indefinitely.

The BNSF and the UP continue to bring in records amount of traffic, that continue to degrade and deteriorate the line.

The Port’s anticipated 2019 FRAP capital project will help stave off some of the wear and tear caused by the Class 1’s, but without railroad revenue for maintenance, it is near impossible for TCRY to continue to keep up with its maintenance obligations.

Please provide notice that the Port has approved the tariff first submitted to the Port on August 29, 2018 and most recently on September 23, 2019.

Thank you,

Rydel Peterson

Member - Owner TCRY

Sent from my iPhone



01-16-2020 Ltr
to TCR...nts.pdf



January 16, 2020

Tri-City Railroad Company, L.L.C.
P.O Box 6000
Kennewick, WA 99336

*Also sent via email: rydel@tcry.com;
LisaAnderson@tcry.com*

Re: TCRY Proposed Tariff

Dear Ms. Anderson,

By your letter to me dated September 23, 2019, TCRY requested that the Port of Benton approve TCRY's request for approval of a proposed tariff titled "Miscellaneous Charges, Supplement 1" dated August 28, 2018 (the "Proposed Tariff"). I attach a copy of your letter and the Proposed Tariff. The Proposed Tariff includes a proposed "Railroad Maintenance Charge" of "ninety-five dollars (\$95.00) per car on all cars [to be] charged by TCRY on all cars that enter the TCRY railroad at RICHLAND CONNECTION in Kennewick, Washington." I now write on behalf of the Port to respond to that request.

As you know, TCRY operates a railroad on trackage leased to it by the Port through the Railroad Lease between the Port and TCRY, entered into as of August 1, 2002 (the "Lease"). The Lease generally identifies the trackage leased to TCRY by the Port as "the Port of Benton Railroad Southern Connection..." See Para. 1. The so-called Southern Connection trackage is also known as the Richland Trackage. As you know, the trackage was obtained by the Port from the U.S. Department of Energy ("DOE") pursuant to the Indenture entered into between the Port and DOE effective October 1, 1998 (the "Indenture").

Your letter quotes from Paragraph 7.1 of the Lease, which provides, "Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to review and approval of the Port, to insure compliance with the Port's agreements with the United States." I also call your attention to Paragraph 1.2 of the Lease, whereby TCRY agreed to take the Southern Connection "subject to the restrictions contained in the Indenture...." Thus, TCRY authorized the Port to review the Proposed Tariff to determine its reasonableness and its compliance with the Indenture.

The Port has undertaken a review of the Proposed Tariff to determine its reasonableness and compliance with the Indenture, and the Port's Commissioners have directed me to advise TCRY as follows:

1. The Proposed Tariff is hereby APPROVED.
2. Notwithstanding the foregoing, the Port calls TCRY's attention to the Order issued on

July 1, 2011 by the United States District Court for the Eastern District of Washington, the Honorable Edward F. Shea presiding, in *BNSF Railway Company v. Tri-City & Olympia Railroad Company LLC*, (CV-09-5062-EFS), a copy of which is attached hereto (the "Court Order"). The Court Order provides at page 21:

As stated above, BNSF and UP have a right to operate directly on the Richland Trackage. Only the Port had the right to terminate BNSF and UP's right to use the Richland Trackage, a right which it retained and did not grant to TCRY under Railroad Lease Paragraph 7.4. Indeed, it could not do so: the Port accepted the United States' obligations under the 1947 and 1961 agreements **to provide continued use without charge to BNSF and UP under the Indenture.**

(Bold and underlining added.) Under Paragraph 7.4 of the Lease, TCRY agreed that it would "not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port's prior written consent." The Court Order goes on to hold that BNSF and UP have the right **"to run directly on the Richland Trackage without paying a fee," and that TCRY's right to quiet enjoyment of the Richland Trackage was "subject to the limitations imposed by the preexisting rights of BNSF and UP...."** (Bold and underlining added.)

In light of the Court Order, the Port cautions TCRY that, while the Port approves the Proposed Tariff as reasonable, the Port believes TCRY would be in breach of the Lease and in violation of the Court Order were it to seek to impose the tariff on BNSF or UP.

3. The Port understands the Proposed Tariff to be akin to a usage fee. According to the Port's consultation with a rail industry expert, a usage fee is not meant to generate profit, but is a mechanism for reimbursement. Per the expert, usage fees on a line the size of the Southern Connection are typically determined by taking the actual maintenance costs, divided by the total number of cars handled on the track. Mr. Kavadias' report, while helpful in some regards, does not provide actual maintenance costs. He also does not explain his methodology and, in many instances, his conclusions do not make sense within the context of the documents the Port has received in the lawsuit pending in the United States District Court for the Eastern District of Washington styled *United States of America, ex rel., Randolph Peterson and Tri-City Railroad Company, LLC v. Port of Benton County, et al.*, (2:17-CV-0191-TOR) (referred to below as the "Lawsuit"). For example, for 2013, Mr. Kavadias attributes 34 % of general and administrative payroll and 54 % of wages, employee benefits, and employee taxes to maintaining the railroad. This is purportedly based on "the accounting information and timecard analysis." We looked at a (one month) representative sample of the timecards from 2013 and found that TCRY employees worked 941 hours, only 62.5 (or 6%) of which were for work related to maintaining the track. Likewise, for 2017, Mr. Kavadias attributes 100% of TCRY's signal maintenance expenditures, which he says are \$103,153.01. But as you know, that same year, TCRY received a WSDOT grant for signal upgrades and a large portion of the 2017 signal expenditures were for that WSDOT-funded project.

Notwithstanding these discrepancies, the Port took the average costs Mr. Kavadias attributed to maintenance between 2010 and 2018 and divided those costs by 8,000 – the number of loaded cars Ms. Anderson identified in her August 29, 2018 letter. Using these numbers, the Port calculated a reasonable usage fee in the \$60-per-loaded-car range. However, the Port also took into account the car

count figures identified in other documents produced in the Lawsuit, which counts were lower than the traffic volumes Ms. Anderson quoted. In considering these additional documents, the Port concluded that the Proposed Tariff in the amount of \$95 per loaded car is not patently unreasonable.

Please note that the Port's research suggests that the Proposed Tariff would fall under the purview of the Surface Transportation Board ("STB"). Because the Port has not received any complaints about the Proposed Tariff, it has not attempted to analyze it within the context of the STB's rules as regulations (as discussed in Paragraph 7.2 and its subparts of the Lease). Were the Port required to conduct that analysis, it would need more information about TCRY's actual maintenance costs to be able to resolve the discrepancies in Mr. Kavadias' report.

4. Attached to your letter of September 23, 2019 was a separate attachment titled "Maintenance Toll Fee" that states, "The Maintenance Toll Fee is assessed by TCRY to the City of Richland, the owner of the Horn Rapids Industrial Park." I attach a copy of that document. The actual language of the Proposed Tariff does not appear to support such an intention. Even if it did, to the Port's knowledge, the City of Richland does not operate a railroad and, thus, does not ship cars that would be subject to the Proposed Tariff. Further, the Court has held in the Eastern District lawsuit, in an Order issued October 10, 2019, in which the Court dismissed certain claims brought by TCRY against the City of Richland, that TCRY's rights under the Lease are subject to the City of Richland's rights under a 1997 easement from the DOE and a 1999 easement. I attach a copy of that document as well. Finally, the Port is unaware of a similar fee being imposed on a municipality. For all of the foregoing reasons, the Port does not believe that the Proposed Tariff, fairly construed, could properly be imposed on the City of Richland.

Finally, please be advised that the Port intends to provide copies of this letter to counsel for BNSF, UP, and the City of Richland, in the interests of transparency.

Best regards,



DAVID J. BILLETDEAUX
Port Counsel

Enclosures: 1. September 23, 2019 Ltr w/two attachments, incl. Proposed Tariff & Maintenance Toll Fee
 2. ECF 264 – Order Entering Court's Rulings from February 23, 2011 Hearing
 3. ECF 198 - Order Granting Defendants The City of Richland and Peter Rogalsky's Motion for Partial Summary Judgment - Entered on October 10, 2019

ENCLOSURE 1

APPENDIX 22

From: Rydel Peterson Rydel@tcry.com
Subject: Fwd: Payment question
Date: October 7, 2020 at 2:23 PM
To: Lisa Anderson lisaanderson@tcry.com

RP

Sent from my iPhone

Begin forwarded message:

From: David Billetdeaux <david@portofbenton.com>
Date: March 25, 2020 at 11:21:14 AM MDT
To: Rydel Peterson <rydel@tcry.com>
Subject: RE: Payment question

Rydel,

It is apparent that TCRY is seeking to create new litigation and the Port declines to assist you in this unfortunate endeavor. Moreover, I am not TCRY's attorney. TCRY is well-represented by counsel and should look to its own attorneys to assist it in analyzing the tariff, if it is unable to understand the tariff.

However, I would like to clarify one point regarding the Port's tariff approval. In the letter approving the tariff, the Port said: *"In light of [Judge Shea's] Court Order, the Port cautions TCRY that, while the Port approves the Proposed Tariff as reasonable, the Port believes TCRY would be in breach of the Lease and in violation of the Court Order were it to seek to impose the tariff on BNSF or UP."* The Port did not "forbid" TCRY to negotiate directly with BNSF or UP. In fact, from the many letters TCRY produced in the recent lawsuit, the Port understands TCRY has and continues to negotiate a maintenance fee with BNSF and UP. Regardless, TCRY should consult with its attorneys as to the terms of the Lease and the requirements of Judge Shea's Order if it disagrees with the Port's interpretation.

Best regards,

David J. Billetdeaux | Port of Benton, Attorney

3250 Port of Benton Blvd. | Richland, WA 99354

509. 375. 3060 | Office

509. 375. 5287 | Fax

509. 578. 6189 | Mobile

Email: david@portofbenton.com

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From: Rydel Peterson <rydel@tcry.com>
Sent: Tuesday, March 24, 2020 7:02 AM
To: David Billetdeaux <david@portofbenton.com>
Subject: Re: Payment question

David,

If the Port is refusing to pay and has forbidden TCRY to invoice BNSF and UP directly, then who does the Port believe is responsible to pay the tariff?

Rydel

Sent from my iPhone

On Mar 23, 2020, at 1:26 PM, David Billetdeaux
<david@portofbenton.com> wrote:

Rydel,

Based on your previous explanation, the Port does not see any basis, contractual or otherwise, that obligates the Port to pay this invoice. Therefore, there is no need to send anyone to the Port to pick up a check, nor should you be on the lookout for one in the mail.

Best regards,

David J. Billetdeaux | Port of Benton, Attorney
3250 Port of Benton Blvd. | Richland, WA 99354
509. 375. 3060 | Office
509. 375. 5287 | Fax
509. 578. 6189 | Mobile
Email: david@portofbenton.com

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-----Original Message-----

From: Rydel Peterson <rydel@tcry.com>

Sent: Monday, March 23, 2020 8:34 AM

To: David Billetdeaux <david@portofbenton.com>

Subject: Payment question

David,

Has the Port had a chance to put a check in the mail to cover TCRY invoice number 11427 ?

If not, would it be ok if we had someone pick it up today from the Port office ?

Thank you,

Rydel

APPENDIX 23

From: Dennis Kylo dkylo@commoditiesplus.com
Subject: RE: Invoice 11458 from Tri-City Railroad Company, LLC

Date: July 7, 2020 at 10:50 AM

To: Lisa Anderson lisaanderson@tcry.com, CW CP cwcpscale@gmail.com, chad@cwcorn.com, charles@cwcorn.com, Monica Bernhardt monica@paulsoncommodities.com

DK

Lisa:

As you are aware, CWCP has no contracts, agreements or working relationships of any kind with the TCRY. CWCP is not responsible for any cars prior to them being spotted on our tracks by either the BNSF or the UPRR, nor are we responsible for any cars once they leave our tracks. We therefore reject this invoice and all such claims by the TCRY!

Have a great day!

Dennis Kylo
Pres. CWCP

From: Lisa Anderson <lisaanderson@tcry.com>

Sent: Friday, July 3, 2020 3:43 PM

To: Dennis Kylo <dkylo@commoditiesplus.com>; CW CP <cwcpscale@gmail.com>; chad@cwcorn.com; charles@cwcorn.com; Monica Bernhardt <monica@paulsoncommodities.com>

Subject: Invoice 11458 from Tri-City Railroad Company, LLC

To Whom it May Concern:

Your company has been identified as a local rail user of the TCRY trackage.

As such, your company has been determined to be the responsible party per the Tri-City Railroad Company Miscellaneous Charges Tariff Supplement 1 Item 5 Railroad Maintenance Charge. A link to the posted Port of Benton approved tariff is provided for your reference as follows:

https://7ce984e5-d1b9-4174-a13a-b4f0a7e40a17.filesusr.com/ugd/a6d54b_b43a2eb19e5a45e3afd2c119eac335c1.pdf

The subject Tariff has been posted on our website at www.tcry.com since 20 days prior to its effective date of September 18, 2018.

If you are in need of additional information in order to facilitate payment processing please give us a call at (509) 371-8313.

If you have a complaint regarding this tariff please notify the Port of Benton. They can be reached at (509) 375-3060.

Please remit payment per the terms of the invoice. If you need to make payment arrangements, please call (509) 371-8313 in order to do so.

We look forward to being able to continue to provide you with a safe and serviceable railroad for you to continue to utilize so that your business may continue to grow and

prosper.

Thank you.



Lisa Anderson, Corporate Secretary
Executive Vice President

PO Box 6000, Kennewick, WA 99336
Cell 360.239.9067 | Fax 509.582.4964
TCRY.com

Total Control Panel

[Login](#)

To: dkyllo@commoditiesplus.com
From: lisaanderson@tcry.com

Message Score: 50
My Spam Blocking Level: High

High (60): **Pass**
Medium (75): **Pass**
Low (90): **Pass**

[Block](#) this sender

[Block](#) tcry.com

This message was delivered because the content filter score did not exceed your filter level.

Total Control Panel

[Login](#)

To: dkyllo@commoditiesplus.com
From: lisaanderson@tcry.com

Message Score: 50
My Spam Blocking Level: High

High (60): **Pass**
Medium (75): **Pass**
Low (90): **Pass**

[Block](#) this sender

[Block](#) tcry.com

This message was delivered because the content filter score did not exceed your filter level.

