

Before the
SURFACE TRANSPORTATION BOARD

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STB Docket No. FD 36426

PORT OF BENTON, WA

**REPLY OF PREFERRED FREEZER OF RICHLAND, LLC
AND HENNINGSSEN COLD STORAGE
TO TRI-CITY RAILROAD COMPANY, LLC'S
MOTION TO DISMISS THE PORT OF BENTON, WA's
PETITION FOR DECLARATORY ORDER**

Mark B. Tuvim
Patrick Jordan
Gordon Rees Scully Mansukhani, LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
(206) 695-5100
mtuvim@grsm.com
pjordan@grsm.com

*Attorneys for Preferred Freezer of
Richland, LLC*

Dated: October 28, 2020

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Preferred Freezer of Richland, LLC (“Preferred”) and Henningsen Cold Storage (“Henningsen”) submit this Reply to Tri-City Railroad Company, LLC’s (“TCRY”) Motion to Dismiss the Port of Benton, WA’s (the “Port”) Petition for Declaratory Order (the “Petition”).

I. BACKGROUND

Preferred and Henningsen adopt and incorporate here the Background section of the Port’s Petition, and supplement the Petition’s Background with these facts:

A. Preferred and Henningsen are Warehousemen With No Commercial or Contractual Relationship with TCRY

Preferred and Henningsen are refrigerated warehousing companies that provide integrated cold-chain warehousing. Preferred’s facility in Richland, Washington is located at 2800 Polar Way, Richland, WA 99354, on a service spur off a mainline track owned by the City of Richland.¹ Henningsen’s facility is located at 2025 Saint Street, Richland, WA 99354, on a service spur off the Line owned by the Port.²

¹ See Verified Statement of Preferred’s General Manager, Edward Gottschalk (“Gottschalk VS”), at ¶¶ 1, 2. The City of Richland owns approximately one mile of track between the Port-owned rail line which TCRY leases (the “Line”) and Preferred’s railyard.

² See Verified Statement of Henningsen’s General Manager, William Friend (“Friend VS”), at ¶¶ 1, 2.

Preferred's and Henningsen's facilities in Richland consist of large commercial freezer warehouses used for the temporary storage of frozen food product owned by their customers, and a private railyard or rail spur next to each company's warehouse. Preferred's and Henningsen's customers contract directly with either Union Pacific Railroad Company ("UP") or Burlington Northern Santa Fe Railroad ("BNSF") for refrigerated railcar rental and nationwide rail transportation. Preferred and Henningsen facilitate their customers' rail shipments by ordering refrigerated railcars from UP and BNSF as necessary to fulfill customer orders, and loading those cars at their customers' direction for pick-up and transport by either UP or BNSF.³

Neither Preferred nor Henningsen operates as a railroad carrier. Neither owns railcars nor rail equipment that operate outside their respective railyards, much less on the Line. Neither pays UP or BNSF to rent or transport railcars – their customers contract with and pay UP and BNSF directly.⁴ Further, neither have a contractual or commercial relationship with TCRY, and TCRY provides no transportation or rail service, or service of any kind, to either Preferred or Henningsen.⁵

In short, Preferred and Henningsen load their customers' products on refrigerated rails cars rented from UP and BNSF by those customers, and UP and BNSF charge Preferred's and Henningsen's customers both for the rental of those cars and to transport those loaded rail cars to destinations determined by those customers. Neither Preferred nor Henningsen is a user or shipper on the Line for which TCRY seeks to impose tariffs – they simply facilitate and load their customers' rail shipments.⁶ To use the industry vernacular, Preferred and Henningsen are warehousemen.

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³ See Gottschalk VS, at ¶¶ 2, 3; Friend VS, at ¶¶ 2, 3.

⁴ See Gottschalk VS, at ¶¶ 2, 3; Friend VS, at ¶¶ 2, 3.

⁵ See Gottschalk VS, at ¶ 4; Friend VS, at ¶ 4. Preferred did have a contractual relationship with TCRY, but terminated that contact on February 5, 2019 based on TCRY's repeated material breaches of it. Since February 5, 2019, Preferred has done no business with TCRY. See Gottschalk VS, at ¶ 4.

