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BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
October 28, 2020
Part of
Public Record

Re: *Port of Benton, WA – Petition for Declaratory Order*, STB Docket No. 36426

Dear Ms. Brown:

The Port of Benton, WA respectfully submits the enclosed Reply to the Tri-City Railroad Company, LLC Motion to Dismiss in the above referenced docket. If you have any questions, please let me know.

Respectfully,



Justin J. Marks

Counsel for the Port of Benton

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36426

PORT OF BENTON, WA –
PETITION FOR DECLARATORY ORDER

REPLY TO
TRI-CITY RAILROAD COMPANY, LLC MOTION TO DISMISS

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Dated: October 28, 2020

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36426

PORT OF BENTON, WA –
PETITION FOR DECLARATORY ORDER

REPLY TO
TRI-CITY RAILROAD COMPANY, LLC MOTION TO DISMISS

The Port of Benton, WA (the “Port”) hereby respectfully submits this Reply to the Tri-City Railroad Company, LLC (“TCRY”) Motion to Dismiss (the “Motion”) as permitted pursuant to 49 C.F.R. §1104.13. On August 14, 2020 the Port petitioned the Board for a declaratory order (the “Petition”) to address disputes and resolve controversies that have arisen between shippers/customers located on the Port-owned rail line (the “Line”) and, the Port’s lessee / operator regarding the applicability and reasonableness of certain tariff supplements issued by TCRY. TCRY’s Motion fails to explain how the tariff questions raised in the Port’s Petition are outside of the Board’s jurisdiction and fails to address the questions posed by the Port to the Board. Further, in its Motion, TCRY makes various unverified and unsupported (and incorrect) factual assertions, and the Board should not give these assertions any evidentiary weight. As such, the Board should reject the TCRY Motion and open a proceeding according to the Port’s proposed procedural schedule to address the Port’s questions regarding the disputed TCRY tariffs.

BACKGROUND

1. The Port's Requested Declaratory Order

The Port and TCRY are parties to a Lease of the Port-owned Line.¹ Pursuant to the Lease, TCRY provides rail service to certain shippers located along the Line and is responsible for maintaining the Line. BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”) each have trackage rights to provide rail service to shippers located along the Line. BNSF and UP have no obligation under their respective trackage rights to pay for maintenance costs on the Line.²

Under the Lease, TCRY is required to obtain the Port's approval for the imposition of tariffs.³ Further, the Lease requires the Port to act as an initial arbiter of disputes between shippers and TCRY over any tariffs issued by TCRY.⁴ If the Port is unable to resolve a complaint that concerns a matter within the jurisdiction of the Board, the Lease provides that the Port will refer the matter to the Board.

TCRY has proposed two supplemental tariffs each of which seeks to assess a per car charge for track maintenance on all cars moved over the Line. TCRY is not limiting these tariffs to customers that it serves, but also seeks to assess the tariffs on customers of BNSF and UP.

The Port filed its Petition to request that the Board resolve the following disputed matters, all of which the Port believes are subject to the jurisdiction of the Board:

¹ See, Petition at Appendix A. As noted in the Petition at 2-3, the Board granted the Port's application for adverse discontinuance and allowed the Port to pursue its state court remedies to terminate the Lease and evict TCRY from the Line; however, until that time, TCRY continues to operate under the Lease.

² See, Petition at 1-2.

³ *Id.* at 3-4.

⁴ *Id.* at 4-7.

- (a) Does a rail carrier such as TCRY have authority to assess the charges set forth in the Supplement 1 against entities that are not rail customers of or shippers served by TCRY?
- (b) Does a rail carrier such as TCRY have authority to assess the charges set forth in the proposed Supplement 5 against “Local Rail Users” that are not rail customers of or shippers served by TCRY?
- (c) Is TCRY required under 49 CFR Part 1300 to provide copies of its tariffs to any entity it asserts is responsible for the charges, at least 20 days in advance of assessing such charges? Does an invoice assessing charges under a tariff provide sufficient notice of the proposed tariff charges under 49 CFR Part 1300?

2. The TCRY Motion to Dismiss

On October 8, 2020, TCRY filed a Motion to Dismiss in-lieu of a reply to the Port’s Petition. In its Motion, TCRY asserts that the Port’s Petition is an attempt to “have the Board determine TCRY’s contractual rights” under the Lease.⁵

The TCRY Motion also makes numerous factual assertions that are both unverified and unsupported by TCRY’s cited exhibits. The Board should accord these assertions no evidentiary weight, should deny the Motion to Dismiss, and should open a proceeding to consider the questions put forth by the Port as requested in the Petition.

⁵ TCRY Motion at 10.

ARGUMENT

1. The Board has Jurisdiction to Consider the Port's Tariff Questions Because the Port is Not Asking the Board to Interpret the Lease, but Instead Seeks the Board's Consideration of the Port's Questions on the Applicability of the Proposed Tariffs under the Board's Regulations.

The Board has jurisdiction over transportation by rail carrier, including exclusive jurisdiction over “rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities.” 49 U.S.C. §10501(a) and (b)(1). “Under 49 U.S.C. §10702(2), a rail carrier must establish reasonable rules and practices for the transportation and service it provides.” *N. America Freight Car Assoc. v. Union Pac. R.R. Co.*, Docket No. NOR 42119, slip op. at 5 (served Mar. 12, 2015). Under 49 U.S.C. §11101(c) and the Board’s regulations at 49 C.F.R. §1300.4, a rail carrier may not increase any rates or charges, or change any service terms...unless 20 days have expired after written or electronic notice has been provided.”