APPENDIX 24

From: Bill Friend Bill.Friend@henningsen.com
Subject: RE: [EXTERNAL] Invoice 11467 from Tri-City Railroad Company, LLC
Date: August 6, 2020 at 5:20 PM
To: Lisa Anderson lisaanderson@tcry.com

BF

Lisa,

After speaking with our corporate office, I have been instructed to tell you that we do not have a contract with TCRY and will not be paying this invoice. I also spoke with Diana Howard at the port of Benton and they did not approve this invoice.

Sincerely,

Bill Friend | Henningsen Cold Storage Co.
General Manager, Richland WA Operations

2025 Saint Street, Richland, Washington 99354

Direct: 509-578-2002 | Cell: 509-551-1744

bill.friend@henningsen.com

Relax, it's handled! www.henningsen.com

From: Lisa Anderson <lisaanderson@tcry.com>
Sent: Thursday, July 23, 2020 2:10 PM
To: Bill Friend <bill.friend@henningsen.com>; Todd Larson <todd.larson@henningsen.com>; richland.office <richland.office@henningsen.com>
Subject: [EXTERNAL] Invoice 11467 from Tri-City Railroad Company, LLC

Mimecast Attachment Protection has deemed this file to be safe, but always exercise caution when opening files.

Good afternoon,

Please see attached.

Hard copy to follow.

Thank you.

Lisa Anderson
Executive Vice President
Corporate Secretary
Tri-City Railroad Company, LLC
(360) 239-9067

To view attachment

Open the attached PDF file. You must have [Acrobat® Reader®](#) installed to view the attachment.

APPENDIX 25

From: Rydel Peterson rydel@tcry.com
Subject: Fwd: Supplement 5.pdf
Date: October 7, 2020 at 2:35 PM
To: Lisa Anderson lisaanderson@tcry.com

RP

Sent from my iPhone

Begin forwarded message:

From: David Billetdeaux <david@portofbenton.com>
Date: June 26, 2020 at 6:56:38 AM MDT
To: Rydel Peterson <rydel@tcry.com>
Subject: Re: Supplement 5.pdf

Rydel,

Thank you for your responses to the Port's inquiries.

The Port has not yet approved or denied this tariff but continues to do its due diligence and will have a more thorough response to you early next week.

Best regards,

David J. Billetdeaux | Port of Benton, Attorney

3250 Port of Benton Blvd. | Richland, WA 99354

509. 375. 3060 | Office

509. 375. 5287 | Fax

509. 578. 6189 | Mobile

Email: david@portofbenton.com

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From: Rydel Peterson <rydel@tcry.com>
Date: Tuesday, June 16, 2020 at 5:01 PM
To: David Billetdeaux <david@portofbenton.com>
Subject: Re: Supplement 5.pdf

David,

In response to your questions:

1. TCRY currently has a Port approved maintenance charge of \$95 per car on all cars that traverse the TCRY trackage.

The User Fee proposes to eliminate that charge and roll the \$95 maintenance charge that is applicable to all cars into the User Fee that is only applicable to loaded cars.

That leaves \$30 per loaded car to help fund the operations and management of the railroad, which seems to TCRY to be a reasonable figure.

2. The Port identifies examples of entities that would be subject to the User Fee.

They are identified in the Port of Benton Rail Plan section 2.8 and the Port of Benton and City of Richland Rail Master Plan section 2.6.

The User Fee is applicable to Local Rail Users.

The tariff defines a Local Rail User as “any entity, person, or business that ships and/or receives railcar loads that traverse TCRY trackage.”

All Local Rail Users would be subject to the tariff.

3. TCRY has a contractual right to impose tariffs.

The Port has a contractual right to ensure that those tariffs are in compliance with the Port’s agreements with the United States.

TCRY knows of no legal authority that would prevent it from instituting and collecting on the proposed User Fee.

Please share any legal authority that the Port believes would prevent TCRY from instituting and collecting on the User Fee from Local Rail Users.

Again, the User Fee would be applicable to all Local Rail Users.

TCRY keeps track of all cars and carloads that traverse TCRY trackage making it relatively easy to determine who the Local Rail User is that is either shipping out a loaded car or receiving a loaded car.

Thank you,

Rydel

Sent from my iPhone

On Jun 15, 2020, at 4:52 PM, David Billetdeaux <david@portofbenton.com> wrote:

Rydel:

As requested, the Port is working with its attorneys and industry experts to review TCRY's proposed tariff. To complete that analysis, the Port requests TCRY provide the following information:

1. Please provide the rationale behind the \$125 per-car fee as well as any industry standard, legal analysis, or other documentation supporting the proposed amount.
2. Please identify the entities subject to the proposed tariff. Although it is not entirely clear, it appears the proposed tariff is to be assessed directly upon the shippers located on the Southern Connection, and not the railroads who operate on the line. However, please confirm. Please also confirm which shippers would be subject to the proposed tariff.
3. If the proposed tariff is meant to be assessed on the shippers, please provide the Port with the legal authority, precedent, and/or industry analysis that would authorize the assessment of charges upon non-TCRY customers. Similarly, please explain how TCRY will accurately determine who to charge and how much to charge if the subject cars are handled by BNSF and/or UP.

I look forward to receiving the above information, which will enable the Port to conduct its analysis of the proposed tariff.

David J. Billetdeaux | Port of Benton, Attorney

3250 Port of Benton Blvd. | Richland, WA 99354

509. 375. 3060 | Office

509. 375. 5287 | Fax

509. 578. 6189 | Mobile

Email: david@portofbenton.com

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Disclaimer: Public documents and records are available to the public as provided under the Washington State Public Records Act (RCW 42.56). This e-mail may be considered subject to the Public Records Act and may be disclosed to a third-party requestor.

From: Rydel Peterson <rydel@tcry.com>
Sent: Monday, June 8, 2020 4:58 PM
To: David Billetdeaux <david@portofbenton.com>
Subject: Supplement 5.pdf

David,

Please find attached Supplement 5 to TCRY's Miscellaneous Charges
Tariff.

The Port's prompt review and approval is appreciated.

Thank you,

Rydel

Sent from my iPhone

APPENDIX 26



MISCELLANEOUS CHARGES

Supplement 5

Dated June 8, 2020 Effective June 28, 2020

GENERAL APPLICATION

- A. TCRY shall mean TRI-CITY RAILROAD COMPANY, LLC
- B. TCRY trackage shall mean approximately sixteen (16) miles of trackage extending from the RICHLAND CONNECTION in Kennewick, Washington to the Port of Benton's MANUFACTURING MALL in Richland, Washington and generally bordered by Horn Rapids Road on the North, formerly known as the 1100 Area.
- C. All railcars are subject to Supplement 5 and the MISCELLANEOUS CHARGES Tariff effective July 11, 2015
- D. Contact for TCRY is: TCRY attention Tariff Department, PO Box 6000, Kennewick, WA 99336, telephone 509-371-8313 or 360-239-9067.
- E. TCRY Rules, Tariffs and Accessorial Charges apply when railcars are on TCRY trackage.
- F. The responsible party is the entity, person, or business subject to Supplement 5 of the Miscellaneous Charges Tariff.

Miscellaneous Charges Supplement 1 number 9 item 5. **Railroad Maintenance Charge** is deleted in its entirety and replaced with:

5. Track Use Fee

A Track Use Fee of One-Hundred-Twenty-Five Dollars (\$125) will be applied to each and every loaded railcar that is destined to or departing from a Local Rail User.

The Track Use Fee is collected by and accrues solely to TCRY.

The applicable Local Rail User is subject to the Track Use Fee.

A Local Rail User is any entity, person, or business that ships and/or receives railcar loads that traverse TCRY trackage.

A Local Rail User is defined by example in the Port of Benton Rail Plan section 2.8 and the Port of Benton and City of Richland Rail Master Plan section 2.6 (copies of the plans are provided on TCRY's website).

The Track Use Fee is applied in accordance with the 1998 Indenture between the Port of Benton and the Department of Energy section XVIII (a copy of the Indenture is provided on TCRY's website).

The Track Use Fee has been reviewed and approved by the Port of Benton to ensure its compliance with the Port of Benton's agreements with the United States.

The Track Use Fee is used to support TCRY's ongoing efforts in the management, operation, and maintenance of the railroad.

END

APPENDIX 27

DELHUR INDUSTRIES, INC.

GENERAL CONTRACTORS
DELHUI15804

4333 Tumwater Access Road
P.O. Box 1116
Port Angeles, WA 98362
360.457.1133
FAX 360.457.8773

30607 Oldfield Street
P.O. Box 883
Hermiston, OR 97838
541.567.8693
FAX 541.567.0369

August 17, 2020

Lisa Anderson, Corporate Secretary
Executive V.P.
PO Box 6000
Kennewick, Wa. 99336

RE: Tri-City Rail Company, LLC Invoice #11490 Dated 8/12/2020

Ms. Anderson,

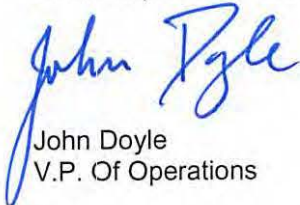
We are in receipt of the referenced invoice received via email on August 12, 2020.

We do not do business with or have any form of an agreement with TCRY. We do know that the Port Of Benton owns the rail line that leads to our siding and that the railroad provider we do business with BNSF Railway Inc. can provide us rail service direct to our siding. The published rates that BNSF charges/invoices us for the service to our siding is all inclusive.

We would think that if the Port Of Benton has approved these charges that TCRY is invoicing that we would have received a formal written direction concurring with Miscellaneous Track Maintenance charges.

We know that TCRY has a lease agreement with the Port to use the rail line but DelHur is not a TCRY customer so you need to void this invoice.

I have copied the Port Of Benton on this matter so they are aware of this matter.



John Doyle
V.P. Of Operations



Tri-City Railroad Company, LLC
P.O. Box 6000
Kennewick, WA 99336

Invoice

Date	Invoice #
8/12/2020	11490

Bill To
DelHur P. O. Box 5270 Richland, WA 99354

Terms
Due upon receipt

Quantity	Description	Rate	Amount
1	Track Maintenance charges assessed on cars that entered the TCRY at Richland Connection in Kennewick, WA for the period of July 23, 2020 to July 31, 2020	95.00	95.00
	Charges assessed per Miscellaneous Charges Tariff Supplement 1 Effective September 18, 2018 and Approved by Port of Benton January 16, 2020.		

Amounts not paid within terms are subject to a 5% late fee and 1.5% interest per month .

Payments/Credits	\$0.00
-------------------------	--------

Invoice Balance	\$95.00
------------------------	---------

E-mail
lisaanderson@tcry.com



John Doyle <jdoyle@delhur.com>

Invoice 11490 from Tri-City Railroad Company, LLC

1 message

Lisa Anderson <lisaanderson@tcry.com>
To: "JDoyle@delhur.com" <JDoyle@delhur.com>

Wed, Aug 12, 2020 at 11:02 AM

Good morning,

Please see attached invoice.

Hard copy to follow.

Thank you.



Lisa Anderson, Corporate Secretary
Executive Vice President
PO Box 6000, Kennewick, WA 99336
Cell 360.239.9067 | Fax 509.582.4964
TCRY.com

To view attachment

Open the attached PDF file. You must have Acrobat® Reader® installed to view the attachment.

Inv_11490_from_TriCity_Railroad_Company_LLC_86876.pdf
2308K

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APPENDIX 28

From: Rydel Peterson rydel@tcry.com
Subject: Fwd: Miscellaneous Charges Tariff Proposed Supplement
Date: October 7, 2020 at 2:40 PM
To: Lisa Anderson lisaanderson@tcry.com

RP

Sent from my iPhone

Begin forwarded message:

From: Rydel Peterson <rydel@tcry.com>
Date: June 24, 2020 at 10:09:53 AM MDT
To: David Billetdeaux <david@portofbenton.com>
Subject: Re: Miscellaneous Charges Tariff Proposed Supplement

David,

Section 7.1 states "The Tenant's use, operations, and maintenance of the tracks shall comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property. In addition, the Tenant shall comply with all laws, rules and regulations applicable to the Tenant's use, operation and maintenance of the property. Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States."

I read that section at it's plain language to mean what it says, that TCRY tariffs "shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States."

Reasonableness is determined by TCRY, not the Port. If a user of the railroad believes the tariff to be unreasonable then they have recourse under section 7.2 of the lease or they can go directly to the STB with their complaint.

The Port approved TCRY's Supplement 1 to its Miscellaneous Charges tariff. The pertinent language of the tariff states "A track charge of Ninety-Five Dollars (\$95) per car will be charged by TCRY on all cars that enter the TCRY at RICHLAND CONNECTION in Kennewick, Washington."

I'm not sure how you or the Port's consultant could not understand what the word "all" meant. As you know and I hope your consultant knows, the Port allows the BNSF and the UP to bring any and all cars across the TCRY, regardless if they are destined for a shipper or receiver located off of the TCRY line. You also know and I hope your consultants do as well that the TCRY trackage is essentially a dead end track, meaning that all cars that come in, either loaded or empty eventually come out, either loaded or empty, and some, as I mentioned, are not even destined for Richland.

The language of Supplement 1 was intentional and was intended to include all cars as it states.

TCRY is not withdrawing Supplement 1 as you seem to suggest, it is proposing to replace it with Supplement 5. Until the Port approves Supplement 5, Supplement 1 is in full force and effect and continues to accrue against the Port.

Given that the Port approved Supplement 1 and given that Supplement 1 included a maintenance charge of \$95 per railcar on all cars that enter TCRY trackage, TCRY utilized the \$95 per car on all cars and rolled it into the \$125 per car on all loaded cars. The difference in \$95 per car on all cars for maintenance and \$95 per car on all loaded cars for maintenance is actually less net revenue to TCRY for maintenance, but with the addition of the \$30 per loaded car to help cover the costs of the operation and management of the railroad, it should even out.

I specifically told you the entities that would be subject to Supplement 5, which, again, would be all Local Rail Users as defined by the tariff to mean "any entity, person, or business that ships and/or receives railcar loads that traverse TCRY trackage."