⁶ See Gottschalk VS, at ¶¶ 2-4; Friend VS, at ¶¶ 2-4.

B. TCRY's Invoices and Lack of Notice to Preferred and Henningsen

Despite providing no service to Preferred or Henningsen, TCRY invoiced both under Supplement 1 without any prior notice.⁷

On July 23, 2020, TCRY sent Preferred an invoice under Supplement 1 for \$94,905.00 but did not also send a copy of Supplement 1.⁸ Preferred complained to the Port and informed TCRY that it would not pay the invoice.⁹ On August 12, 2020, TCRY sent Preferred a letter and a new invoice under Supplement 1, this time for \$6,650.00 for 70 “cars that entered the” Line from July 23 to 31, 2020.¹⁰ In this August 12 letter, TCRY abandoned its July Invoice, but claimed that invoice was “proper [legal] notice” of Supplement 1, and therefore, TCRY could charge Preferred for “railcar shipments that traverse TCRY trackage” as of July 23, 2020 and thereafter.¹¹ Preferred reiterated its complaint to the Port and informed TCRY that it would await the STB’s action on the Port’s Petition filed on August 14, 2020 before addressing the invoice. Notwithstanding its position, TCRY has continued to invoice warehouseman Preferred it for tariffs under Supplement 1.¹²

As with Preferred, Henningsen received a Supplement 1 invoice from TCRY on July 23,

⁷ According to the TCRY website, Supplement 1 provides in pertinent part:

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 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.

Supplement 1 further provides without elaboration: “The responsible party is the entity subject to this Supplement 1 to the Miscellaneous Charges Tariff.”

⁸ See Gottschalk VS, ¶ 5 & Exhibit 1 (July 23, 2020 Invoice).

⁹ See Verified Statement of David Billetdeaux (“Billetdeaux VS”), Exhibits 5 & 16.

¹⁰ See Gottschalk VS, ¶ 5 & Exhibit 2 (August 12, 2020 Letter and Invoice).

¹¹ See Gottschalk VS, at pp. 2, 4.

¹² See Gottschalk VS, ¶ 5 & Exhibits 3 and 4 (September 9, 2020 and October 21, 2020 Invoices, respectively).

2020, which did not include a copy of Supplement 1.¹³ Henningsen also complained to the Port and informed TCRY that it would not pay the invoice.¹⁴ As it did with Preferred, TCRY abandoned its initial invoice and sent a second Supplement 1 invoice on August 12, 2020, and claimed that its first invoice to Henningsen was appropriate legal notice of TCRY's tariff.¹⁵ And as with Preferred, TCRY continues to invoice warehouseman Henningsen for tariffs under Supplement 1.¹⁶

Nowhere in its invoices and communications does TCRY explain how Supplement 1 applies to warehousemen Preferred or Henningsen when TCRY provides no service to them and when they make no railcar shipments on the Line or otherwise. In fact, TCRY fails to explain to whom Supplement 1 applies, as it facially identifies no entity responsible for payment of its "maintenance" fee other than "the entity subject to this Supplement 1." Further, TCRY's invoices provided no supporting detail for the number of cars TCRY attributed to Preferred or Henningsen, nor does TCRY provide supporting evidence of maintenance costs or assurance that TCRY will actually spend the revenue generated from Supplement 1 on maintenance.¹⁷

Preferred and Henningsen subsequently learned that TCRY has submitted to the Port for approval Supplement 5, which provides in pertinent part as found on the TCRY website:

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

¹³ See Friend VS, ¶ 5 & Exhibit A (July 23, 2020 Invoice).

¹⁴ See Friend VS, ¶ 5 & Exhibit B (August 6, 2020 email from Bill Friend to TCRY Vice President, Lisa Anderson).

¹⁵ See Friend VS, ¶ 5 & Exhibit C (August 12, 2020 Invoice).

¹⁶ See Friend VS, ¶ 5 & Exhibits D and E (September 9, 2020 and October 21, 2020 Invoices, respectively).

