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September 12, 2018

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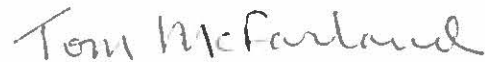
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. AB-1270, *Port of Benton, WA -- Adverse Discontinuance of Rail Service -- Tri-City Railroad Company, LLC*

Dear Ms. Brown:

Hereby transmitted is a Petition To Stay Or Dismiss And Reply In Partial Opposition To Petition For Partial Waiver Of Regulations And For Exemptions for filing with the Board in the above referenced matter.

Very truly yours,



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

TMcf:kl:1818\ef/STB1

cc: John D. Heffner, Esq., *by e-mail & first-class, U.S. mail*

BEFORE THE
SURFACE TRANSPORTATION BOARD

PORT OF BENTON, WA -- ADVERSE	)	
DISCONTINUANCE OF RAIL SERVICE	)	DOCKET NO.
-- TRI-CITY RAILROAD COMPANY,	)	AB-1270
LLC	)	

**PETITION TO STAY OR DISMISS AND REPLY IN
PARTIAL OPPOSITION TO PETITION FOR PARTIAL
WAIVER OF REGULATIONS AND FOR EXEMPTIONS**

TRI-CITY RAILROAD COMPANY, LLC
10 North Washington Street
Kennewick, WA 99336

Petitioner

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Attorney for Petitioner

DATE FILED: September 12, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

PORT OF BENTON, WA -- ADVERSE	)	
DISCONTINUANCE OF RAIL SERVICE	)	DOCKET NO.
-- TRI-CITY RAILROAD COMPANY,	)	AB-1270
LLC	)	

**PETITION TO STAY OR DISMISS AND REPLY IN
PARTIAL OPPOSITION TO PETITION FOR PARTIAL
WAIVER OF REGULATIONS AND FOR EXEMPTIONS**

Pursuant to 49 C.F.R. § 1117.1, Tri-City Railroad Company (TCRY), a Class III rail carrier subject to the jurisdiction to the Board, hereby files a Petition to Stay or Dismiss adverse discontinuance proceedings instituted by the Port of Benton, Washington (the Port) unless and until the Port lawfully terminates a Railroad Lease between TCRY and the Port that applies to the rail line owned by the Port over which TCRY is authorized by the Board to operate.^{1/} The Port instituted adverse discontinuance proceedings on August 28, 2018 by filing a Petition for Partial Waiver of Regulations and for Exemptions (Port's Petition), which is a prelude to filing an Application for Adverse Discontinuance. If TCRY's Petition to Stay or Dismiss is not granted, TCRY partially opposes the Port's Petition.

PETITION TO STAY OR DISMISS

In *LRY, LLC (LRY) d.b.a. Lake Railway -- Petition for Declaratory Order -- Rail Line in Lake County, OR and Modoc County, CA*, 2017 WL 2560033 (Finance Docket No. 36117, decision served June 12, 2017), LRY was operating over a rail line pursuant to a lease from the

^{1/} The rail line under consideration extends between Milepost 18.84 at Richland Junction and Milepost 29.73 at Horn Rapids Road, a distance of 10.89 miles at or near Richland, Benton County, WA.

owner of the line, Lake County, OR (the County). The County served a notice on LRY that purported to terminate the lease. In response, LRY filed a complaint in the United States District Court for the District of Oregon challenging termination of the lease. Pending disposition of the federal court litigation, LRY filed a Petition for Declaratory Order at the Board, asking the Court to preserve the status quo by staying any proceeding that might be filed in the future seeking adverse discontinuance of LRY's rail service over the County's rail line.

The Board refused to issue a declaratory order, treating the matter as hypothetical inasmuch as no such adverse discontinuance proceeding had been instituted. However, as directly pertinent to the present proceeding, the Board said (2017 WL 2560033, at *1, emphasis added):

Should the County or any other party begin a Board proceeding seeking authority to require LRY to discontinue service over the line, LRY may petition the Board for a stay of that proceeding or argue its opposition to adverse discontinuance on the merits at that time.

The present case has the element that warrants stay or dismissal that was missing in the LRY case, i.e., a proceeding seeking adverse discontinuance of TCRY's rail service over the line that it leases from the Port. The Port's Petition for Partial Waiver is a direct prelude to an Application for Adverse Discontinuance.

The issues raised by the Port at pages 3 and 4 of its Petition, regarding whether TCRY has violated terms of its Lease Agreement with the Port, are cognizable in court rather than at the Board, whose jurisdiction does not extend to interpreting or enforcing private contracts. *See Township of Woodridge, NJ v. Consolidated Rail Corp.*, 2001 WL 283507 at *2 (STB Docket No. 42053, decision served March 23, 2001) ("... the merits of the contract interpretation

dispute . . . are best addressed by the Courts.”); *see, also Union Pacific Railroad -- Petition for Declaratory Order and Preliminary Injunction*, 2018 WL 3209461 at *4 (Finance Docket No. 36197, decision served June 29, 2018) (“ . . .the controversy between the parties is in arbitration per the terms of the Agreement. The associated issues are best left to that forum at this time and can proceed independently without the need for a declaratory order from the Board.”).^{2/}

The Port has not alleged that the Railroad Lease has been terminated in accordance with its terms. Contrary to the Port’s allegations, TCRY is not in default of its obligations under the Railroad Lease (*see* note 2, *supra*), but even if it were to be in default, the Port has not taken steps required by the default provisions of Section 14 of the Railroad Lease before it could lawfully seek termination of the Lease.

Moreover, there is federal litigation pending between TCRY and the Port in which the Port can raise issues regarding TCRY’s alleged default of provisions of the Railroad Lease. *See United States of America, ex. rel. Randolph Peterson, and Tri-City Railroad Company, LLC v. Port of Benton County, et al.*, USDC, ED Wash. No. 2:17-CV-191-TOR, filed on April 2, 2018.