TCRY included, by way of example, reference to the Port of Benton Rail Plan and the Port of Benton and the City of Richland Rail Master Plan to help elucidate the definition of Local Rail User.

The BNSF and the UP do not ship or receive railcar loads that traverse TCRY trackage, unless you know something I don't. Please share if you do.

TCRY is working within the framework provided by the railroad lease and subsequently the Indenture. The railroad lease gives TCRY the right to establish tariffs and the Port the right to ensure their compliance with the Indenture. A major tenet of the Indenture was for the Port or its agent, in this case TCRY, to be able to charge money for the use of the railroad in order to develop revenue, to offset the costs of the operation and maintenance of the railroad.

TCRY's position remains the same as I've previously stated, it has a contractual right to set tariffs and it knows of no legal authority that would prevent it from establishing and collecting on Supplement 5. If the Port is able to locate that legal authority showing that Supplement 5 is somehow illegal or without basis, please share.

As to your hypothetical, if Preferred Freezer met the definition of a Local Rail User then it would be assessed a fee of \$125 per loaded railcar that it either shipped or received. Assuming that Preferred Freezer received the 10 loaded railcars from Iowa then it would be charged \$1,250 for those loaded railcars received. Assuming Preferred Freezer shipped the 15 loaded cars to Montana then it would be charged \$1,875 for those 15 car loads shipped.

I have attached approved Supplement 1, Supplement 5, and our previous correspondence regarding Supplement 5 to this email. As I have mentioned before, it certainly makes it much easier to follow a thread of communications on one subject if that thread is continued, versus starting a new one.

TCRY submitted to the Port Supplement 5 on June 8. The Port's first substantive response was on June 15, which TCRY responded to the following day. The Port followed up with a series of questions on June 23, most of which were previously answered on June 16. How long does the Port envision this process taking? What are the established Port policies and/or procedures that it follows in evaluating a TCRY tariff? As a public agency, I am sure the procedures/policy are approved by the Port Commission and are readily available to the public, let alone the Port's tenant who are subject to them.

To that end, TCRY requests that the Port provide TCRY with the Port's approved procedures/policy when evaluating TCRY's tariffs.

Thank you,

Rydel

On Tue, Jun 23, 2020 at 12:47 PM David Billetdeaux <david@portofbenton.com> wrote:

Rydel:

As you know, under section 7.1 of TCRY's lease, the Port must determine whether TCRY's Proposed Tariff is reasonable. To conduct that due diligence, the Port requires additional information, which I requested, but you have not provided. The Port will continue to do whatever research it can, but as explained below, the information I requested is central to the analysis that we have been advised is necessary to determine the reasonableness of the Proposed Tariff.

First, in your recent email, you explained that the current \$95 tariff is on all cars and that the Proposed Tariff is only on loaded cars. According to the Port's consultation with a rail industry expert, the industry standard is that user fees, like the \$95 tariff, are only assessed on loaded cars and our prior analysis and approval was based on that understanding. In other words, we approved that tariff believing it was to be assessed on loaded cars. Regardless, we have not received complaints and now that TCRY is withdrawing the tariff, this issue is moot. However, the Port's prior underlying analysis is relevant to TCRY's Proposed Tariff. Both the \$95 tariff and the Proposed Tariff are akin to user fees. And as I explained in my January 16, 2020 letter to TCRY, in evaluating the reasonableness of the \$95 per (loaded) car user fee, the Port looked at TCRY's maintenance costs (averaged over eight years) and divided those costs by car count information available to the Port. When the Port did that calculation, the result was \$63 per car. However, the Port noted discrepancies in the information provided and, based on the totality of the information, determined the \$95 was not unreasonable.

The Proposed Tariff is a more than 30% increase, which is why the Port sought an explanation for the increase. From your response, it appears that TCRY did not base the \$125 Proposed Tariff on any underlying data or calculation. Please correct me if that is not the case. Please also provide whatever data or calculations TCRY did rely upon in coming up with the dollar amount for the Proposed Tariff.

Second, I asked you to identify the entities subject to the proposed tariff. Rather than just tell me, you referred to the Port of Benton Rail Plan section 2.8 and the Port of Benton and City of Richland Rail Master Plan section 2.6. Those documents were not created within the context of tariffs, they do not define "local rail user," and not all the entities listed in those documents fall within the definition contained in the Proposed Tariff. For example, the cited sections of both documents identify the Port as a rail user located off the City's Horn Rapids Spur (because it owns a transload facility). But the Port does not ship or receive railcar loads that traverse the Southern Connection. Similarly, the cited sections in those documents generally discuss the shippers located off the Southern Connection and the Horn Rapids Spur, but do not discuss BNSF or UP. Yet, both Class I railroads appear to meet the Proposed Tariff's definition of local rail user. In short, your explanation did not answer my question. Please provide the names of the entities that TCRY believes would be subject to the Proposed Tariff.

Third, I asked for the legal authority, precedent, and/or industry standard that would authorize TCRY to assess charges upon non-TCRY customers. You did not provide a response. A similar issue came up in 2009 when the Port was conducting due diligence of a facility user fee tariff TCRY proposed (but withdrew before the Port completed its analysis). At that time, the Port's industry expert noted that TCRY could not collect fees from shippers because it was not performing any work for the shippers. Likewise, the CFRs that govern railroad tariffs contemplate privity between the entity charging a fee and the entity against which charges will be assessed. See 49 C.F.R. 1300 *et seq.* Thus, I am unaware of any framework under which TCRY could legally assess fees upon entities that are not TCRY customers – which is why I asked you to provide that framework or analysis.

Finally, how would the Proposed Tariff be assessed? To provide a hypothetical, let's say BNSF brought 10 loaded cars from an entity in Iowa to Preferred Freezer and then turned around brought 15 loaded cars from Preferred Freezer, bound for an entity Montana. Which entity or entities would be charged?

As I mentioned at the outset, the Port continues its due diligence, but needs the above information to complete its analysis. In the meantime, the Port will seek comment from the entities it understands would be affected by the Proposed Tariff.

Best regards,

David J. Billetdeaux | **Port of Benton, Attorney**

3250 Port of Benton Blvd. | Richland, WA 99354

509. 375. 3060 | Office

509. 375. 5287 | Fax

509. 578. 6189 | Mobile

Email: david@portofbenton.com

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| <Supplement 1 .pdf>
| <Supplement 5.pdf>

APPENDIX 29

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

Port of Benton Southern Connection Options List

General Options

- Do nothing. Continue with current arrangement – TCRY remains as Southern Connection operator pursuant to the 2002 Lease Agreement terms; BNSF continues operations under its federally-authorized rights dating back to 1947-48; and UP retains identical federally-authorized rights (currently unexercised due to UP's reliance upon TCRY service) to operate as BNSF does.
- Sell the Southern Connection in compliance with any applicable state law bidding requirements. The Port would end its status as a railroad common carrier subject to STB oversight, and it would relinquish control over the Southern Connection. In the absence of any additional action, the Southern Connection purchaser would assume the Port's obligations under the 2002 Lease with TCRY.
- 1947-48 Agreement remains in place, but the Port of Benton, as Southern Connection owner, independently assesses against each customer using the Southern Connection a per-carload "transit fee" applicable to all carloads moving over the Southern Connection via direct BNSF or UP service.
- The Port takes no immediate steps to negotiate the terms of TCRY's exit or continued operations over the Southern Connection. UP resumed direct service over the Southern Connection pursuant to the 1947-48 Agreement.
- Maintain operational and/or contractual *status quo* but negotiate a track maintenance and capital contribution arrangement with the City of Richland, Washington.
- The Port remains the owner of the Southern Connection but cedes day-to-day management of Southern Connection operations to a contractor, with decision making authority regarding the agreements to govern Southern Connection railroad operations.

Options Specific to the Port's Relationship with TCRY

- Negotiate voluntary termination of TCRY operations pursuant to a buyout or similar settlement arrangement.
 - TCRY should agree as part of the settlement to cooperate in an appropriate STB proceeding terminating its Southern Connection operations, allowing its STB-licensed common carrier rights and obligations to transfer to another operator.

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

- Terminate 2002 Lease Agreement without TCRY's consent, and pursue corresponding involuntary termination of TCRY's operating rights/obligations via adverse discontinuance at the STB.
- Identify a TCRY default under the terms of the 2002 Lease and, in accordance with the Lease terms, effect termination of TCRY's leasehold interest.

Options Specific to the Port's Relationship with BNSF and UP

The options discussed below focus on the prospective future relationship among the Port, BNSF and UP. Most of the options presuppose that TCRY has been, or will be, dealt with by – (a) negotiation of TCRY's voluntary exit; (b) successful conclusion of TCRY's involuntary "eviction" (if possible); or (c) a new accord under which the Port and its Class I partners are content to work and cooperate with TCRY as the Port's designated short line operator for the foreseeable future.

- Preserve BNSF and UP operating rights under 1947-48 Agreement (no changes), with BNSF and UP each assuming direct responsibility for Southern Connection service going forward.
- Preserve BNSF and UP operating rights under 1947-48 Agreement (no changes), but negotiate a separate accord under which BNSF and UP jointly would make use of a new short line on the Southern Connection in place of their own service or TCRY service.
- Give BNSF and UP notice of termination of their Southern Connection access rights under 1947-48 Agreement; propose new terms to govern BNSF' and UP's use of the Southern Connection.
- The Port, BNSF and UP voluntarily negotiate amendments to 1947-48 Agreement, reallocating rights and responsibilities among the Port, BNSF and UP.
- The Port, BNSF and UP agree to negotiate a new Southern Connection agreement to replace the 1947-48 Agreement, pursuant to which (alternatively): [options omitted]

Options Specific to a Relationship with a New Short Line Operator

- Do nothing with respect to the 2002 Lease Agreement with TCRY, but enter into a lease agreement with a third-party short line approved (and used) by UP and BNSF under the proposition that the 2002 Lease Agreement does not guarantee TCRY exclusivity of use.

APPENDIX 30

State of Washington Rail 2018

1. Application Type

Our application is proposing to access both FRAP and FRIB funding.

2. Contact Information

Scott D. Keller, Executive Director
Port of Benton
3250 Port of Benton Blvd
Richland, WA 99354
509-375-3060
keller@portofbenton.com

Diahann Howard, Director of Economic Development & Gov.
Port of Benton
3250 Port of Benton Blvd
Richland, WA 99352
509-375-3060
dhoward@portofbenton.com

3. Project description

The Port of Benton is requesting funds to support its need to improve the overall safety and maintenance of its short line rail asset located in Richland, WA in order to ensure and preserve long term economic development and reliability of this system that serves state, national and global shippers. The rail line is served by both Burlington Northern Santa Fe and Union Pacific along with the Port's short line operator Tri-City Railroad Company (TCRY).

The Port has learned that our short line operator, Tri-Cities Railroad Company (TCRY) has not kept the line to the Class 3 FRA standards required under the Lease with the Port. Instead, the rail line has been found to have almost 200 defects even at a Class 1 FRA standard and has recently been designated as "excepted track" by TCRY. In other words, the track, according to TCRY, is now three full levels below the standard it is required to be maintained at. Excepted track is the lowest standard under which rail movement may occur. Improvements are urgently needed to preserve the line and preclude the line from being taken out of service.

During the course of the Port of Benton's contract/lease with TCRY to maintain and operate the rail we have requested maintenance records and when not received the Port took on visual inspections of the rail. However, when our capital project led by the Port was initiated to upgrade Columbia Park Trail Bridge started September 2012 that resulted into direct discovery of the true condition of the rail asset. This prompted the Port to get further inspections including state of the art imaging technology by Aurora® that provided the Port exact condition of every tie and component. The Port also hired Holland to provide an assessment of the track structures condition. These inspections showed that approximately 8,000 ties need replaced within the next few years. We need the track back to Class 3 and as the asset owner the Port has experience in managing such projects. We will be doing bridge upgrades, tie and ballast replacement to ensure the track is safe.

4. Project schedule July, 2019-July, 2020

Project Milestone	Month/Year
Complete project definition	18-Oct
Begin preliminary engineering	complete
Complete environmental documentation	
Complete right of way certification (may include acquisition)	
Start of Construction	19-Jul
Construction complete and project functionally operational	19-Dec

5. Project cost \$2,000,000

Provide an estimate of projects cost using this matrix.

	Design Engineering	Right of Way	Construction Engineering	Construction other	Construction Contract	Total
Estimated Project Cost						
Committed Local Funds				250,000		250,000
Additional Local Funds Requested						
Other Committed Funds						
WSDOT Funds Requested				1,750,000		1,750,000

6. Proposed funding Indicate the various sources from which matching funds are coming and indicate if the funds are cash payment or benefits in kind. **Labor match is subject to prevailing wage requirements.** \$250,000 FRIB, \$1,500,000 FRAP, \$250,000 Port of Benton

Funding Source	Public or Private	Cash or In-Kind	Amount
Local-Port District	Public	Cash	\$250,000
Local-Other			*below
Railroad			*below
WSDOT	Public		\$250,000 loan
WSDOT	Public		\$1,500,000 grant
Federal Funds	Public		*below

Other			
Total			\$2,000,000

**Due to ongoing litigation we do not want to request any funding from other partners and we are unable to apply for federal funds related to rail at this time. TCRY has initiated litigation in the Eastern District of Washington under Cause No. 2:17-cv-00191-TOR*

Related attachment required with application:

- **Funding commitment letters from all funding partners**

Please see attached.