TCRY is a railroad subject to STB jurisdiction.⁶ As such, TCRY has the right to issue tariffs with respect to transportation and service that it provides. In this instance, TCRY seeks to issue tariffs – Supplement 1 and Supplement 5 – which would assess charges on “track users” which would include both customers served by TCRY, and other parties for whom TCRY does not provide transportation or service (customers that are served by BNSF or UP) and who do not have any privity or direct commercial connection for transportation services with TCRY.⁷ The Port has received complaints from the shippers on the Port owned Line that are not TCRY customers.⁸ Under the Lease, the Port is required to attempt to resolve complaints between

⁶ *Port of Benton County, Wash. – Adverse Discontinuance of Rail Service – Tri-City Railroad Company, LLC*, AB 1270 (served Oct. 31, 2019).

⁷ Petition at 4-8.

⁸ Petition at 5, 8.

TCRY and shippers on the Port owned Line.⁹ However, the Port is permitted under the Lease to seek guidance from the Board if the dispute involves an issue under the Board's jurisdiction.

TCRY asserts that the Port's Petition is an attempt to "have the Board determine TCRY's contractual rights" under the Lease.¹⁰ However, the Petition does not ask the Board to interpret the Lease. The Port is asking for guidance on the application of the Board's tariff regulations, and of the requirements of 49 U.S.C. §10702. These are threshold questions within the Board's jurisdiction that are outside of any questions of contract interpretation. The Board does not have to interpret the Lease to resolve the questions posed by the Port. Further, the Board does not have to interpret private contracts between TCRY and the complaining shippers because TCRY has no commercial relationship with any of these shippers.

In addition, it is clear that there is a controversy between TCRY and shippers located on the Line who are not served by TCRY. The TCRY Motion acknowledges as much in citing the responses that it received from CWCP and from Henningsen Cold Storage.¹¹

Although TCRY suggests that the Port has the authority to tell entities located along the Line to pay TCRY's tariffs,¹² the Port clearly does not have that authority which cannot be created by private parties. Rather, it is within the Board's jurisdiction over transportation by rail carriers, and their rates, practices and service, under 49 U.S.C. §10501(a) and (b)(1) to review tariffs for a determination of whether a rail carrier can assess a tariff against an entity that is not served by the rail carrier and which has no commercial relationship for transportation services with the rail carrier. When asked to provide the legal basis for assessing tariff charges against entities that TCRY does not serve, TCRY only responded by asking for legal authority that it

⁹ Petition at 3-4.

¹⁰ TCRY Motion at 10.

¹¹ TCRY Motion at 8.

¹² TCRY Motion at 12.

cannot.¹³ The Port believes it is within the Board's jurisdiction to resolve this dispute and provide guidance on the permitted scope of the tariffs.

Further, if the tariff is permissible, then under 49 U.S.C. §11101(c) and the Board's regulations at 49 C.F.R. §1300.4, the Board clearly has jurisdiction to determine what notice must be provided by a rail carrier to potentially responsible parties, and whether TCRY has provided such notice.

The Port understands that the Board leaves for the courts to enforce and interpret contracts.¹⁴ However, the issues here are not contractual, but rather disputes over tariff requirements which are clearly within the Board's jurisdiction. Accordingly, the Board should reject the TCRY Motion and institute a proceeding to consider the Port's Petition and the questions raised therein.

2. The Board Should Not Give Any Evidentiary Weight to the TCRY Motion to Dismiss Because It is Riddled with Unsupported, Unverified, and Irrelevant Assertions.

As is its wont, TCRY's Motion contains a long and tortured (one-sided) history of the Port's ownership of the Line, of the Lease, of TCRY's disputes with the Port regarding the TCRY obligation to maintain the Line and the termination of the Lease, and TCRY's unsuccessful attempts to assess maintenance charges against BNSF, UP and the Port. The TCRY Motion, and the factual assertions contained therein, are not verified. For some of these assertions, TCRY attempts to grant them a veneer of support by citing to appendices. However, these citations rarely support the TCRY statements. Moreover, these facts are not relevant to the central argument in TCRY's Motion that the Board does not have jurisdiction over the questions raised in the Port's Petition.¹⁵

¹³ TCRY Motion at 10.

¹⁴ See *TCRY Discontinuance Decision*, slip op. at 5.

¹⁵ Likewise, these facts are not responsive to the questions themselves were the Board to institute

In the interest of developing a complete record, the Port submits the following response to the more egregious TCRY assertions.

a. TCRY Unsupported and Unverified Assertions Related to the History of the Line.

TCRY states:

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.

TCRY Motion at 2 (citing to the 1947 agreement). Contrary to the TCRY statement, the Washington Supreme Court has stated that BNSF and UP have rent free access to the entirety of the line and not a portion of the Line. *Peterson v. State*, 460 P.3d 1080, 1082 (Wash. 2020)(attached as Exhibit A).

TCRY states:

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.

TCRY Motion at 2. TCRY's unverified and unsupported statement is false. No support is given for the assertion that TCRY was instrumental in the growth of the traffic. As the Washington Supreme Court recounted, BNSF sued TCRY not so that it could serve the customers on the Line directly, but because TCRY physically blocked BNSF from using the Line. "In 2009, BNSF informed TRCY (*sic*) that it would no longer pay for access to the Richland Trackage. In response, TRCY (*sic*) physically blocked BNSF from using the track. Ultimately, a federal court found that BNSF had the right to use the Richland Trackage and enjoined TRCY (*sic*) from

a proceeding.

preventing access.” *Peterson*, 460 P.3d at 1082.

TCRY states:

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 2000 when it directed TCRY to cancel UP’s operating rights.