In its Draft Notice of Intent at Page 13 of its Petition, the Port stated:

. . . POB (the Port) intends to commence an eviction proceeding against TCR once the Board approves this application (for adverse discontinuance). . .

The Port has it backwards. A court is required to rule on the validity of the Railroad Lease before the Board can rule on the Port’s adverse discontinuance application. What if the Board were to grant the adverse discontinuance application, and a Court were to later determine

^{2/} Contrary to the Port’s allegations at page 3 and 4 of its Petition, TCRY has maintained the rail line in accordance with Section 8.1 of the Railroad Lease, and has not imposed a maintenance surcharge on the line.

that there was no violation of the Lease terms, so that there could be no valid eviction? In that case, an innocent lessee would be prevented from operating over the rail line despite a valid property right and contractual right to do so. That cannot be the law.

For all of the foregoing reasons, the Board should stay or dismiss this proceeding and the Port's prospective application for adverse discontinuance of TCRY's rail service unless and until the Port obtains a valid judicial determination that the Railroad Lease between TCRY and the Port has been lawfully terminated.

**REPLY IN PARTIAL OPPOSITION TO PETITION FOR PARTIAL
WAIVER OF REGULATIONS AND FOR EXEMPTIONS**

For the reasons stated previously, the Board need not address the Port's Petition for Partial Waiver and Exemptions. However, if the Board addresses that Petition, TCRY partially opposes the Port's requests.

TCRY opposes a waiver of 49 C.F.R. § 1152.22(b) regarding the physical condition of the Rail Line (Petition at 6). The Port acknowledges that it has both verbal and documentary information on the line's physical condition. (*Id.*). There is no valid reason why the Port should not provide that information.

For reasons already stated, TCRY opposes the statement at page 2 of the Port's Draft Notice of Intent (Petition at 13) that the Port can file an application for adverse discontinuance of TCRY's operation of the rail line pursuant to a lease before obtaining a judicial determination that the lease is invalid.

TCRY is attaching as Appendix A a short rebuttal of allegations in the Port's Petition that are false or materially misleading.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should stay or dismiss this proceeding unless and until the Port obtains a valid judicial determination that the Railroad Lease between the Port and TCRY has been lawfully terminated. If the Board nevertheless addresses the Port's requested waivers and exemptions, the Board should take into account TCRY's limited opposition.

Respectfully submitted,

TRI-CITY RAILROAD COMPANY, LLC
10 North Washington Street
Kennewick, WA 99336

Petitioner


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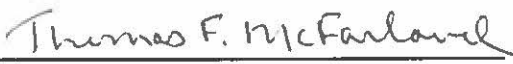
DATE FILED: September 12, 2018

**Responses of Lisa Anderson, TCRY Executive Vice President, to False or
Materially Misleading Statements in the Port of Benton's Petition**

1. At the top of page 4 the Port states "Moreover, TCR[Y]sic has attempted to impose a maintenance surcharge on the Line or its customers without obtaining prior POB consent as the lease requires." This is completely false. TCRY has requested on numerous occasions that the Port approve TCRY's "Maintenance Toll Fee" and supplement to it's "miscellaneous tariff." (See TCRY's answer to Port's counterclaim's and affirmative defenses. There is a litany of correspondence from TCRY to the Port surrounding approval of the toll fee and tariff.)
2. Also at the top of page 4, the Port states, "Service to customers will not be affected because both BNSF Railway and Union Pacific Railroad hold operating rights to serve all customers and have stated their willingness to provide all service once TCR service ceases." Also not true. TCRY has an exclusive service and track agreement with the largest single car customer located in the Richland area shipping roughly 4,000 annual carloads.
3. On page 6 the Port references that TCRY has not provided maintenance records, which is not true, but even more telling is the Port's desire to mislead the STB. TCRY has no contractual obligation to provide such records. (See TCRY's answer to Port's counterclaims and affirmative defenses. The Port hired rail consultant, Tangent Rail Services, even points that fact out to the Port in a piece of their correspondence to the Port).
4. Also on page 6 the Port misleads the STB that there are significant maintenance issues with the leased track. (See TCRY's answer to Port's counterclaim's and affirmative defenses. FRA inspector Paul Gangstad comments (paraphrasing) that the track is in great shape and tells TCRY to keep up the good work.)
5. Again on page 6 the Port is misleading the STB, for the FRA has never threatened to take the Yakima bridge out of service. The FRA has noted defective ties on the bridge, which need to be replaced. It is the Port who has stood in the way of TCRY performing its maintenance duties on the bridge by threatening a Temporary Restraining Order if TCRY did not provide documents outside the scope of its lease with the Port, prior to performing its scheduled maintenance. (See TCRY's answer to Port's counterclaims and affirmative defenses). The FRA Class 3 track issue is squarely before the federal court. The lease does not require a FRA Class 3 track standard as the Port claims. The lease states in section 8.1 "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." (See TCRY's answer to Port's counterclaim's and affirmative defenses).
6. On page 7 the Port implies that the lease requires TCRY to provide this type of information. It does not.
7. TCRY believes the Port does have the information referenced on page 8.
8. The system map that the Port included is incomplete.

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2018, I served the foregoing Petition To Stay Or Dismiss And Reply In Partial Opposition To Petition For Partial Waiver Of Regulations And For Exemptions by e-mail on John D, Heffner, Esq. at *john.heffner@clarkhillstrasburger.com*, and on Mr. Heffner by first-class, U.S. mail, postage prepaid at 1025 Connecticut Avenue, N.W., Suite 717, Washington, D.C. 20036-4104.


Thomas F. McFarland