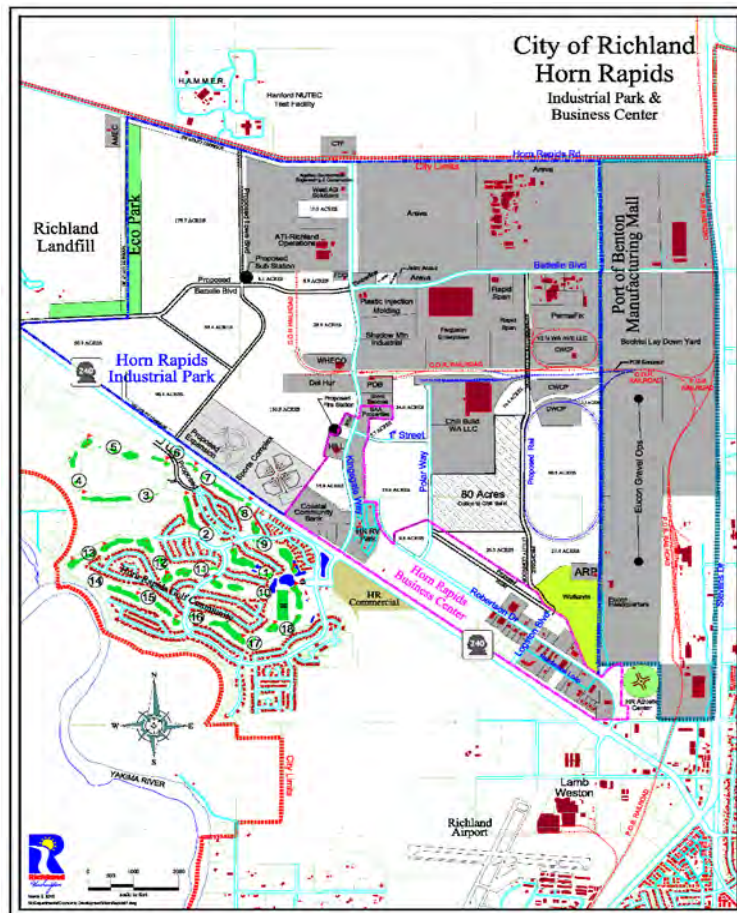
7. Project Detail-Benefit-Cost Analysis

7.1 Shipper benefits and transportation savings The Port of Benton's short line rail asset offers direct service from our short line operator and both Class I [railroads companies are designated as I, II, III, whereas rail lines are designated as 1, 2, 3] railroads to its customers this provides a competitive market for shippers and keeps rail transportation cost effective when competing in international markets.

7.2 Reduction in impacts to roadways Access to rail reduces the need for trucks. Currently there are 1-2 unit trains per week bring product from the east along with daily shipments in and out to support international exports of frozen French fries and other frozen products. Regionally there are over 250,000 truck trips that could leverage the use of rail facilities. Increasingly, the Tri-Cities and Walla Walla regions are becoming a logistic hub due to availability and access to air, rail, water and highways systems. The impact within trucking industry and electronic logging devices is also placing more pressure on agricultural producers seeking to get their products to national and international markets.

7.3 Economic development and job creation The City of Richland's Horn Rapids Industrial Park (HRIP) has a spur located off the Port of Benton's short line track. The HRIP encompasses over 2,000 acres of heavy industrial property of which approximately 1,300 acres are developed and 692 acres are available for sale. In addition, the Port and City just received an additional 1,341 acres of industrial land located to the north of the HRIP. BST Associates Analysis estimates that 30% of firms seeking industrial properties will also be seeking to secure a rail option, resulting in 370-1770 rail related jobs with wages \$38-\$56,000 per year. The Association of American Railroads, Economic and Fiscal Impact Analysis of Class I Railroads, May 16, 2016, IMPLAN model (www.aar.org; p12-13) states that for each railroad job, 9 other jobs are created within a community. Currently, there are over 900 jobs that are rail related that would be retained. This type of job development and growth is strongly desired within the Tri-Cities as our economy has begun its shift towards a post Hanford project economy. The prospect for economic development opportunities for large industrial companies, companies and services related to value added agricultural processors all of which ship internationally is of strong significance not only locally but to the state of Washington. There is also opportunity to due value added manufacturing in the areas of

clean energy, importing in products then exporting them back out to serve international markets. The Tri-Cities has skilled and knowledgeable workforce within this sector as well as value added agriculture.



City of Richland and Port of Benton Industrial Property

7.4 Reduction in carbon and other greenhouse gas emission Access to rail may provide trucking operations a more efficient way to reduce travel time. The constraints on the trucking industry limits the shipper's ability to get their products from eastern Washington to the container ports in Seattle and Tacoma especially during inclement weather. Use of rail would ease overall carbon and other emissions. Moving freight by rail lowers greenhouse gas emission by 75% when compared to truck.

7.5 Tax revenue generated from increased industrial development BST Associates Analysis estimated that land sales within remaining HRIP and new 1,341 acres of industrial property has the potential to produce the following: value of construction, sales tax (no tax exceptions) and property tax that could result in a value of \$88.82m-\$267.16m back to the state and local community.

7.6 Reduction in ongoing maintenance expense Proposed improvements would provide a stable rail option that could result in more use of rail verses truck. WSDOT estimates advise that diverting cargo from truck to rail leads to a \$0.18 per mile cost savings on highway maintenance.

7.7 Reduction in operating costs it is unclear if these improvements would provide a reduction in rail related costs at this time. We do know that at current pricing levels it would keep the cost low to shippers that are seeking to get their Ag products to national and international markets, and provides certainty of the line.

7.8 Public benefit it is of paramount interest to the Port of Benton that safety of the rail asset be realized; this will provide long term economic development benefits of jobs and investment to the region. We also want to be prepared for the future needs that removal of the U.S Department of Energy's low level waste out of the region and State of Washington may access rail.

7.9 Other quantifiable project benefits Upgraded rail improvements will allow for competitive and marketing advantages of having both Class 1 railroads being located along with industrial land availability.

8. Project Sustainability This project ensures the rail asset that is currently deteriorating will be brought back to a level that promotes rail uses that can result in fewer truck trips. The Port of Benton is the assets owner and currently leases the line to our short line operator, Tri-Cities Railroad Company. The Port has received project dollars in the past and we coordinate these efforts with the short line operator and follow the ports standard procedure for request for qualifications and proposals. The Port manages the contractors and the work and can complete this project as it has done in the past as the owner of the asset.

9. Safety improvements The Port has learned that our short line operator, Tri-Cities Railroad Company (TCRY) has not kept the Yakima River Bridge to the Class 3 FRA standard required under the Lease with the Port. Instead, the FRA has given the TCRY a civil violation and has found defects even at a Class 1 FRA standard. All bridge ties on the Yakima River Bridge will now need to be replaced to bring this Bridge up to the proper standard and to ensure structural integrity. Further, through this process the Port has discovered cross ties on various bridges that are more than 30 years old that have become spike killed (e.g. spikes which no longer will hold and maintain gauge of the rails). One bridge referred to as Berry's Bridge constructed in mid-1980's when SR 240 was relocated to allow construction of I-182 has cross ties that have never been replaced since original construction.

10. Urgent need The integrity and structural support, ballast deck and tie improvements are necessary to ensure safety and preserve this strategic short line.

11. Preservation of rail line The Port has learned that our short line operator, Tri-Cities Railroad Company (TCRY) has not kept the line to the Class 3 FRA standard required under the Lease with the Port. TCRY has now designate the entire line as “excepted track.” Improvements are urgently needed to preserve the line.

During the course of the Port of Benton’s contract/lease with TCRY to maintain and operate the rail we have requested maintenance records and when not received the Port took on visual inspections of the rail. However, when our capital project led by the Port was initiated September of 2012 to upgrade Columbia Park Trail Bridge that resulted into direct discovery of the true condition of the rail asset. This prompted the Port to get further inspections including state of the art imaging technology by Aurora® that provided the Port exact condition of every tie and component. The Port also hired Holland to provide an assessment of the track structures condition. We need the track back to Class 3 as required under the Port’s agreement with TCRY. The Port as the owner of the asset will follow our standard procedure for request for qualifications and proposals. The preservation of the line is vitally necessary to ensure the existing shippers have access to their markets and the City and the Port can provide this option to future companies seeking to make investment and create jobs for the region.

12. Geographic balance and support for regional economies Overall there are over 250,000 truck trips per year within our region connected to agriculture and value added agriculture. This is growing in volume and new factors within the trucking industry (i.e. electronic logging devices) may result in HRIP along with the broader Tri-Cities region and Walla Walla area being seen as a strategic logistics hub in getting products to the northwest seaports as well as to the east. Many shippers operations are currently constrained and unable to expand due to limitations of shipping option locations and certainty of getting their products to their global customers. This investment would ensure that shippers retain this option and have the ability to expand their opportunities to meet the unseen impacts of workforce, regulation and logistic needs.

13. Reducing system-wide rail delays Currently TCRY has issued a slow order of 5mph and has routinely taken the track out of service for maintenance during standard business hours. This has caused shippers to have crews work overtime and graveyard shift in order to ensure that there are no delays further down the system. Shippers have also had trains held at BNSF hump yard while they have waited to access the track with tie and track improvements this need will be eliminated with the proposed improvements.

14. Environmental effects Increased access to rail can provide “a variety of environmental benefits, including: reduced operating cost, reduced highway maintenance, reduced accidents and emissions. Trucks move one ton of freight 240 miles per gallon of fuel. Trains move one ton of freight 640 miles per gallon of fuel.” (BST Rail Line Analysis) We believe providing a rail option can help support overall reduction of environmental impacts.

15. Coordination with regional and statewide goals This project has been within the Freight Rail in the Benton-Franklin-Walla Walla RTPO plan, September 2008. We provided annual updates to our Benton Franklin RTPO and submit our transportation plan annually. This project area is strategic located to ensure movement of freight to provide cost effective access to global markets.

16. Project Business Plan

Management profile The Port of Benton management team will oversee this project.

Marketing Plan The Port of Benton actively markets the existing industrial land along with the City of Richland economic development offices. We also coordinate our efforts with our local Associate Development Organization, TRIDEC by responding to the state Department of Commerce leads, adding data into GIS planning database and attending industry target sector trade shows. The ports rail being dually serviced by both Class I Railroads is a strong selling point when discussing land options with prospective clients. The Port also accesses Zoom prospector, website, print and social media to conduct its land marketing.

Operations Plan Currently, the Port of Benton has an operations and maintenance contract with TCRY. Both Class I railroads run directly to customers, which they are allowed to do in perpetuity under the Indenture agreement that was a part of the federal government's land transfer to the Port of Benton in 1996. **The Port of Benton, pursuant to rulings from the Railroad Retirement Board, is not considered an operator of the railroad.**

Financial plan This project will be incorporated within the Port of Benton budgeting process and work plan for 2019.

17. Acknowledgement of contractual agreement upon award

The grant applicant (the Port of Benton) has read and understands WSDOT's Grant/Loan Agreement expectations related to Contingent Interest and Maintenance Obligation. The Port will conduct its standard procedure for the contracted work.

18. Additional Comments

The following reports are attached

- **Port of Benton Rail Line Market Analysis, January 2017 BST Associates**
- **Rail Masterplan, January 2017 prepared by Tangent Services, Inc.**

The following reports are available upon request:

- **Inspection Reports from HDR**
- **Inspection Reports from FRA**
- **Holland track geometry and rail profile measurement**
- **2002 Lease Agreement between TCRY and the Port of Benton.**

The Indenture described above provides that the Port of Benton is to "devote all lease payments or other sources of revenue from the Real Property [Note: the "Real Property" refers to land

provided by the Department of Energy to the Port known as the 1100 area] and Railroad to first cover maintenance of the Railroad.” The Port satisfied this obligation by contracting with TCRY through a Lease agreement which specified that TCRY would act as the operator of the railroad and that all maintenance, repairs, and replacements of all aspects of the entirety of the rail line were to be funded at TCRY’s sole cost and expense. Unfortunately, TCRY has not lived up to their end of the contract and has allowed the line to fall multiple levels below the FRA Class 3 leased standard. The Port is currently seeking damages for, among other things, deferred maintenance in an amount to be determined at trial through the above-mentioned Federal lawsuit between TCRY and the Port of Benton. Any damages awarded to the Port will be used to fund fixes to the deferred maintenance. However, federal lawsuits can drag on for an indeterminate amount of time, and the need to fix various aspects of the rail line (ties, bridges, etc) is a very immediate problem.

19. Required Attachments

- Letters of support from railroads
- Funding of commitment letters from all funding partners
- Estimate of project cost, review and signed by an engineer licensed the state of Washington
- A business plan for the project
- Income statements, cash flow statement and balance sheet for years 2016 and 2017
- Pro formas for 2020,2021,2022 (and beyond) if the project is funded
- Detailed vicinity map clearing showing site plan and project limits
- Photographs of the site of the project that identify specific landmarks, points on track, building and/or shipping areas

APPENDIX 31

From: Rydel Peterson rydel@tcry.com
Subject: Fwd: Invoice 11470 from Tri-City Railroad Company, LLC
Date: October 7, 2020 at 2:45 PM
To: Lisa Anderson lisaanderson@tcry.com

RP

Sent from my iPhone

Begin forwarded message:

From: Rydel Peterson <rydel@tcry.com>
Date: July 29, 2020 at 10:35:50 AM MDT
To: David Billetdeaux <david@portofbenton.com>
Subject: Re: Invoice 11470 from Tri-City Railroad Company, LLC

David,

Please share with Mr. Martin the following:

Yes, Supplement 1 to the Miscellaneous Charges tariff is due and owing.

We apologize for not notifying Lamb Weston earlier, but did not realize their year end was May 31.

If they would like to make payment for the amounts owed June 1 to present we can resend them an invoice for that amount and we can work out a payment plan to deal with the amount they owe from January thru May. This plan would not be difficult to implement from an accounting perspective and would not require them to "re-open" the book. They should contact me or Lisa directly to discuss.

We value their commitment to the community and want to be able to continue to provide them a safe and serviceable railroad for their continued use.

Thank you,

Rydel

Sent from my iPhone

On Jul 27, 2020, at 12:33 PM, David Billetdeaux <david@portofbenton.com> wrote:

Rydel,

Mr. Martin at Lamb Weston has raised concerns to the Port. Please provide any comment you wish to in response.

Thank you,

David J. Billetdeaux | Port of Benton, Attorney

3250 Port of Benton Blvd. | Richland, WA 99354

509. 375. 3060 | Office

509. 375. 5287 | Fax

509. 578. 6189 | Mobile

Email: david@portofbenton.com

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From: Martin, Dirk <Dirk.Martin@lambweston.com>
Sent: Thursday, July 23, 2020 4:13 PM
To: Diahann Howard <dhoward@portofbenton.com>
Subject: FW: Invoice 11470 from Tri-City Railroad Company, LLC

Diahann,

We just received the attached invoice from TCRY where they are referencing a Tariff already in place from 2018 and just approved by the Port of Benton in January of this year. This is different than the most recent Supplement 5 tariff that you have yet to approve.