TCRY Motion at 2. TCRY is correct that (at TCRY’s request) the Port sent a letter on September 12, 2000 discussing the possibility that TCRY could cancel UP’s rights in an attempt to assist TCRY. The Port mistakenly believed at the time that TCRY had the ability to do so. However, it now appears, that the Port may not even have the authority to cancel UP’s operating rights. As the Washington Supreme Court explained in connection with identical BNSF operating rights, “the Port took the Richland Trackage subject to many conditions, including the condition that it honor the agreements with the BNSF railroad.” *Peterson*, 460 P.3d at 1084. The court explains that when the United States government owned the Line, it could have cancelled the agreement. But, it says, “[i]t is not so clear that the Port has the unfettered freedom to cancel as well. The indenture preserved a reversionary interest in the United States that could be triggered by a cancellation.” *Id.* The court continues, “[a]t the very least, BNSF would have grounds to seek judicial review if the Port unilaterally attempted to terminate the contract, possibly leading to costly litigation.” *Id.*

TCRY states:

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.

TCRY Motion at 3 (citing to Appendix 7). This statement is unverified and unsupported by the citation to Appendix 7. Further, it is not relevant to this proceeding. TCRY is referring to property that the Port purchased from BNSF for fair market value 30 miles away from the Line.

TCRY includes a series of statements related to disputes among TCry, the City of Richland and UP (*TCRY Motion* at 3-4), none of which have any apparent relevance to the Port, or the tariff questions raised by the Petition.

b. TCRY Assertions Related to Recent Litigation History

TCRY states:

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

TCRY Motion at 4. TCry's description of the Federal Court litigation and the results are misleading. Before dismissing the State law claims, the Federal Court dismissed all of TCry's Federal law claims (relating to claims under the False Claims Act that the Railroad Retirement Board ("RRB") was wrong in its determination that the Port does not have an obligation to pay Railroad Retirement Act taxes or unemployment contributions) and awarded the Port attorneys' fees because TCry's claims were so clearly frivolous and vexatious. The Federal Court then dismissed the State law claims since there were no related Federal law claims remaining. TCry has not appealed all of the findings of the District Court, but rather has appealed only the Federal Court's affirmation of the RRB findings, dismissal of 42 U.S.C. §1983 claims, exclusion of TCry's damages expert's trial testimony, and the award of attorneys' fees. Additionally, TCry does not note that its State Court claims have been consolidated with TCry's State Court action to terminate the Lease and evict TCry from the Line.

TCRY states:

The Port of Benton has spent over a million dollars of taxpayer money to harm TCry.

TCRY Motion at 5. The Board should ignore the assertion that the Port has attempted to harm TCry. The Port has merely been seeking to terminate the Lease based on TCry's defaults. It

is TCRY through its various litigations that has caused the Port to expend its funds to defend the Port and the public interest. It is TCRY, not the Port that has drawn the ire of the Federal Court for the Eastern District of Washington for bringing an action that “was clearly frivolous and the evidence supports the finding that the action was also vexatious and brought primarily for the purpose of harassment.” *United States ex rel. Peterson v. Port of Benton Cty.*, No. 2:17-CV-0191-TOR, 2019 WL 4979822, at *10 (E.D. Wash. Oct. 8, 2019). It is TCRY that was ordered to pay attorneys’ fees to the Port because of its frivolous lawsuit. *United States ex rel. Peterson v. Port of Benton Cty.*, No. 2:17-CV-0191-TOR, 2019 WL 6684509, at *5 (E.D. Wash. Dec. 6, 2019).

c. TCRY’s Assertions Related to the Port’s Attempts to Levy Supplement 1 Against BNSF, UP, the Port and “Rail Users.”

In its restatement of the Port’s approval of TCRY’s Supplement 1¹⁶ and its attempts to levy the tariff against the Port, TCRY recounts:

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.”

TCRY Motion at 7 (citing Appendix 21). As stated in the Port’s Petition, although the Port approved Supplement 1, it did not make any determination about what entities TCRY could assess the charges against. But as TCRY notes here, the Port cautioned TCRY that the Port did not believe that TCRY could assess the charges against BNSF or UP given the prior federal court decision on the subject. *Petition* at 4. The determination of what entities can legally be subjected to Supplement 1 is a question of law for the Board (and part of the subject of the Petition).

¹⁶ A copy of Supplement 1 is attached to the Petition as Appendix B.

TCRY continues, stating:

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 notice.

TCRY Motion at 7. TCRY did seek to collect the Railroad Maintenance Charge in Supplement 1 from the Port, but the Port has refused to pay. The Port owns the Line, but it does not operate as a railroad; it does not hold itself out to perform rail service; and it does not move any cars over the Line. As such, Supplement 1 by its terms does not apply to the Port. It is hard to understand how the Port's ability to cancel the 1947 agreement would make the Port responsible for the charges.¹⁷

TCRY next recounts its attempts to recover the charges under Supplement 1 from "rail users." TCRY states:

TCRY then looked to the users of the railroad which had been identified by the Port multiple times over the years, first in 2012 and later in 2017 to pay the Railroad Maintenance Charge.

TCRY Motion at 7 (citing to the Port of Benton Rail Plan and the Port of Benton and City of Richland Rail Master Plan).

TCRY suggests that it intended to apply the tariffs to the rail users identified in the Port of Benton Rail Plan and the Port of Benton and City of Richland Rail Master Plan. However, TCRY never directly communicated this to the Port. In fact, the Port repeatedly asked TCRY what entity the tariff would apply to, but TCRY never provided an answer. In an email from D. Billetdeaux to R. Peterson dated July 3, 2020, Mr. Billetdeaux states as a follow up to two previous emails: "The Port reiterates it (*sic*) request for TCRY to identify with specificity the entities that would be subject to the to the Proposed Tariff." *See* Verified Statement of David

¹⁷ As noted above at page 8, it is not clear in any event that the Port even has the right to cancel the contract.

Billetdeaux at 4; Exhibit 8. However, TCRY never provides an answer.