¹⁷ See Gottschalk VS, Exhibits 1-4; Friend VS, Exhibits A, C, D, and E.

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).¹⁸

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.

To Preferred's and Henningsen's knowledge, the Port has not approved Supplement 5.

C. The Port's Petition and TCRY's Responsive Motion

On August 14, 2020, two days after TCRY's August 12 invoices to Preferred and Henningsen, the Port filed its Petition. The Petition asks the Board whether TCRY can assess charges under Supplement 1 and proposed Supplement 5 against entities like warehousemen Preferred and Henningsen, who have no contractual or commercial relationship with TCRY and are not shippers on the Line.¹⁹ The Petition further requests that the Board determine if TCRY must provide 20-day written notice to Preferred and Henningsen of its tariffs, and if so, whether an invoice later withdrawn constitutes sufficient notice.²⁰

Rather than substantively respond to the Port's Petition with applicable legal authority, TCRY moved to dismiss it as outside the Board's jurisdiction. Preferred and Henningsen submit this Reply to TCRY's dismissal motion.

¹⁸ Preferred and Henningsen were not consulted and did not agree to be to be defined as "Local Rail Users" in the Port's marketing materials and economic development rail plans. Further, as the Port explained, its rail plans were not created within the context of tariffs or published rates governed by the Board. See *Billetdeaux VS*, Exhibit 8, at 5 (noting that the rail plans "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" Supplement 5).

¹⁹ See Port's Petition, at 10.

²⁰ See Port's Petition, at 10.

II. ARGUMENT

A. The Port's Petition Asks the Board to Assess the Scope of TCRY'S Supplements 1 and 5, and the Prerequisites of the Required 20-Day Notice – NOT to Interpret the Port-TCRY Lease.

TCRY asserts in its Motion that the Port's Petition asks that the Board decide if "TCRY has a contractual right to impose the Port approved [Supplement 1] on users of the Port owned railroad."²¹ TCRY misconstrues the Petition and the Board's jurisdiction to address it.

The Petition seeks the Board's guidance on three basic issues plainly within the Board's jurisdiction:

1. 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?
2. 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?
3. 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? Further, does an invoice assessing charges under a tariff constitute sufficient notice of the tariff charges under 49 CFR Part 1300?

"Motions to dismiss are generally disfavored" and require the Board to view the alleged facts in a light favorable to the Port. *Cent. Valley Ag Grinding, Inc. & Cent. Valley Ag Transp. Inc.*, No. R 42159, 2018 WL 3588734, at *3 (S.T.B. July 24, 2018). 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) & (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. Am. Freight Car Assoc. v. Union Pac. R.R. Co.*, Docket No. NOR 42119, slip op. at 5 (served Mar. 12, 2015). Further, "[a] rail carrier may not increase any rates or charges, or change any service term . . . unless 20 days have expired after written or electronic notice has been provided." 49 C.F.R. §

²¹ TCRY's Motion at 8.

1300.4; *see also* 49 U.S.C. § 11101(c).

Contrary to TCRY's characterization, the Petition does not ask the Board to interpret the TCRY-Port Lease by, for example, asking whether TCRY can under the Lease propose tariffs for approval by the Port. Nor does the Petition ask the Board to interpret the Indenture – the Port has already approved Supplement 1 thereunder. Rather, the Petition asks (1) whether TCRY can impose its tariffs upon entities with whom TCRY has no commercial or contractual relationship and to whom TCRY provides no service, and (2) whether an invoice subsequently withdrawn provides the necessary legal notice of a tariff to entities subject thereto.²² These are narrow issues of railroad law over which this Board has exclusive jurisdiction.²³

B. Supplements 1 and 5 are Unreasonable Practices in violation of 49 USC § 10702 as Applied to Warehousemen Preferred and Henningsen

“A rail carrier providing transportation or service” must establish “reasonable . . . rates . . . rules and practices.” 49 U.S.C. § 10702(1) & (2). The legal standard for determining whether a particular practice is unreasonable varies depending on the nature of the case.” *N. Am. Freight Car Ass’n*, No. NOR 42119, 2015 WL 1119742, at *4 (S.T.B. Mar. 11, 2015). “The Board may look to a number of different factors to determine whether a practice is unreasonable, and the Board analyzes what it views as the most appropriate factors in each particular case.” *Id.*

In this case, TCRY's attempt to impose tariffs on warehousemen Preferred and Henningsen and other entities with which it has no commercial or contractual relationship and for whom it provides no service is an unreasonable practice in violation of 49 U.S.C. § 10702(2).