This is very concerning that TCRY business accounting practices are so far in arrears that they are back billing us for 6 months of rail service. Our financial year ends May 31 and this will cause an accounting variance in our year end close that was not communicated prior. We continue to have concerns with the Port of Benton's use of TCRY to manage the rail access we currently need. We are having to investigate more cost effective and better service options that will significantly reduce our use of the Port of Benton facilities.

I need the Port of Benton to confirm that Miscellaneous Charges Tariff Supplement 1 Effective September 18, 2018 is still active and approved.

Thanks,

Dirk Martin

Sr. Director Logistics | Supply Chain
m +1 940.453.6661

From: Grade, Deanna <Deanna.Grade@lambweston.com>
Sent: Thursday, July 23, 2020 2:54 PM
To: Hansen, Kindra <Kindra.Hansen@lambweston.com>; Martin, Dirk <Dirk.Martin@lambweston.com>
Cc: Ratuiste, Morie <Morie.Ratuiste@lambweston.com>
Subject: FW: Invoice 11470 from Tri-City Railroad Company, LLC

Dirk,

I just received the attached invoice from TCRY. Are these fees part of the conversations being had with the Port? Please confirm LW shouldn't pay the fees listed on the invoices.

Thank you

Thank you,

Deanna Grade
Manager Transportation Procurement
8701 W. Gage Blvd.
Kennewick, WA 99336
P 509-736-0442
F 509-736-2162
deanna.grade@lambweston.com
<image001.jpg>

From: Lisa Anderson <lisaanderson@tcry.com>
Sent: Thursday, July 23, 2020 2:23 PM
To: Grade, Deanna <Deanna.Grade@lambweston.com>;
brad.sanders@lambweston.com; Ratuiste, Morie <Morie.Ratuiste@lambweston.com>
Subject: Invoice 11470 from Tri-City Railroad Company, LLC

[FROM EXTERNAL SOURCE]

Good afternoon,

Please see attached.

Hard copy to follow.

Thank you.

Lisa Anderson
Executive Vice President
Corporate Secretary
Tri-City Railroad Company, LLC
(360) 239-9067

To view attachment

Open the attached PDF file. You must have [Acrobat® Reader®](#) installed to view the attachment.

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<Inv_11470_from_TriCity_Railroad_Company_LLC_18836.pdf>

APPENDIX 32

MARK B. TUVIM
MTUVIM@GRSM.COM
DIRECT DIAL: (206) 695-5144
DIRECT FAX: (877) 304-9894



ATTORNEYS AT LAW
701 FIFTH AVENUE, SUITE 2100
SEATTLE, WA 98104
WWW.GRSM.COM

July 28, 2020

VIA U.S. MAIL AND EMAIL

Lisa Anderson
Executive Vice President
Corporate Secretary
Tri-City Railroad Company, LLC
PO Box 6000
Kennewick, WA 99336

Re: Invoice #11469

Dear Ms. Anderson:

Ed Gottschalk has forwarded to my attention the above-referenced invoice which purports to seek payment from Preferred Freezer of Richland for "Track Maintenance charges assessed on cars that entered the TCRY in Kennewick, WA for the period of January 16, 2020 – June 30, 2020" pursuant to "Miscellaneous Charges Tariff Supplement 1 Effective September 18, 2018 and Approved by Port of Benton January 16, 2020."

I have reviewed the Tariff Supplement at issue and do not see any provision which would reasonably put a shipper such as Preferred Freezer on notice that it would be subject to this tariff. I have also spoken with counsel for the Port of Benton who agrees with my interpretation and informed me that the Port did not intend any entity other than a servicing railroad would possibly be subject to the tariff at issue. Accordingly, Preferred Freezer will not be paying this invoice.

Even though this matter is distinct from the on-going litigation between my client and TCRY, I am copying Nick Kovarik so that he is aware of this communication directly with you.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP

s/ Mark B. Tuvim

Mark B. Tuvim

MBT:lv
cc: Nick Kovarik

APPENDIX 33

From: Rydel Peterson Rydel@tcry.com
Subject: Fwd: Port invoice
Date: October 7, 2020 at 2:49 PM
To: Lisa Anderson lisaanderson@tcry.com

RP

Sent from my iPhone

Begin forwarded message:

From: Rydel Peterson <rydel@tcry.com>
Date: March 17, 2020 at 4:27:53 PM MDT
To: David Billetdeaux <david@portofbenton.com>
Subject: Re: Port invoice

David,

The tariff applies to all cars that enter the track, not just to those who operate the cars on the tracks.

When the Port approved the tariff the Port determined that the tariff was reasonable and in compliance with the Indenture.

The plain language of the tariff applies to all cars that enter the TCRY railroad and provides that the responsible party must pay TCRY in accordance with the payment terms identified on the TCRY invoice.

The Port informed TCRY that it would be in breach of the lease if it were to seek to impose the tariff on the BNSF or UP without the Port's prior written consent.

As a result, through outside legal counsel and through a plain reading of the tariff, TCRY has determined that the Port is the responsible party, for it has the authority to grant TCRY permission to impose the tariff on the BN and the UP but has refused to do so.

If the Port feels that TCRY has not specifically requested permission to impose the tariff on the BN and the UP, please take this writing as that request.

If the Port feels that it is not the responsible party, please tell us who the Port believes is the responsible party to pay the tariff.

Thank you,

Rydel

On Tue, Mar 17, 2020 at 1:02 PM David Billetdeaux <david@portofbenton.com> wrote:

Rydel,

I'm writing to let you know that I acknowledge receipt of your email and the attached invoice. However, the Port must seek to understand upon what legal basis TCRY believes it is imposing a tariff on the Port of Benton, when the Port does not operate rail cars over the tracks that we own?

Best regards,

David J. Billetdeaux | Port of Benton, Attorney

3250 Port of Benton Blvd. | Richland, WA 99354

509. 375. 3060 | Office

509. 375. 5287 | Fax

509. 578. 6189 | Mobile

Email: david@portofbenton.com

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From: Rydel Peterson <rydel@tcry.com>
Sent: Tuesday, March 17, 2020 10:17 AM
To: David Billetdeaux <david@portofbenton.com>
Subject: Port invoice

David,

I understand that the Port's outside counsel and TCRY's outside counsel have been attempting to resolve the issues between the parties which have included

been attempting to resolve the issues between the parties which have included options of resolving the matters on a global basis or paying the maintenance tariff in arrears on a monthly basis. However, so far, these two options have not gained much traction. While TCRY is not waiving its right to collect on the accrued tariff charges and will address that issue in the future, TCRY is going to invoice the Port twice per month for the current maintenance charges at \$95 per car.

To that end, please find attached the first invoice per the terms of the recently approved TCRY Miscellaneous Charges Supplement 1 tariff. The invoice is for the first 15 days of activity over the TCRY line for the month of March. It is vital to TCRY and the health and safety of the track that the Port agree to make the tariff payments in a timely fashion. This will allow TCRY to continue to keep the track open in a safe and serviceable condition.

Please let me know if you have any questions.

Thank you,

Rydel

APPENDIX 34

PORT OF BENTON RAIL PLAN

Prepared for:



The Port of Benton

December, 2012

Prepared by:



Tangent Services, Inc.
4160 SE International Way, Suite 206
Portland, OR 97222

2.6.1. Local TCRY Operations

The TCRY operates out of the Richland Yard where the crews are based, locomotives are serviced, and railcars are maintained. TCRY has five running locomotives; three of these are GP4-2 units and two are Port-owned SW 1500 units. There are four additional locomotives that are used for parts. TCRY also has one regulator and one tamper, both Port-owned, for track maintenance.

TCRY typically runs a two-man crew from 6:00 am to 2:30 pm, Monday through Friday. They will, however, run two crews if needed and have flexible operating hours depending on the customers' requirements. TCRY has a total of six operating employees capable of performing all jobs. Total employment for TCRY in Richland is 12 people.

The limits for TCRY switching are the Kennewick Yard to the south and the end of the Port line at Horn Rapids Road to the North.

2.7. Rail Agreements

Port-TCRY: The Port has a lease agreement with TCRY (dated 2002). The agreement leases to TCRY property consisting of track, right-of-way, bridges, trestles, crossings, maintenance equipment, and the 1171 Building. The lease transfers the cost and responsibility of operating and maintaining the railroad to TCRY.

Port-BNSF/UP: The Port also has joint agreements with the BNSF and UP (dated 1947, 1961, and 1979) which grant operating rights on the Port's tracks.

City-BNSF/UP: The City has separate agreements with the BNSF and UP (both dated 2011) granting the railroads non-exclusive permission to operate on the City's track.

TCRY-UP: The TCRY has interchange and marketing agreements with the UP. The terms of these agreements are confidential. The TCRY does not have similar agreements with the BNSF. From 2000 to 2009 the BNSF contracted with TCRY to serve the Port line, interchanging at Richland Junction. Since 2009, the BNSF has been operating directly on the Port track.

TCRY-UP-BNSF: Operations on the Port's rail line are controlled by a Comprehensive Operational Plan (COP). The TCRY, BNSF, and UP have agreed the COP consists of the following TCRY-issued documents: General Orders, System Special Instruction No. 8, and Timetable 1st Subdivision No. 8.

2.8. Local Rail Users

The Port rail line is a critical asset for the community and local shippers, providing important infrastructure to support economic development.

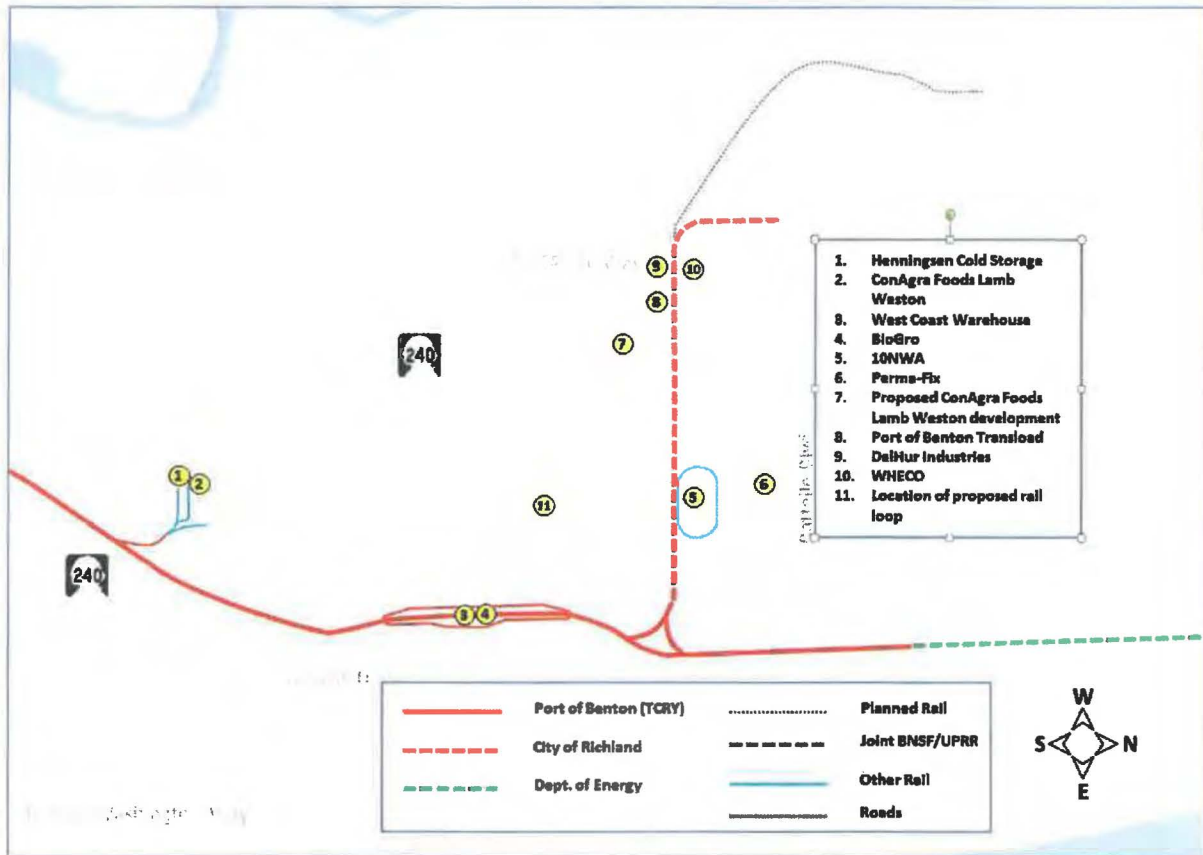
The following rail users are located on the Port of Benton line:

- **ConAgra Foods Lamb Weston and Henningsen Cold Storage** are located on Saint Street adjacent to the Richland Airport. The Port owns the railroad spur off the mainline and the two tenants own the tracks on their properties. Inbound oil for food processing is handled for ConAgra and outbound refrigerated jumbo boxcars are handled for both shippers.

PORT OF BENTON RAIL PLAN

- Located in the Richland Yard, **West Coast Warehouse** brings in salt by rail and trucks it to the ConAgra facility for use in food processing.
- Also located in the Richland Yard, **BioGro** trucks in fertilizer from Mabton and rails it out to customers.