The Port also asked TCRY under what authority it could issue a tariff to non-TCRY customers. In its Motion, TCRY asserts:

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*"

TCRY Motion at 8 (citing to Appendix 25). The TCRY Motion overstates the TCRY response to the Port. TCRY's own citation indicates that TCRY did not answer the Port's question. The Port asked specifically what authority TCRY could produce to impose a tariff upon "non-TCRY customers." But, TCRY only states that it has a contractual right to impose tariffs (which is not disputed) without explaining the authority under which TCRY could assess the charges against entities that it does not serve. *See TCRY Motion* at Appendix 25.

TCRY later asks, "[w]hy would the Port approve Supplement 1 if it did not intend TCRY to be able to collect on it? *TCRY Motion* at 11.

As noted, the Port does not object to TCRY issuing reasonable tariffs, but its approval of tariffs was never intended to be a determination of the legality of the tariff or who would be responsible for the charges. Those are matters for the Board, and the purpose of the Port's Petition. The Port's advice regarding BNSF and UP was based on the District Court's holding. The question presented by the Petition as to whether TCRY can assess its tariffs against entities that it does not service is left unaddressed by TCRY's statements throughout the TCRY Motion.

- d. TCRY Does Not Support Its Claim that the Port's Petition is An Attempt to Dismantle TCry.

TCRY claims that the Port's Petition is an effort to dismantle TCry.

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 TCry utilizing the Board to do its bidding.

TCry Motion at 11 citing Appendix 29, the "The Southern Connection Options List".

There is no evidence that the Port has sought to dismantle TCry. TCry attaches The Southern Connection Options List but fails to note that the Port never adopted any of the recommendations in the report. Moreover, it is TCry, not the Port, that created the controversy between TCry and users of the rail line that TCry does not serve by attempting to impose its Supplements. As noted above, despite the grant of adverse discontinuance by the Board, TCry and the Port continue to operate under the Lease pending the outcome of the State Court litigation. Under the Lease, the Port is directed to attempt to resolve such disputes, and to bring to the Board issues that are within its jurisdiction. This is exactly what the Port has done – nothing more and nothing less.

- e. TCry Posted Its Supplement 5 Tariff to Its Website Falsely Representing that It had Port Approval.

In its Motion, TCry attempts to rebut the Port's factual statements (Petition at 7) that TCry posted Supplement 5 stating that the Port approved it and that it was effective. TCry asserts, "[w]hen TCry submits its tariffs to the Port for approval, it submits them in the final form in which they are seeking approval." *TCry Motion* at 9. TCry does not explain though, why it posted Supplement 5 to its website without any indication that it was still under consideration, had not received Port approval, and was not yet effective.

- f. TCRY Simultaneously Claims that the Port Is Inhibiting It from Raising funds to Rehabilitate the Line then Complains when the Port Raises Funds to Rehabilitate the Line.

As stated by TCRY in Supplements 1 and 5, TCRY seeks to impose the tariffs for maintenance of the Line. TCRY's responsibility for maintaining the Line is the source of disagreement between the Port and TCRY. *See TCRY Discontinuance* at 5. But yet, TCRY asserts that, "[t]he 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. *TCRY Motion* at 12 (citing Appendix 30). TCRY's simultaneously claims that the Port is impeding its ability to maintain the Line and then complains that the Port has received grants to rehabilitate the Line including crossings and bridges. This complaint does not in any way respond to the questions posed by the Port in its Petition and demonstrates the absurdity of TCRY's posturing.

CONCLUSION

For the reasons stated above, the Port respectfully requests that the Board deny the TCRY Motion to Dismiss and open a proceeding to consider the Port's Petition for Declaratory Order. The Port is not asking the Board to interpret any contracts, the Port is asking for the Port's guidance governing tariffs under the Board's jurisdiction.

Respectfully submitted,



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Attorneys for Port of Benton, WA

Dated: October 28, 2020

EXHIBIT A

Randolph PETERSON, Petitioner,

v.

**STATE of Washington, Department
of Revenue, a state agency,
Defendant,**

**Port of Benton, a Washington port
district, and BNSF Railway
Company, Respondents,**

**Jason Mount, James Summey, Peggi
Doggett, Jennifer Hartsfield, and
Mandi Oukrop, Petitioners.**

No. 97410-1

Supreme Court of Washington.

Argued January 21, 2020

Filed April 17, 2020

Background: Taxpayer, who was also the principal owner of a railroad services company, brought action against port district, among others, arising out of its failure to charge two railroads for using a portion of track that such railroads or their predecessors had assisted the United States in building in exchange for the right to use the track for free, which track was located on land that the United States had subsequently sold to the port district, and port district had leased to taxpayer's company. Railroads intervened as defendants, and additional taxpayers intervened as plaintiffs. The Superior Court, Thurston County, James Dixon, J., awarded summary judgment to port district. Taxpayers appealed, and the Court of Appeals, Mann, C.J., 9 Wash.App.2d 220, 443 P.3d 818, affirmed. Taxpayers petitioned for review.

Holdings: The Supreme Court, González, J., held that port district did not act with donative intent when it failed to charge railroads for their use of track, and thus its actions did not violate state constitutional provision barring municipal gifts of public funds.

Affirmed.

1. Railroads ⚡72(5)

Indentures, which are writings containing a conveyance, contract, or covenant between two or more persons and often contain the signatures of both parties, are often used to memorialize a covenant running with the land in favor of a railroad and, like deeds, may be recorded.

2. Appeal and Error ⚡3554

On review of summary judgment, Supreme Court's review is de novo.

3. Municipal Corporations ⚡871

The party alleging a violation of state constitutional provision barring use of municipal funds in aid of corporations bears the burden of showing an unconstitutional gift of public funds. Wash. Const. art. 8, § 7.

4. Municipal Corporations ⚡871

For the purposes of state constitutional provisions barring gifts of public funds, a "gift" is a transfer of property without consideration and with donative intent; receipt of valuable consideration assures that a transaction is not a gift. Wash. Const. art. 8, §§ 5, 7.