1. TCRY's Application of Supplements 1 and 5 is Overbroad and Unreasonable

Supplement 1 is facially silent as to whom the tariff applies.²⁴ TCRY attempts to correct this mistake with Supplement 5, and seeks to impose Supplement 5 on “Local Rail User[s]” of the

²² See Petition, at 10 (asking whether TCRY impose tariffs on entities that “are not rail customers of or shippers served by TCRY?”).

²³ If this Board declines to hear the Port's Petition, Preferred and Henningsen reserve the right to bring before the Board an unreasonable rate practice and unreasonable rate complaint against TCRY for Supplements 1 and 5.

²⁴ See n.7.

Line, which it defines as “any entity, person, or business that ships and/or receives a railcar load that traverse[s]” the Line.²⁵ Both Supplements are overbroad, and therefore constitute an unreasonable practice under 49 U.S.C. §§ 10702(1) and (2).

Under TCRY’s apparent interpretation of Supplement 1 (applicable to all cars traversing the Line) and Supplement 5 (applicable to all loaded rail cars traversing the Line), TCRY apparently seeks to impose these tariffs on (a) private car owners, (b) shippers, (c) facility owners like warehousemen Preferred and Henningsen, (d) the Port as the Line’s owner, and (e) rail carriers who transport cars along the Line. Under TCRY’s apparent interpretation of Supplement 5, all of these entities are “Local Rail User[s]” of the Line, thereby allowing TCRY to charge five or more “tariffs” for each car that passes across its leased track even if TCRY provides no service to them. This is not supported under applicable law.

2. TCRY’s Imposition of Tariffs on Preferred or Henningsen When it Provides no Service to Them is Unreasonable

Laws governing tariffs, or “rate schedules,” require that a party imposing a tariff – typically a carrier – provide service to a shipper. *See generally* 49 C.F.R. § 1300 *et seq.* (requiring privity between carrier and customer to impose tariff); *accord* 49 C.F.R. § 1301 (discussing published rates applicable to “transportation or service provided by a rail carrier”). Indeed, 49 U.S.C. § 10702’s plain language requires that a carrier must “provid[e] transportation or service” to the entity as a prerequisite to charge a rate or tariff. *Id.*

Here, TCRY provides no service or transportation to warehousemen Preferred or Henningsen. Neither Preferred nor Henningsen has a contractual or commercial relationship with TCRY, and neither has requested that TCRY transport goods to or on any point on the Line or provide any other service for them.²⁶

The Port has repeatedly requested that TCRY provide a legal basis for its attempt to impose

²⁵ See Petition, Appendix C, at 2.

²⁶ See Gottschalk VS, at ¶ 4; Friend VS, at ¶ 4.

tariffs on entities that are not its customers or for which it provides no service.²⁷ TCRY has failed to respond with any legal authority, and provided no such authority to the Board in its Motion. Undersigned counsel has been unable to locate any authority that would authorize TCRY to impose tariffs or user fees on entities with which it has no contractual or commercial relationship. *Cf. MidAmerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099, 1103 n.2 (8th Cir. 1999) (noting that “[r]ailroads must maintain class rates because of their common carrier obligation to transport goods to any point on their lines upon request by a shipper”). Put simply, there is no basis – contractual, commercial, or legal – to apply Supplements 1 and 5 to Preferred or Henningsen.