Figure 5: Rail Users



The Port's rail line connects to a City-owned line that serves the City's Horn Rapids Industrial Park. Rail users located on the City line include:

- **10 N. Washington Ave LLC (10NWA)** is a TCRY affiliate. It is located on a 33-acre site with a spur and loop track approximately 3,800 feet in length. 10NWA owns approximately 19 acres of the site. The remaining 14 acres is owned by Central Washington Corn Processors, a feed grain company. The site is an approved UP shuttle train destination.
- **Perma-Fix Environmental Services**, which provides nuclear and industrial waste management services, has a facility on Battelle Boulevard. It completed a rail connection to the City line in 2011 which passes through the 10NWA property.³

³ Perma-Fix Environmental Services press release, April 21, 2011. Retrieved on September 29, 2012, from <http://www.perma-fix.com/news.aspx?newsframe=http://ir.stockpr.com/perma-fix/company-news/detail/3793/perma-fix-announces-completion-of-rail-line-connecting-doe-hanford-site-and-perma-fix-northwest-richland-facility>

- **ConAgra Food Lamb Weston** is developing an automated frozen product warehouse on 80 acres of land recently acquired from the City.
- The **Port of Benton** owns a 7,200 square foot refrigerated intermodal transload facility.
- **DelHur Industries** has a 15-acre site with 1,100 feet of track available for transloading bulk materials. It also has a 100-ton truck scale at the same site.⁴

2.8.1. Traffic Volume

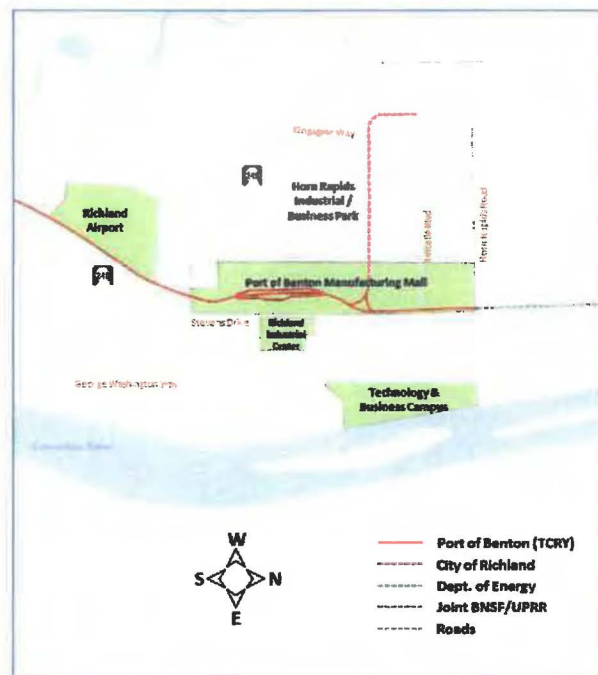
TCRY handles between 1,500 and 2,000 rail cars (roundtrip) each year.⁵

2.9. Future Development

The Port owns 10 development sites in Richland and Prosser. Of these, two are served by the Port's rail line: the 760-acre Manufacturing Mall and the 650-acre Richland Airport. The potential for more rail-related industrial development at the Richland Airport appears to be limited. The Manufacturing Mall, however, appears to have large contiguous pieces of vacant land that could be developed for rail-served industry.

The City's Horn Rapids Industrial Park has more than 1,500 acres designated for industrial use. Of this, approximately 800 acres appear to remain available for development of rail-served industry (about 350 acres east and 450 acres west of Kingsgate Way).

Figure 6: Industrial and Business Parks



⁴ DelHur Industries web site. Retrieved on October 2, 2012, from <http://www.delhur.com/richland.html>

⁵ TCry staff interview, October 17, 2012.

APPENDIX 35

RAIL MASTER PLAN

Prepared for:



Port of Benton and City of Richland

January 2017

Prepared by:



Tangent Services, Inc.

with

TBY, Inc.

about 20' 6" at four feet from center.⁶ The interchange standard for double-stack container cars (Plate H) shows a vertical height of 20' 3" over rail. **A survey of the bridge to assure there is enough vertical clearance for stacking two high-cube double-stack containers in platform wells on railcars is recommended.**

- The **Berry's Overpass Bridge**, a WSDOT-constructed concrete span, spans I-182/Highway 12.

Figure 3: Rail Bridge Photos



Irrigation Canal Bridge



Columbia Park Trail Bridge



Yakima River Bridge



Berry's Overpass Bridge

2.6. Local Rail Users

The Port's rail line is a critical asset for the community and local shippers, providing important transportation infrastructure to support economic development.

The following rail users are located on the Port of Benton line:

⁶ Source: Port of Benton, December 2016.

- **Lamb Weston** and **Henningsen Cold Storage** are located on Saint Street adjacent to the Richland Airport. The Port owns the railroad spur off the mainline and the two tenants own the tracks serving their properties. Inbound oil for food processing is handled for Lamb Weston and outbound refrigerated jumbo boxcars are handled for both shippers.
- Located in the Richland Rail Yard, **West Coast Warehouse** brings in salt by rail and trucks it to the Lamb Weston facility for use in food processing.

Rail users located off the City's Horn Rapids Spur include:

- **10 N. Washington Ave LLC (10NWA)** is a TCRY affiliate. It is located on a 33-acre site with a spur and loop track approximately 3,800 feet in length. 10NWA owns approximately 19 acres of the site. The remaining 14 acres are owned by CWCP.
- **Perma-Fix Environmental Services**, which provides nuclear and industrial waste management services, has a facility on Battelle Boulevard. It completed a rail connection to the City spur in 2011 which passes through the 10NWA property.⁷
- In 2015, **Preferred Freezer Services** opened a 455,000-square foot automated frozen product warehouse on 80 acres of land acquired from the City. The facility handles 10 to 12 railcars a day.
- In 2016, **CWCP** completed construction of a grain transload facility with an 8,500-foot loop track, rail receiving facilities, and both vertical and flat storage.
- The **Port of Benton** owns a 9,060-square foot refrigerated intermodal transload facility.
- **DelHur Industries** has a 15-acre site with 1,100 feet of track available for transloading bulk materials. It also has a 100-ton truck scale at the same site.⁸

Rail Traffic Volume

CWCP reports that it is currently handling about 4,000 railcars annually, and believes the local feed market will support a volume up to about 5,000 railcars.⁹ Preferred Freezer Services reports that it is currently loads 70 to 84 outbound railcars each week (equivalent to 3,640 to 4,368 railcars annually).¹⁰ Activity by other rail users along the line, e.g., Henningsen Cold Storage, is believed to be minimal. For the purposes of this study, the annual volume of the other users is assumed to be 750 railcars (between 500 and 1,000).

In total, the current one-way railcar volume on the Port/City rail line is approximately 8,750 railcars each year.

⁷ Perma-Fix Environmental Services press release, April 21, 2011. Retrieved on September 29, 2012, from <http://www.perma-fix.com/news.aspx?newsframe=http://ir.stockpr.com/perma-fix/company-news/detail/3793/perma-fix-announces-completion-of-rail-line-connecting-doe-hanford-site-and-perma-fix-northwest-richland-facility>

⁸ DelHur Industries web site. Retrieved on October 2, 2012, from <http://www.delhur.com/richland.html>.

⁹ Interview with Dennis Kylo, CWCP, November 8, 2016

¹⁰ PFS volumes courtesy of BST Associates, who surveyed PFS for their market study for the Port 2016.

APPENDIX 36

GREGORY C. HESLER, WSBA NO. 34217
PAINE HAMBLLEN LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007
william.schroeder@painehamblen.com
greg.hesler@painehamblen.com

The Honorable _____

Attorney for Plaintiff BNSF Railway Company

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

BNSF Railway Company	)	
	)	No. CV-09-5062-EFS
Plaintiff,	)	
	)	VERIFIED COMPLAINT
vs.	)	
	)	
Tri-City & Olympia Railroad Company,	)	
L.L.C.	)	
	)	
Defendant.	)	

BNSF Railway Company complains against Tri-City & Olympia Railroad Company as follows.

INTRODUCTION

1. BNSF Railway Company brings this action for declaratory and injunctive relief to require Tri-City & Olympia Railroad Company ("TCRY") to refrain from blocking access to railroad trackage in the Richland, Washington area over which BNSF is contractually entitled and statutorily obligated to operate.

1 BNSF further brings this action for damages to redress TCRY's unlawful denial of
2 access to the Richland area trackage.
3

4 JURISDICTION AND VENUE

5 2. Jurisdiction is founded on diversity of citizenship pursuant to 28
6 U.S.C. § 1332: the matter in controversy is between citizens of different states and
7 exceeds the sum or value of \$75,000, exclusive of interest and costs.
8

9
10 3. Federal question jurisdiction pursuant to 28 U.S.C. § 1331 is also
11 invoked because BNSF seeks to enforce federal statutory rights and obligations.
12

13 4. Federal jurisdiction is also proper pursuant to 28 U.S.C. § 1336
14 because this action seeks to enforce an order of the Interstate Commerce
15 Commission, the predecessor to the Surface Transportation Board.
16

17 5. Venue is proper under 28 U.S.C. § 1391 since the events giving rise to
18 this claim occurred in this judicial district.
19

20 PARTIES

21 6. BNSF is a Delaware Corporation with Texas as its principal place of
22 business.
23

24 7. TCRY is a Washington limited liability company with a Washington
25 principal place of business. TCRY exclusively operates in Washington.
26
27
28

1 **BACKGROUND**

2 **HISTORY OF BNSF'S CONTRACTUAL RIGHT TO OPERATE OVER THE**
3 **TRACKAGE**

4 8. By a November 6, 1947 agreement among the Northern Pacific
5 Railroad (BNSF's predecessor), Oregon-Washington Railroad, Union Pacific
6 Railroad ("UP") (collectively the "Railroads") and the Atomic Energy
7 Commission, the federal government granted BNSF and UP joint rights to operate
8 over a line of railway and to use the interchange facilities and wye trackage
9 associated with that line of railroad. The railroad was to be built beginning at a
10 point of connection with UP's mainline from Kennewick extending beyond
11 Richland to what is now a point near Horn Rapids Road. The Railroad's operating
12 rights were originally terminable upon 6 months notice from the government.
13
14
15

16 9. By a separate November 6, 1947 agreement, UP granted trackage
17 rights to BNSF's predecessor over UP's line from Kennewick to the point along
18 UP's mainline track that would connect with the trackage to be built pursuant to
19 the 1947 Agreement with the federal government.
20
21

22 10. On September 28, 1947 the Interstate Commerce Commission
23 (predecessor to the Surface Transportation Board) approved operating authority for
24 both railroads over the new track built pursuant to the 1947 Agreement in ICC
25 Finance Docket No. 15925. Pursuant to that ICC order and by a December 7, 1948
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28

1 amendment, the parties modified the original 1947 Agreement to restrict the
2 federal government's ability to terminate BNSF or UP's operating rights absent a
3 material default and failure to cure within 6 months.
4

5
6 11. By a contract dated June 2, 1952, effective July 1, 1952 (as later
7 supplemented October 3, 1952), the federal government allowed BNSF to serve the
8 Duane Avenue Team Track and Cook's Siding at Richland, Washington.
9

10 12. In a January 24, 1961 agreement, effective March 1, 1961, the Atomic
11 Energy Commission and the Railroads acknowledged that the 1947 Agreement
12 concerning operating rights over the government railroad line in the vicinity of
13 Richland, Washington remained in full effect.
14

15
16 13. The 1961 Agreement leased to the Railroads various sidings and spur
17 tracks in Richland (including trackage identified as the Richland Fuel Spur 1100
18 Area Coal Track), trackage extending off of the 700 area switch to the coal track
19 switch, the Duane Avenue Team Track, the Richland Asphalt Track, a short spur
20 extending off the government's trackage near Saints Road, and any new industrial
21 tracks that had been or would be built at the Railroads' expense.
22
23

24
25 14. The 1961 Agreement superseded and terminated the 1952 siding/spur
26 Agreement. The terms of the 1961 Agreement could be terminated by any party on
27
28

1 six-months written notice. At the same time, however, the 1947 Agreement
2 remained in force.
3

4 15. By Amendment dated June 17, 1979, the government and the
5 Railroads amended the 1961 Agreement in order to accommodate the
6 government's ability to report the spur and siding properties that were leased
7 pursuant to the 1961 Agreement as surplus properties. Accordingly, the
8 amendment deleted the references to the lease of certain properties.
9
10

11 16. Simultaneously, the government issued a Permit that allowed the
12 Railroads to use the spur tracks and siding referred to as Wellsian Way Railroad
13 Spur and the Richland Asphalt Spur. The June 17, 1979 Permit could be
14 terminated by any party on 30 days written notice.
15
16

17 17. In 1998 the government transferred to the Port of Benton the railroad
18 line extending from Kennewick, Washington to the 1100 area in Richland, subject
19 the 1947 and 1961 Agreements with the Railroads and also subject to the
20 Government's rights of reversion. Hence the Port obtained the government's
21 rights to the rail line, while BNSF and UP maintained the operating rights granted
22 in the 1947 and 1961 Agreements over the Richland, Washington area track
23 ("Richland Trackage").
24
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1 18. In 1998 the Port contracted with Livingston Rebuild Center ("LRC")
2 to maintain the Richland Trackage and to provide contingent rail operations. The
3 contract with LRC does not and cannot alter or abridge BNSF or UP's rights under
4 the various prior agreement with the government. Additionally, LRC agreed not to
5 enter into any agreements or arrangements or make any representations on behalf
6 of the Port.
7

8
9
10 19. LRC was soon thereafter absorbed by Talgo, Inc., and the agreement
11 between the Port and LRC was assigned to TCRY.
12

13 TCRY OPERATIONS NEAR RICHLAND

14 20. In 2002, TCRY entered into a new maintenance and operation
15 contract ("Lease") with the Port. Pursuant to that agreement TCRY conducts rail
16 operations on behalf of the Port and maintains the Richland Trackage for the Port.
17

18 21. The Lease does not grant TCRY exclusive trackage or operating rights
19 over the Richland Trackage. Rather, § 7.4 of the Lease provides that TCRY "shall
20 not take any actions which will amend, modify, terminate or invalidate any
21 existing contracts which the Port has with any other railroad carrier, without the
22 Port's written consent."
23

24
25 22. On May 8, 2000, BNSF and Tri-City entered into an Interchange
26 Agreement to allow for the interchange of traffic between TCRY and BNSF at the
27
28

1 Richland Junction. Pursuant to that contract TCRY moves traffic over the
2 Richland Trackage on BNSF's behalf and interchanges cars with BNSF at the
3 Richland Junction.
4

5 23. Before entering into the interchange arrangement with TCRY, BNSF
6 exercised the right to operate over the Richland Trackage granted by the 1947 and
7 1961 Agreements. In 2000, however, BNSF determined that hiring TCRY to
8 service BNSF customers along the Richland Trackage and to interchange those
9 cars with BNSF at Richland Junction would facilitate operations.
10
11