See publication Words and Phrases for other judicial constructions and definitions.

5. Municipal Corporations ⚡871

To determine whether a challenged transaction is in fact an unconstitutional gift of public funds, the court first asks if the funds are being expended to carry out a fundamental purpose of the government and, if the answer to that question is yes, then no gift of public funds has been made; when the expenditures are held to not serve fundamental purposes of government, the court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body in order to determine whether or not a gift has occurred. Wash. Const. art. 8, §§ 5, 7.

6. Municipal Corporations ⚡871

Port district did not act with donative intent when it failed to charge two railroads for their use of track that they or their predecessors helped build when the land was owned by the United States in exchange for

the right to use the track for free, and thus its actions did not violate state constitutional provision barring municipal gifts of public funds; there was no evidence port district attempted to hide the arrangement, which was also reflected in a recorded indenture, from the state auditor, obligation to honor the railroads' agreement with the United States was a condition of the sale of the land to the port district, and there was no showing of grossly inadequate consideration to the port district or significant cost to taxpayers. Wash. Const. art. 8, § 7.

7. Municipal Corporations ⇌871

It is not an unconstitutional gift of public funds for a municipality to make an improvident deal. Wash. Const. art. 8, § 7.

8. Municipal Corporations ⇌871

The fact that a third party benefits is not sufficient to convert a lawful contract into an unconstitutional gift of public funds. Wash. Const. art. 8, § 7.

9. Public Contracts ⇌300

Washington law allows the public assumption of contracts except where assumption is specifically prohibited by law or would violate public policy.

Appeal from Thurston County Superior Court, Docket No: 16-2-03211-4, James J. Dixon, Judge.

Philip Albert Talmadge, Talmadge/Fitzpatrick, 2775 Harbor Ave. Sw, Third Floor Ste. C, Seattle, WA, William Christopher Schroeder, William John Schroeder, Anne Kathleen Schroeder, KSB Litigation, P.S., 510 W. Riverside Ave. Ste. 300, Spokane, WA, for Petitioner.

Rob J. Crichton, Eric Ryan Laliberte, Keller Rohrback L.L.P., 1201 3rd Ave. Ste. 3200, Seattle, WA, David Billetdeaux, Port of Benton, 3250 Port Of Benton Blvd., Richland, WA, Paul J. Lawrence, Gregory J. Wong, Alanna Peterson, Pacifica Law Group LLP, 1191 2nd Ave. Ste. 2000, Seattle, WA, for Respondents.

Andrew Gordon Yates, Timothy David Wackerbarth, Lane Powell PC, Po Box

91302, 1420 5th Ave. Ste. 4200, Seattle, WA, for Other Parties.

González, J

¶1 Many delegates to our state constitutional convention were suspicious of corporate influence on government. The constitution those delegates drafted establishes that no municipality may “give any money, or property, or loan its money, or credit to or in aid of any . . . corporation, except for the necessary support of the poor and infirm.” CONST. art. VIII, § 7.

¶2 More than 70 years ago, two railroad companies helped the United States Atomic Energy Commission build a track to the Hanford Nuclear Reservation in return for the right to use the track without paying rent. After the nuclear reactors at Hanford were decommissioned, the United States transferred nearly 800 acres, including the track at issue, to the Port of Benton (Port), subject to existing agreements and potential reversion to the United States if certain conditions were not met.

¶3 The Port has continued to honor the agreements and operate the railroad. The Port’s decision not to charge rent was challenged by a taxpayer, Randolph Peterson, as an unconstitutional gift of public funds. This challenge was dismissed at summary judgment. On the record before us we do not find a constitutional violation and affirm.

FACTS

¶4 During the Second World War, the War Department of the United States government used its eminent domain powers to acquire hundreds of square miles near the Columbia River in southeast Washington in order to build the Hanford Nuclear project. *Hutchinson v. Port of Benton*, 62 Wash.2d 451, 452, 383 P.2d 500 (1963). In 1947, the Atomic Energy Commission and two railroads agreed to build the 5.4 mile railroad spur at issue to provide a second railroad track into the Hanford Nuclear Reservation. This track is now known as the Richland Trackage. BNSF Railway Company and Union Pacific Railroad Company are the successors in interest to the original contracting railroads. *BNSF Ry. Co. v. Tri-City & Olympia R.R.*

Co., 835 F. Supp. 2d 1056, 1058 (E.D. Wash. 2011). In return for their assistance, the United States government gave the two railroads the right to use the Richland Trackage rent-free. Over the years, the parties modified the agreement in small ways, but throughout, the two railroads had the right to use the Richland Trackage without paying rent, and either the railroads or the United States could terminate the agreement with varying amounts of notice.

[1] ¶15 Over the years, some of the land the United States seized during World War II was sold to the Port. *Hutchinson*, 62 Wash.2d at 452, 383 P.2d 500. In 1998, the United States Department of Energy, the successor to the War Department and the Atomic Energy Commission, concluded that about 800 acres of industrial property, 26 facilities, and 16 miles of railroad track, including the Richland Trackage, near Hanford was surplus property and offered to give it to the Port. At the time, the property was valued at about \$5.1 million. The Port and the Department of Energy entered into a detailed indenture¹ outlining the conditions of the transfer. The existing agreements with Union Pacific and BNSF railroads were assigned to the Port in the indenture, with some modifications. Under these contracts, either side could cancel the agreement on six months' notice. Depending on the circumstances, cancellation could trigger the United States' reversionary interest in the property.²

¶16 Peterson, the plaintiff in this case, is the principal owner of the Tri-City Railroad Company (TRCY). In 2000, the Port leased some of its property, including the Richland Trackage and its interchange with the main

line, to TRCY's predecessor. TRCY operates a railroad, pays a leasehold tax, and maintains a portion of the rails running across the Port's property. *BNSF Ry. Co.*, 835 F. Supp. 2d at 1060. That same year, the Port directed TRCY to cancel Union Pacific's right to access the interchange and the leased track. After negotiation, the parties reached an agreement, and Union Pacific continued to use the track and interchange. For some time, TRCY or its predecessors-in-interest charged a per-car fee for access to the Richland Trackage. *Id.*

¶17 In 2009, BNSF informed TRCY that it would no longer pay for access to the Richland Trackage. *Id.* In response, TRCY physically blocked BNSF from using the track. *Id.* Ultimately, a federal court found that BNSF had the right to use the Richland Trackage and enjoined TRCY from preventing access. *Id.* at 1062-64, 1066.