3. Supplements 1 and 5 are Inapplicable to Preferred and Henningsen Because Neither is a Shipper On or User Of the Line

Preferred’s and Henningsen’s warehouses near the Line do not make TCRY’s Supplements 1 and 5 applicable to them. That proximity does not make them a user of or shipper on the Line – neither operates a railroad, owns rail cars or equipment that travel on the Line, ships rail cars, pays UP or BNSF for railcar use or rail transportation, or is identified as a shipper on any bill of lading.²⁸

Rather, it is Preferred’s and Henningsen’s customers which ship products by rail in refrigerated railcars provided and transported by UP and BNSF. Preferred and Henningsen simply facilitate and load their customers’ rail shipments. UP and BNSF charge Preferred’s and Henningsen’s customers to provide and transport those loaded rail cars to destinations determined by those customers.²⁹ Preferred and Henningsen are neither users of nor shippers on the Line, and Supplements 1 and 5 are inapplicable to them under any rule of reasonableness. *See, e.g.*, U.C.C. § 7-102(a)(12) (“‘Shipper’ means a person that enters into a contract of transportation with a carrier.”).

4. Preferred and Henningsen are Warehousemen Subject Only to Demurrage Charges From Servicing Railroads that Supply Railcars.

As discussed above, Preferred and Henningsen are warehousemen in the transportation

²⁷ See Billetdeaux VS, Exhibits 8, 13, 17.

²⁸ See Gottschalk VS, at ¶¶ 2, 3; Friend VS, at ¶¶ 2, 3.

²⁹ See Gottschalk VS, at ¶¶ 2, 3; Friend VS, at ¶¶ 2, 3.

arrangement here. Federal law allows carriers to charge warehousemen for demurrage related to the railcars received from these servicing railroads – not tariffs for track use. *See, e.g.*, 49 USC § 10746; 49 CFR § 1333.3. TCRY provides no railcars to either Preferred or Henningsen.³⁰ Because it provides no service or railcars to them, TCRY cannot impose either tariffs or demurrage on Preferred or Henningsen, and any attempt to do so is patently unreasonable and unlawful.

III. CONCLUSION

For the forgoing reasons, Preferred and Henningsen respectfully request that the Board accept the Port's Petition, and declare that TCRY may not impose Supplement 1 or 5 on warehousemen Preferred and Henningsen.

Respectfully submitted,

s/ Mark B. Tuvim

Mark B. Tuvim
Patrick Jordan
Gordon Rees Scully Mansukhani, LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
(206) 695-5100
mtuvim@grsm.com
pjordan@grsm.com

*Attorneys for Preferred Freezer of
Richland, LLC and Henningsen Cold
Storage*

Dated: October 28, 2020.

³⁰ See Gottschalk VS, at ¶ 4; Friend VS, at ¶ 4.

VERIFICATION

I hereby verify on behalf of Preferred Freezer of Richland, LLC and Henningsen Cold Storage, 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.

s/ Mark B. Tuvim
Mark B. Tuvim
Attorney for Preferred Freezer of
Richland, LLC and Henningsen Cold
Storage

CERTIFICATE OF SERVICE

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

Eric M. Hocky
Justin J. Marks
ehocky@clarkhill.com
jmarks@clarkhill.com
Counsel for Port of Benton, WA

Rydel Peterson
rydel@tcry.com
Counsel for Tri-City Railroad Company, LLC

Thomas F. McFarland
mcfarland@aol.com
Counsel for Tri-City Railroad Company, LLC

Jeremy M. Berman
jmberman@up.com
Counsel for Union Pacific Railroad Company

Jill Rugema
Jill.rugema@bnsf.com
Counsel for BNSF Railway Company, Inc.

Bill Friend
Bill.friend@henningsen.com
Henningsen Cold Storage

Brad Sanders
Brad.Sanders@lambweston.com
Lamb Weston

Dennis Kylo
Dennisk@cwccorn.com
Central Washington Corn Processors

Katy Conlan
katyconlan@packagingcorp.com
Packing Corp of America

John Doyle
jdoyle@delhur.com
DelHurIndustries

Albert Nicholson
ANicholson@lineagelogistics.com
Lineage Logistics

s/ Lynn Van Eyck
Lynn Van Eyck, Legal Assistant
lvaneyck@grsm.com

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