12 24. BNSF, however, never waived or surrendered the right to operate over
13 the Richland Trackage. The Interchange Agreement therefore recognizes that,
14 "This designation [of the interchange tracks] does not limit BNSF's usage of
15 trackage as provided under separate agreements dated November 6, 1947, and
16 January 24, 1961, as supplemented and modified."
17
18

19 25. From 2000 to July 19, 2009, TCRY moved BNSF customer cars over
20 the Richland Trackage to the Richland Junction for interchange with BNSF. To
21 compensate TCRY for these services BNSF paid a per car switch charge pursuant
22 to TCRY's switching tariff.
23
24

25 26. TCRY switching charges and fees were absorbed into BNSF's line
26 haul rates; customers contract with and pay BNSF for transportation services
27
28

1 charged for cars interchanged between BNSF and TCRY at Richland Junction.
2 Until this month, TCRY never appeared in the rate or route of any BNSF customer
3 car originating or terminating along the Richland Trackage. Instead, TCRY moved
4 and interchanged cars on behalf of BNSF.
5

6 7 BNSF'S RICHLAND BUSINESS

8 27. BNSF customers located along the Richland Trackage ship and
9 receive raw materials, fuel, manufactured products and agricultural goods, among
10 other things. Regular and reliable rail service is essential to BNSF's customers on
11 the Richland Trackage: many of the goods shipped via rail are perishable;
12 production plants rely upon delivery of raw materials to operate and outgoing
13 shipments of finished goods to clear inventory space; and livestock operations
14 require a regular supply of animal feed.
15
16

17
18 28. BNSF transports over 3,000 cars per year to or from customers along
19 the Richland Trackage, accounting for tens of millions of dollars in revenue.
20 BNSF's relationship with customers on the Richland Trackage is based upon the
21 efficient, timely and dependable movement of traffic originating and terminating
22 with those shippers. BNSF's inability to provide such service would irreparably
23 damage customer confidence in and reliance upon BNSF.
24
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1 29. Federal law requires BNSF to provide transportation services on its
2 network upon reasonable shipper request. 49 U.S.C. § 11101. Hence BNSF's
3 customer relationships are not only business driven, the obligation to provide
4 transportation services is statutorily mandated.
5

6
7 30. UP also serves customers along the Richland Trackage through a
8 similar interchange arrangement with TCRY. UP competes with BNSF throughout
9 the region and across the country.
10

11 **RICHLAND REQUESTS THAT THE INTERCHANGE POINT BE MOVED**
12

13 31. Recently, the City of Richland asked BNSF to consider relocating the
14 BNSF-TCRY interchange from Richland to Kennewick. The city had received
15 numerous complaints from the neighborhood about the noise from switching
16 operations that disturbed residents.
17

18 32. While evaluating the city's request, BNSF examined the cost
19 structure, service capabilities and operating plans for the Richland area. This study
20 provided compelling economic and operational support for BNSF to initiate
21 service on the Richland Trackage, thereby serving customers directly and
22 eliminating the need for an interchange with TCRY.
23
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1 TCRY BEGINS TO BILL BNSF CUSTOMERS DIRECTLY

2 33. In the summer of 2009, BNSF modified the billing arrangement to
3
4 employ monthly payment and “net settling” accounting – BNSF’s standard
5 payment terms with other short line railroads – rather than the semi-monthly cycle
6 previously employed between the parties. Under the new monthly payment terms,
7
8 BNSF continued to pay all switching fees owed to TCRY.

9 34. TCRY objected to the changes in financial procedures.
10

11 35. On July 6, 2009, in response to BNSF’s refusal to revert to semi-
12
13 monthly remissions, TCRY announced that, effective immediately, BNSF
14 customers would be directly billed for all switching and rail service fees provided
15
16 by TCRY.

17 36. In mid-July, TCRY informed BNSF customers that, effective July 1,
18
19 2009 (weeks prior to the circulation of the letter), TCRY would bill customers
20
21 directly for rail service and would require payment in advance unless the customer
22 had established approved credit.

23 37. The rates BNSF charges customers on the Richland Trackage already
24
25 include the amounts paid to TCRY for the movement of cars to the interchange
26
27 track. BNSF is unable to alter these rates without complying with regulatory and
28
statutory requirements and providing at least 20 days notice to customers (49

1 U.S.C. § 11101), all of which takes a significant amount of time. Because BNSF
2 has not yet been able to change the rates charged to customers and because TCRY
3 backdated the effective date of customer direct billing, the invoices TCRY sent to
4 BNSF customers constituted double-billing for the transportation and interchange
5 services provided by TCRY.
6

7
8 38. On July 15, 2009, a representative from ConAgra Foods emailed to
9 BNSF and TCRY complaining about the unannounced change in the billing and
10 the rate structure: "THIS IS TOTALLY UNACCEPTABLE ON THE PART OF
11 BOTH TCRY AND ESPECIALLY BNSF. TCRY DID NOT NOTIFY
12 SHIPPERS PRIOR TO THIS ACTION. BNSF DID NOT NOTIFY SHIPPERS.
13 This is contrary to BNSF claims about rate applicability of its BNSFQ 122622
14 which is to be effective through 2/28/10. I need prompt responses as to the
15 applicability. As the largest shipper on TCRY this action WITHOUT
16 COMMUNICATION is beyond belief." (emphasis in original).
17
18
19
20

21 39. TCRY has denied service and refused delivery to BNSF customers
22 along the Richland Trackage who have not yielded to TCRY's retroactively
23 imposed payment terms.
24

25 40. TCRY's attempts to direct bill BNSF customers has created serious
26 conflict between BNSF and its customers, to the irreparable detriment of BNSF
27
28

1 customer goodwill. Being charged twice for the same service and being denied
2 service for refusing to agree to onerous and unreasonable payment terms will
3 inevitably cause customers to cease doing business with BNSF.
4

5
6 BNSF RESUMES DIRECT SERVICE TO RICHLAND

7 41. TCRY's interference with BNSF's customer relationships prompted
8 BNSF to accelerate the evaluation of the interchange relationship with TCRY.
9

10 42. On July 15, 2009, BNSF wrote TCRY announcing that, pursuant to
11 rights originally granted in the 1947 Agreement, BNSF would begin direct service
12 to rail customers along the Richland Trackage on July 20, 2009. BNSF offered to
13 meet with TCRY to coordinate dispatching and operating protocol and to discuss
14 BNSF's participation in shared track maintenance.
15
16

17 43. On July 16, 2009, BNSF informed customers that BNSF would
18 resume direct service over the Richland Trackage on July 20, 2009, eliminating the
19 need to interchange with TCRY.
20
21

22 44. On July 16, 2009, Mark Schmidt of BNSF spoke with Randolph
23 Peterson, TCRY's owner, regarding BNSF's resumption of direct service on the
24 Richland Trackage. Peterson threatened to prevent any BNSF operations over the
25 line and dissembled that "track maintenance" would be performed on the line
26
27
28

1 beginning July 20, 2009, precluding BNSF from entering the track to serve
2 customers.
3

4 45. On July 16, 2009, Jan Ruby of BNSF called Peterson to discuss
5 scheduling and dispatching on the Richland Trackage. Peterson reiterated that
6 TCRY would block BNSF's access by placing a "track maintenance" red flag at
7 the entrance to the Richland Trackage.
8
9

10 46. Apparently, TCRY does not intend to prevent its own trains from
11 operating or stop cars from being interchanged with UP.
12

13 TCRY ILLEGALLY BLOCKS ACCESS TO THE RICHLAND TRACKAGE
14

15 47. On July 20, 2009, a BNSF locomotive attempted to enter the Richland
16 Trackage to provide service to BNSF customers.
17

18 48. TCRY prevented BNSF from gaining access to the Richland
19 Trackage.
20

21 49. TCRY trains and locomotives continue to operate on the Richland
22 Trackage.
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1 54. A genuine controversy has therefore arisen between the parties
2 concerning their respective rights to operate over the Richland Trackage.
3

4 55. A declaratory judgment is both necessary and proper in order to
5 determine the operating rights that exist among the parties regarding the Richland
6 Trackage.
7

8
9 56. The wrongful self help denial of BNSF's right to operate over the
10 Richland Trackage is causing irreparable harm and effecting an illegal adverse rail
11 service abandonment.
12

13 COUNT II: TORTIOUS INTERFERENCE WITH CONTRACT
14

15 57. BNSF has contractual relationships with Richland Trackage
16 customers to which BNSF delivers cars and for which BNSF transports.
17

18 58. TCRY knows about the contractual relationships between BNSF and
19 its customers. In fact TCRY provided rail and switching services to these
20 customers on behalf of BNSF and in BNSF's account until July 19, 2009.
21

22 59. Pursuant to the 1947 and 1961 Agreements, BNSF is entitled to
23 operate over the Richland Trackage. Pursuant to the 1948 ICC Order BNSF is
24 authorized and obligated to provide rail service on the Richland Trackage. The
25 Port has not notified BNSF of any contractual breach and the STB has not
26 condoned any service abandonment.
27
28

1 60. By physically blocking access, TCRY has caused BNSF to be unable
2 to perform on Richland Trackage customer transportation contracts.
3

4 61. TCRY has no basis in the law or in the terms of any contract to
5 prevent BNSF from exercising the contractual right and statutory duty to operate
6 over the Richland Trackage.
7

8
9 62. BNSF has suffered and continues to suffer significant and irreparable
10 damages, including: compensating customers whose shipments have been delayed;
11 providing alternative shipping options to and from Richland area; having current
12 business diverted; and losing customer goodwill and confidence.
13

14
15 COUNT III: TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY

16 63. BNSF has a business expectancy of entering into contracts and
17 arrangements to provide transportation services to current and prospective
18 customers along the Richland Trackage.
19

20 64. TCRY knows that BNSF advertises the Richland Trackage to be part
21 of the route system served by BNSF. TCRY provided rail and switching services
22 to these customers on behalf of BNSF and in BNSF's account until July 19, 2009.
23

24
25 65. Pursuant to the 1947 and 1961 Agreements, BNSF is entitled to
26 operate over the Richland Trackage. Pursuant to the 1948 ICC Order, BNSF is
27 authorized and obligated to provide service on the Richland Trackage.
28

1 66. By physically blocking access to the Richland Trackage, TCRY has
2 hindered and disabled BNSF's ability to serve customers and fulfill business
3 expectations.
4

5 67. TCRY has no basis in the law or in the terms of any contract or statute
6 to prevent BNSF from exercising its contractual right and statutory obligation to
7 operate over the Richland Trackage.
8
9

10 68. TCRY's improper denial of access to the Richland Trackage has
11 impeded BNSF's ability to enter into new shipping contracts with Richland area
12 businesses.
13

14 69. This interference inflicts irreparable harm because BNSF can never
15 know the exact business that was lost or the extent of customer goodwill harm.
16
17

18 COUNT IV: EFFECTUATED UNLAWFUL DISCONTINUANCE OF RAIL
19 TRANSPORTATION

20 70. Class I railroads like BNSF can discontinue operations over a portion
21 of its railroad network only after receiving authorization from the Surface
22 Transportation Board ("STB"). 49 U.S.C. § 10903.
23

24 71. The STB has not authorized BNSF to discontinue operations over the
25 Richland Trackage.
26
27
28

1 72. By blocking access to the Richland Trackage, TCRY has effected an
2 adverse abandonment of BNSF service to the rail line, causing BNSF to violate its
3 statutory obligations and causing its shippers to suffer.
4

5 73. The adverse abandonment effected by TCRY's blockade has caused
6 irreparable harm to BNSF and BNSF's customers.
7

8 WHEREFORE, BNSF requests the following relief:
9

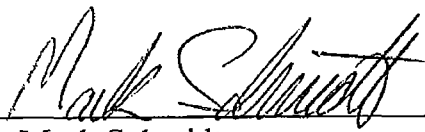
10 A. A declaration (1) that BNSF has operating rights over the Richland
11 Trackage pursuant to the 1947 and 1961 Agreements, as supplemented and
12 modified, and (2) that TCRY's blockade of access to the Richland Trackage
13 contravenes federal law and BNSF's contractual rights;
14

15 B. A temporary restraining order, preliminary injunction and permanent
16 injunction requiring TCRY to afford BNSF access to the Richland Trackage
17 without interference and to coordinate train scheduling and dispatching with
18 BNSF;
19

20 C. Damages in an amount to be determined at trial; and
21

22 D. Reasonable fees and costs as authorized by law.
23
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1 Dated this 20th day of July, 2009.

2
3 By: 
4 Mark Schmidt
5 Assistant Vice President of Shortline
6 Development
7 BNSF Railway Company
8
9

10 PAINE HAMBLER LLP

11
12 By: 
13 Gregory C. Hesler, WSBA #34217
14

15 *In association with*

16 Timothy R. Thornton, *pro hac vice pending*
17 Matthew R. Brodin, *pro hac vice pending*
18 Briggs and Morgan
19 2200 IDS Center
20 80 South Eighth Street
21 Minneapolis, Minnesota 55402
22 Tel: (612) 977-8400
23 pvolk@briggs.com
24 mbrodin@briggs.com

25 Attorneys for BNSF Railway Company
26
27
28

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 20th day of July, 2009, I electronically filed the
3 foregoing **VERIFIED COMPLAINT**, with the Clerk of the Court using the
4 CM/ECF System which will send notification of such filing to the following:

5 Gregory C. Hesler greg.hesler@painehamblen.com
6 marsha.ungricht@painehamblen.com

7 and I hereby certify that I have mailed by United States Postal Service the
8 document to the following non CM/ECF participants:

9 Matthew R. Brodin – *pro hac vice pending*
10 Briggs and Morgan, P.A.
11 2200 IDS Center
12 80 South Eighth Street
Minneapolis, Minnesota 55402

13 Timothy R. Thornton - *pro hac vice pending*
14 Briggs and Morgan, P.A.
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16 80 South Eighth Street
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17 /s/Gregory C. Hesler
18 Gregory C. Hesler, WSBA No. 34217
19 Attorney for Plaintiff
20 Paine Hamblen LLP
21 717 West Sprague Avenue, Suite 1200
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Facsimile: 509-838-0007
23 greg.hesler@painehamblen.com

24 I:\Spodocs\91111\00243\plead\00722303.DOC

APPENDIX 37

Contract No. AT-45-1-Gen-21

ATOMIC ENERGY COMMISSION

CONTRACT FOR RAILROAD SERVICE

THIS CONTRACT, entered into this 6th day of November, 1947, by and between the UNITED STATES OF AMERICA (hereinafter called the "Government"), acting by and through the UNITED STATES ATOMIC ENERGY COMMISSION, created by Public Law 535, 79th Congress, approved August 15, 1946, (hereinafter called the "Commission"), NORTHERN PACIFIC RAILWAY COMPANY, a Wisconsin corporation, (hereinafter called "Pacific Company"), and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, an Oregon corporation, and its Lessee, UNION PACIFIC RAILROAD COMPANY, a Utah corporation, (hereinafter collectively called the "Union Company"). Said railroad companies are also hereinafter collectively referred to as "Railroads".