¶18 In 2016, Peterson, in his capacity as a taxpayer, brought this case against the Port and the Washington State Department of Revenue.³ Peterson alleged that these government agencies were failing to meet their obligations to collect taxes and that allowing the railroads to use the Richland Trackage rent-free violated article VIII, section 7 and article I, section 12 of our state constitution. Most relevantly, Peterson argued that rent-free use of the tracks amounted to an unconstitutional gift of public funds. Later, Peterson submitted an expert declaration that suggested the value of BNSF's rent-free use of the tracks would be between \$2,106,000 and \$3,159,000 in 2017. In 2016, the property was valued at roughly \$50 million, about \$25 million of which appears to have been attribut-

1. An indenture is "a writing containing a conveyance, contract or covenant between two or more persons." J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 383 (1893). Unlike a traditional deed, it often contains the signatures of both parties. See also BLACK'S LAW DICTIONARY 919 (11th ed. 2019). Indentures are often used to memorialize a covenant running with the land in favor of a railroad and, like deeds, may be recorded. See, e.g., *Williams v. Ind. Rail Rd. Co.*, 33 N.E.3d 1043, 1048 (Ind. Ct. App. 2015); *Richmond, Fredericksburg & Potomac RR. Co. v. United States*, 75 F.3d 648, 654 (Fed. Cir. 1996).

2. The indenture provides, in relevant part,

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. CP at 92.

3. The Department of Revenue has since been dismissed from the case.

able to the Richland Trackage, its associated land, and its structures. BNSF and Union Pacific Railroad intervened on the Port's side and five Port district taxpayers intervened on Peterson's side.

¶9 Peterson and the Port (among others) moved for summary judgment. After the summary judgment hearing, Judge James Dixon concluded that the United States Department of Energy's 1998 gift transfer of land and improvements to the Port was adequate consideration for BNSF's rent-free use of the Richland Trackage. The judge granted the Port's motion, denied Peterson's, and dismissed Peterson's claims with prejudice. Peterson initially challenged dismissal on both article VIII, section 7 and article I, section 12 grounds. Br. of Appellants at 2. The Court of Appeals rejected both arguments. Peterson narrowed the issues on review to whether BNSF's continued rent-free use of the Richland Trackage violates article VIII, section 7.

ANALYSIS

[2, 3] ¶10 This case is here on review of summary judgment. Our review is de novo. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wash.2d 94, 104, 297 P.3d 677 (2013) (citing *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004)). As the challenger, Peterson bears the burden of showing an unconstitutional gift of public funds. *King County v. Taxpayers of King County*, 133 Wash.2d 584, 597, 949 P.2d 1260 (1997) (quoting *Gen. Tel. Co. of Nw. v. City of Bothell*, 105 Wash.2d 579, 588, 716 P.2d 879 (1986)).

¶11 The prohibition on gifts and loans was one of the most hotly debated issues at our state's constitutional convention. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 162 (2d ed. 2013). The convention was lobbied heavily, including by some delegates, to allow municipalities to subsidize corporations deemed to be for the public good, especially railroads. *Id.* Ulti-

mately, the lobby attempt failed, and our constitution prohibits gifts of public funds "except for the necessary support of the poor and infirm," which is not at issue here. CONST. art VIII, § 7.⁴ By largely prohibiting gifts of public funds, "the framers intended to prevent the harmful 'effects on the public purse of granting public subsidies to private commercial enterprises, primarily railroads.'" *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash.2d 679, 701-02, 743 P.2d 793 (1987) (quoting *City of Marysville v. State*, 101 Wash.2d 50, 55, 676 P.2d 989 (1984)). Our founders did not want gifts and loans given to private parties, but "[t]hey were not concerned about the nonspeculative transfer of money from one nonprofit government agency to another." *City of Marysville*, 101 Wash.2d at 55, 676 P.2d 989.

[4, 5] ¶12 For the purposes of article VIII of our state constitution, "a gift is a transfer of property without consideration and with donative intent. 'Receipt of valuable consideration assures that a transaction is not a gift.'" *Gen. Tel. Co. of Nw.*, 105 Wash.2d at 588, 716 P.2d 879 (footnote omitted) (quoting *Louthan v. King County*, 94 Wash.2d 422, 428, 617 P.2d 977 (1980)). To determine whether a challenged transaction is in fact a gift of public funds,

[f]irst, the court asks if the funds are being expended to carry out a fundamental purpose of the government? If the answer to that question is yes, then no gift of public funds has been made. The second prong comes into play only when the expenditures are held to not serve fundamental purposes of government. The court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body in order to determine whether or not a gift has occurred.

CLEAN v. State, 130 Wash.2d 782, 797-98, 928 P.2d 1054 (1996) (citing *Citizens for*

tions and exceptions." *CLEAN v. State*, 130 Wash.2d 782, 797, 928 P.2d 1054 (1996) (citing *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash.2d 679, 701 n.13, 743 P.2d 793 (1987)). As a municipal corporation of the State of Washington, the Port is bound by our state constitution. See ch. 53.04 RCW.

4. Two distinct provisions of our state constitution prohibit or limit gifts of public funds. Article VIII, section 5 restricts the State's ability to give gifts and section 7 governs municipalities. "Although these two provisions are worded slightly differently, this court has held that they have identical meaning, as well as the same prohibi-

Clean Air v. City of Spokane, 114 Wash.2d 20, 39, 785 P.2d 447 (1990); *Taxpayers*, 108 Wash.2d at 702, 743 P.2d 793). As the trial court's conclusion that the railroad services of BNSF are not a fundamental government service has not been challenged, we then turn to donative intent and consideration. *See id.*

¶13 The parties disagree on what constitutes evidence of donative intent and what consideration is relevant. Peterson argues that donative intent is apparent from the failure to charge rent, among other things, and that only the consideration paid by the railroad to the Port matters for our analysis. The Port argues that Peterson has offered no evidence of donative intent and that the United States government's transfer of nearly 800 acres, 26 improvements, and 16 miles of track is adequate consideration.

[6] ¶14 More specifically, Peterson contends that the Port's donative intent is apparent in (1) its "deliberate hiding of its sweetheart arrangement with the railroads from the State Auditor," (2) its "condon[ing]" the railroads' decision not to pay track maintenance fees to his company, (3) its coordinated legal defense with BNSF, and (4) its decision not to charge rent. Pet'rs' Suppl. Br. at 13-15, 18.

¶15 Like the trial court, we do not find these facts sufficient to raise a question of donative intent. The assertion that the Port attempted to hide anything from the state auditor is simply not established in this record. Peterson asserts that the Port improperly failed to notify the state auditor during the 2012 and 2015 audits that the railroads were using the Richland Trackage rent-free and without paying a leasehold tax. As authority, he cites the deposition of the executive director of the Port, Scott Keller. Keller acknowledged that the Port had been audited, but nothing in his deposition suggests that the Port breached a duty to disclose the rent-

free use of the tracks to the auditor, that leasehold tax was owed, or that there was any deliberate effort to conceal the arrangement. Further, the record itself belies any attempt to hide the indenture. Indentures are regularly recorded, and the header of the copy of the indenture, included in the clerk's papers, suggests it had been filed with the federal court in 2010.⁵ This record does not support an inference that the Port attempted to hide anything from the auditor.

[7] ¶16 Similarly, the fact that the Port did not insist the railroad pay track maintenance fees to Peterson's company does not show an intent to make a gift. Nor does the fact that the Port and the railroad are coordinating their legal defense in this case. Only the fact that the Port has not charged rent gives us pause. Again, the Port took the Richland Trackage subject to many conditions, including the condition that it honor the agreements with the BNSF railroad. The United States clearly could have cancelled that agreement on six months' notice. It is not so clear that the Port has the unfettered freedom to cancel as well. The indenture preserved a reversionary interest in the United States that could be triggered by a cancellation. At the very least, BNSF would have grounds to seek judicial review if the Port unilaterally attempted to terminate the contract, possibly leading to costly litigation. Thus, the real question is not whether abiding by the existing agreement is evidence of intent to give a gift: the question is whether honoring an agreement and failing to risk litigation is evidence of intent to give a gift. While we can imagine a case where the failure to cancel a contract could ripen into a gift of public funds when the municipality had the clear authority to cancel if, year after year, the private company reaped increasing benefits grossly disproportionate to the original consideration. This would be especially problematic if the agreement resulted in significant cost to the taxpayers.⁶ But there has

5. We note that the leasehold tax is imposed on the private lease of public property. RCW 82.29A.030. While the issue is not before us, a cursory review of chapter 82.29A RCW suggests the railroads would not have owed tax on the rent they did not have to pay.

6. We caution that it is not a gift of public funds to make an improvident deal. *See Scott Paper Co. v. City of Anacortes*, 90 Wash.2d 19, 26, 578 P.2d 1292 (1978). In *Scott Paper*, for example, a city had contracted to provide water to a paper company for 25 years at a rate set by a formula. 90 Wash.2d at 22, 578 P.2d 1292. Before the end of

been no showing of grossly inadequate consideration to the Port or significant cost to the taxpayers.⁷ Nothing in this record creates an inference of donative intent.

¶17 Nor is the compensation so grossly inadequate as to suggest donative intent. Peterson contends that the 1998 transfer of land and improvements from the United States to the Port is irrelevant because the Port did not get the transfer from the railroads. He notes that in the baseball stadium cases, the baseball franchise itself paid rent to the municipality and tens of millions of dollars in construction costs in return for the use of the stadium. *See* Pet'rs' Suppl. Br. at 9-10 (citing *Taxpayers of King County*, 133 Wash.2d at 598-601, 949 P.2d 1260, and *CLEAN*, 130 Wash.2d at 798-99, 928 P.2d 1054). BNSF has only paid \$50,000 to the Port this millennium.

¶18 We find no authority for the proposition that the consideration must come from the railroads. It is true that our past cases have usually concerned an alleged gift from the State or a municipality to a private party in exchange for (possibly inadequate) consideration from that private party. *E.g.*, *CLEAN*, 130 Wash.2d 782, 928 P.2d 1054 (from the State and county to a baseball franchise); *Citizens for Clean Air*, 114 Wash.2d 20, 785 P.2d 447 (from the city to a private municipal waste disposal company). But none of these cases *require* that the consideration be paid by the private party. Instead, these cases direct us to evaluate “the consideration *received by the public* for the expenditure of public funds.” *CLEAN*, 130 Wash.2d at 798, 928 P.2d 1054 (citing *Citizens for Clean Air*, 114 Wash.2d at 39, 785 P.2d 447) (emphasis added). In this case, the consideration received was from the United States Department of Energy and, presently, is worth about \$50 million. Peter-

son did not provide us with any evidence of the value of the rent-free use of the tracks in 1998, but assuming that value appreciated at the same rate (which is speculative), it was between \$210,600 and \$315,900 a year at the time. *See* CP at 1542. Peterson simply has not presented evidence that suggests the compensation received by the Port was inadequate, let alone grossly inadequate.