WITNESSETH THAT:

RSM
QFA
Z
WHEREAS, for the purposes hereinafter stated, there has been prepared a map marked Exhibit "A" dated August 25, 1947, attached hereto and made a part hereof, on which are shown in various colors certain existing and proposed lines of railway in Benton County, Washington, extending in a general northwesterly direction from Kennewick, Washington; and

WHEREAS, the Government has constructed on its property a line of railway, a portion of which is shown in green on said exhibit, extending from Hanford, Washington, southerly to a point near the north bank of the Yakima River; and

WHEREAS, the Government desires to have a direct rail connection to the south so as to interchange business with the Pacific Company and with the Union Company at an interchange facility to be constructed near the vicinity of point E on said exhibit, and in order to accomplish this purpose it is proposed:

(1) That the Commission construct the proposed line of railway shown in yellow on said exhibit between approximately point B on the north right of way line of the Union Company and point D, and also construct said interchange facilities.

The Commission proposes to authorize its prime contractor, the General Electric Company, a New York corporation (hereinafter called the "Electric Company"), to construct and maintain said line and facilities under the terms of contract numbered W-31-109-eng-52, dated May 15, 1946, between the Government and said Electric Company (hereinafter called "Prime Contract");

(2) That the Pacific Company obtain the right to operate with its employees and equipment over the existing track of the Union Company shown in red on said exhibit between point A, which is the point of connection with the line of railway of the Pacific Company, and point B, which is the point of connection with the Government trackage;

(3) That the Pacific Company and Union Company be granted the right to operate with their respective employees and equipment over said track shown on said exhibit between points B and E and to and in said interchange facilities;

NOW, THEREFORE, the parties do mutually agree as follows:

ARTICLE I.

The Commission shall procure or provide all necessary rights of way and public authority for the construction, maintenance and operation of said interchange facilities and said line of railway and appurtenances (including bridge across the Yakima River) between points B and E.

ARTICLE II.

The Commission shall forthwith locate, lay down and construct said line of railway (including said bridge) in approximately the location shown in yellow on said exhibit between points B and D. The Commission shall also forthwith construct or provide said interchange facilities and a wye in the vicinity of point E. Said line of railway, bridge, interchange facilities and wye shall be constructed in a manner suitable for the operations of the Pacific Company and the Union Company with their respective equipment.

ARTICLE III.

The Commission shall pay for all cost of right of way for and construction of said line of railway B-D, including said bridge, and for the cost of said interchange facilities and wye.

ARTICLE IV.

The Pacific Company and Union Company agree, upon the completion of the line B-D and the interchange facilities and wye, each to pay one-half of the sum of \$100,000, which sum fairly represents the cost to which the Railroads would be subjected if they constructed interchange trackage at point B. Unless otherwise directed by the Commission, said sums shall be paid to the Electric Company as prime contractor of the Commission, or to such other contractor as the Commission may designate, for application in reduction of cost of work under the terms of said prime contract or other contract.. The Commission shall own said interchange facilities and wye but the Pacific Company and the Union Company shall be entitled during the term of this agreement to use the same and the connecting trackage C-E for the purpose of interchanging business with the Government free of rental or any other charge.

ARTICLE V.

The Commission hereby grants the Pacific Company and Union Company the equal joint right to operate with their respective employees and equipment over said line of railway shown on said exhibit between points B and E, and to use said interchange facilities and wye for the purpose of interchanging business with the Government. The Commission agrees that the Pacific Company and the Union Company shall each have equal rights and privileges in the transaction of their business and any right or privilege at any time granted by the Commission to one of said companies in respect to its operations shall be a right or privilege which the other company may at its option exercise in respect to its operations.

ARTICLE VI.

The Union Company agrees, by contract of even date herewith, in form and substance mutually satisfactory to the Union Company and the Pacific Company to grant to the Pacific Company the equal joint use and possession in common with the Union Company of said line of railway shown in red on said exhibit between points A and B. Such use by the Pacific Company shall be restricted to movements of its business in each direction between Kennewick and the connection with the Government trackage at point B.

ARTICLE VII.

The Pacific Company and Union Company each for itself agrees to deliver and receive at said interchange facilities all business which either is obligated to transport as a common carrier by railroad.

The Union Company and Pacific Company may from time to time by mutual agreement between them arrange for one of them to operate a joint train between points A and E in which will be moved the business of both railroads. The railroad operating such joint train shall be considered as the agent of the other company in such operation.

ARTICLE VIII.

The Commission will have the general control, management and administration of said railway between points B and E, said interchange facilities and wye, and will at all times keep the same in good condition and repair and suitable for the business of the Pacific Company and Union Company, provided if damage results to said Government trackage by reason of the negligent act or omission of the Railroads, or either of them, the one at fault will reimburse the Commission for such damage. The Railroads shall not by reason of any defect in the trackage or by reason of the failure or neglect to repair such defect, make against the Government, its employees, agents, or contractors any claim or demand for loss, damage or injury arising from such defect, neglect or failure, but should the Commission fail to repair any defect within a reasonable time after being notified so to do by the Railroads or either of them, then such Railroads or either of them may make the necessary repairs at once, the cost of which will be paid by the Commission.

ARTICLE IX

Subject to the approval of the Commission, the Pacific Company and the Union Company shall agree from time to time upon rules and regulations covering the movement of engines, cars and trains over the line B-E, and on said interchange facilities and wye. All rules, regulations and train schedules shall be equal, just and fair as between the Pacific Company and the Union Company and shall not unjustly discriminate against either.

ARTICLE X.

The Pacific Company and Union Company, each for itself, agrees to make the following payments as rental for the right to use the trackage B-C until such time as the total of such payments made by both equals the initial actual cost to the Commission of constructing said line of railway between points B-C:

(1) The Pacific Company shall pay the sum of \$4.00 for each loaded car moved in either direction over said line B-C, provided such car has received or will receive a line haul over the lines of railway of the Pacific Company. Movements from or to Pasco shall not be deemed line haul movements, provided, however, that line haul movements to and from points beyond Pasco shall not lose character as such by reason of stoppage in transit at Pasco.

(2) The Union Company shall pay the sum of \$4.00 for each loaded car moved in either direction over said line B-C, provided such car has received or will receive a line haul over the lines of railway of the Union Company. Movements from or to Kennewick shall not be deemed line haul movements, provided, however, that line haul movements to and from points beyond Kennewick shall not lose character as such by reason of stoppage in transit at Kennewick.

Unless otherwise directed by the Commission, the payments provided for in paragraphs numbered (1) and (2) of this Article shall be paid to the Electric Company as prime contractor of the Commission, or to such other contractor as the Commission may designate, for application in reduction of cost of work under the terms of said prime contract or other contract. The Pacific Company and Union Company shall make such payments on or before the 25th day of each month for all such cars so moved in the preceding month.

Upon completion of the trackage B-C the Commission shall furnish to each of the other parties a detailed statement showing the actual cost of construction of this trackage, including the right of way and bridge.

The payments to be made by the Pacific Company and Union Company as provided in this Article shall be in lieu of all other charges for the use by them or either of them, during the term of this agreement, of said line B-C.

After such rental payments made by the Railroads shall equal the initial actual cost to the Commission of constructing said line of railway between points B-C, the railroads shall continue to have the right during the term of this agree-

ment to operate over the trackage without further rental payments.

ARTICLE XI.

The Commission shall from time to time designate tracks within the interchange facilities for the purpose of interchanging cars hereunder.

All cars and contents placed on the interchange tracks shall be deemed to be in the possession of the Commission and to continue in the possession of the Commission until the Railroads shall move said cars from said interchange tracks.

The Commission shall pay to the Railroads demurrage accruing on all cars interchanged with it by the Railroads while such cars are in the possession of the Commission, but such demurrage charges shall not be made after the Commission has notified the Railroads that such cars are available for the use of the Railroads and may be removed from such interchange tracks. The Commission shall pay demurrage charges in accordance with the terms and provisions of the Association of American Railroads Freight Tariff 4-Y, I.C.C. 3963, B. T. Jones, Agent, or supplements thereto and reissues thereof.

The Commission shall be responsible for loss of or damage to cars and equipment of the Railroads and cars and equipment owned by others for which the Railroads are responsible while such cars and equipment are in the possession of the Commission, ordinary wear and tear excepted.

As engines and crews of two or more of the parties hereto will be using at the same time trackage B-E, including the interchange facilities and wye, it is agreed that each party will assume any liability for injury to or death of any person or persons, or loss of or damage to any property caused by its sole negligence; and if such injury, death, loss or damage results from the concurring negligence of two or more of the parties hereto, the responsibility therefor shall be assumed equally by the parties at fault. If such liability results from defects of equipment of any party, or concurring of two or more parties, the cost resulting shall be divided on the same basis as loss or damage resulting from negligence of such party or parties.

ARTICLE XII.

The parties hereto, with respect to the operation of equipment and appliances on and over said Government trackage shall comply with all applicable laws and all applicable rules, regulations and orders promulgated by any Board, Commission or other public body having jurisdiction, for the protection of persons or otherwise.

ARTICLE XIII.

No members of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XIV.

The Railroads warrant that they have not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Railroads for the purpose of securing business.

ARTICLE XV.

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Railroads will immediately give notice thereof to the Commission. Such notice shall include all relevant information with respect to such dispute.

The Commission may terminate this agreement at any time upon six months advance notice thereof in writing being given by the Commission to the Railroads.

The financial liabilities assumed hereunder by the Commission shall be conditional upon the availability of funds for payment of any claims which may arise.

ARTICLE XVI.

The Railroads, in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

The Railroads agree that the provision of above paragraph will also be inserted in all of their subcontracts. For the purpose of this Article, a subcontract is defined as any contract entered into by the Railroads with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw materials shall not be considered as a subcontract.

ARTICLE XVII.

(1) It is understood that disclosure of information relating to the work contracted for hereunder to any person not entitled to receive it, or failure to safeguard all secret, confidential and restricted matter that may come to the Railroads or any person under their control in connection with the work under this contract, may subject the Railroads, their agents, employees and subcontractors to criminal liability under the laws of the United States. See Sections 10 and 16 of the Atomic Energy Act of 1946 (Public Law 585 - 79th Congress). See also Title I of an Act approved June 15, 1917, (40 Stat. 217; 50 U.S.C. 31-42) as amended by an Act approved March 28, 1940 (54 Stat., Chap. 79); and the provisions of an Act approved January 12, 1933, (52 Stat. 3; 50 U.S.C., 45-45d), as supplemented by Executive Order No. 6381, dated March 22, 1940, 5 F.R. 1147; see also, generally, the Atomic Energy Act of 1946, (Public Law 585 - 79th Congress).

(2) The Railroads agree to conform to all security regulations and requirements of the Atomic Energy Commission. Except as the Commission may authorize, in accordance with Section 10 (b)(5)(B) of the Atomic Energy Act of 1946, the Railroads agree not to permit any individual to have access to restricted data until the Federal Bureau of Investigation shall have made an investigation and report to

the Commission on the character, associations, and loyalty of such individual and the Commission shall have determined that permitting such person to have access to restricted data will not endanger the common defense or security. The term "restricted data" as used in this paragraph means all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security. The Railroads shall insert in all subcontracts under this contract provisions similar to the text of Sections (1) and (2) of this Article.

ARTICLE XVIII.

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise hereunder, and which are not disposed of by mutual agreement, shall be decided by a representative of the Commission duly authorized to supervise and administer performance of the work hereunder, who shall reduce his decision to writing and mail a copy thereof to the Railroads. Within thirty (30) days from this mailing, the Railroads may appeal in writing to the Commission, whose written decision thereon shall be final and conclusive. Pending decision of a dispute hereunder, the Railroads shall diligently proceed with performance under this contract. To the extent that disputes involve questions which are subject to determination by the Interstate Commerce Commission, National Railroad Adjustment Board, or other regulatory body having jurisdiction over such questions, this Article shall not apply; nor shall this Article apply to disputes between the Railroads which do not involve the Commission.

ARTICLE XIX.

As used in this contract, the term "Commission" shall mean the United States Atomic Energy Commission, created by Public Law 585, 79th Congress, approved August 1, 1946, or the duly authorized representative or representatives of said Commission.

ARTICLE XX.

This agreement is conditioned upon the approval, if required, by the Interstate Commerce Commission of the arrangement herein contemplated whereby the Railroads will operate over trackage B-E, including the interchange facilities and wye, and whereby the Pacific Company will take use in common with the Union Company of said line of railway shown in red on Exhibit "A" between points A and B.

IN WITNESS WHEREOF, the parties have executed this contract as of the day and year first above written.

WITNESSES:

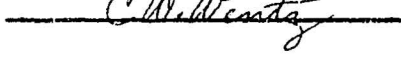
UNITED STATES ATOMIC ENERGY COMMISSION


J. L. DICKSON


J. E. TRAVIS

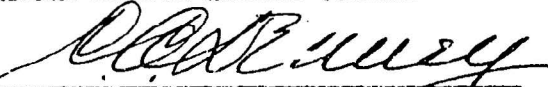

H. G. SACKETT


F. W. G. [unclear]


C. W. WEST

By 
C. SHUGG

MANAGER, HANFORD DIRECTED OPERATIONS
NORTHERN PACIFIC RAILWAY COMPANY

By 
C. W. MURRAY
President

OREGON-WASHINGTON RAILROAD & NAVIGATION
COMPANY

UNION PACIFIC RAILROAD COMPANY

By 
[unclear]
PRESIDENT