[8] ¶19 The record does establish that the railroads have benefited from the fact that the Port has honored the agreements they had made with the United States government. However, the fact that a third party benefits is not sufficient to convert a lawful contract into a gift of public funds. *See Taxpayers of King County*, 133 Wash.2d at 596, 949 P.2d 1260 (citing *Taxpayers*, 108 Wash.2d at 705, 743 P.2d 793); *City of Marysville*, 101 Wash.2d at 58, 676 P.2d 989. In *City of Marysville*, for example, we examined the benefits to third parties when a city purchased a private golf course, converted it to a public one, and continued to employ three club employees. 101 Wash.2d at 51, 676 P.2d 989. As city workers, the employees became members of the Public Employees' Retirement System (PERS). *Id.* PERS administrators concluded that the three workers were entitled to service credit for their previous work at the golf course and billed the city accordingly. *Id.* The city rejected the bill as an unconstitutional gift of public funds. *Id.* We found that the legislature intended to offer service credit as an inducement for workers to stay on the job in such circumstances, and that the workers had “provided ample consideration for such benefits by remaining on the job after the acquisition.” *Id.* at 58-59, 676 P.2d 989. Accordingly, there was no unconstitutional gift of public funds. *Id.*

the contractual period, the cost of delivering water exceeded the contract price. *Id.* at 26, 578 P.2d 1292. The State argued that enforcing the contract amounted to a gift of the difference between the contract price and the cost of providing the water. *Id.* at 31-32, 578 P.2d 1292. We disagreed. We looked to the time the parties contracted, found that the city “fully expected to profit admirably from its agreements” at that time and found no violation of our state constitution. *Scott Paper*, 90 Wash.2d at 33, 578 P.2d

1292 (“[I]f intent to give a gift is lacking[,] the elements of a gift are not present, and article 8, section 7 does not apply.”).

7. Peterson has submitted a detailed declaration explaining the burden that modern trains impose on old tracks and the cost of deferred maintenance. Generously construed, it supports an inference that the rent-free use of the tracks will impose maintenance costs on Port taxpayers.

[9] ¶120 While *City of Marysville* is only loosely on point, it does illustrate a situation where a political subdivision of the State assumed existing obligations and honored them at some cost to itself without violating article VIII, section 7. As the Port points out, Washington law allows the assumption of contracts except where assumption is specifically prohibited by law or would violate public policy. *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wash.2d 284, 288, 868 P.2d 127 (1994) (citing *Schultz v. Werelius*, 60 Wash. App. 450, 453, 803 P.2d 1334 (1991)).

¶121 In the alternative, Peterson argues that the existence of donative intent or grossly inadequate compensation should be treated as a question of fact, not law. Pet'rs' Suppl. Br. at 13 n.8 (citing *Casa del Rey v. Hart*, 110 Wash.2d 65, 750 P.2d 261 (1988); *Matter of Estate of Little*, 106 Wash.2d 269, 288, 721 P.2d 950 (1986); *Miebach v. Colasurdo*, 102 Wash.2d 170, 685 P.2d 1074 (1984); *Buckerfield's Ltd. v. B.C. Goose & Duck Farm Ltd.*, 9 Wash. App. 220, 511 P.2d 1360 (1973)). We find these cases unhelpful.

¶122 *Little* concerned whether a particular conveyance of real property was a gift or a sale, which would have triggered different consequences under intestacy law. *Little*, 106 Wash.2d at 288, 721 P.2d 950. That case turned on the deceased's donative intent, not the donative intent of a municipal corporation. *Miebach* concerned whether Miebach was a bona fide purchaser given his at-least constructive knowledge of significant defects in a sheriff's sale, including the gross inadequacy of the purchase price. *Miebach*, 102 Wash.2d at 175-76, 685 P.2d 1074. While the court stated that whether Miebach was a bona fide purchaser for value was a mixed question of fact and law, it had no difficulty setting aside the sheriff's sale and reversing the trial court's decision quieting title in the purchaser on the record before it. *Id.* at 181-82, 685 P.2d 1074. *Casa del Rey* is substantially similar to *Miebach*. *Buckerfield's* concerned whether a transfer of a boat within a family was a gift or an attempt to hide assets from creditors, which in part turned on whether there was donative intent on the part of the original owner. 9 Wash. App. at 221, 224, 511 P.2d 1360. None of these cases

help us decide whether, in this case, there is a material question of fact on the adequacy of compensation or the existence of donative intent.

CONCLUSION

¶123 The historical events that led up to this case are unusual. The Second World War and its aftermath drove the federal government to seize land and make deals it might not have otherwise made. But the trial court properly found that the Port did not make a gift of public funds when it accepted the land subject to existing contracts, and Peterson has not shown that the Port made a gift of public funds by continuing to honor those contracts. Accordingly, we affirm.

WE CONCUR:

Stephens, C.J.

Johnson, J.

Madsen, J.

Owens, J.

Wiggins, J.P.T.

Gordon McCloud, J.

Yu, J.

Montoya-Lewis, J.



The STATE of Washington, Respondent,

v.

Honolulu MOLIA, Appellant.

No. 78981-3-I

Court of Appeals of Washington,
Division 1.

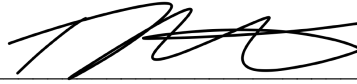
FILED 4/6/2020

Background: Defendant was convicted in the Superior Court, King County, Andrea Darvas, J., of three counts of rape of a

VERIFICATION

I hereby verify on behalf of the Port of Benton, WA, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on October 28, 2020.

A handwritten signature in black ink, appearing to read 'David J. Billetdeaux', written over a horizontal line.

David J. Billetdeaux
Port of Benton, Attorney

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 28, 2020