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April 29, 2019

BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
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RE: *Docket No. AB-1270 Port of Benton County, WA – Adverse Discontinuance of Rail Service – Tri-City Railroad Company LLC*

Dear Ms. Brown:

Hereby transmitted is a Rebuttal to Reply in Opposition to Application for Discontinuance for filing with the Board in the above referenced matter.

Sincerely yours,

CLARK HILL PLC



John Heffner

JH:

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1270

**PORT OF BENTON, WA,
ADVERSE APPLICATION FOR
DISCONTINUANCE OF RAIL SERVICE
TRI-CITY RAILROAD COMPANY, LLC**

REBUTTAL TO REPLY IN OPPOSITION

Respectfully submitted,

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Dated: April 29, 2019

I.
INTRODUCTION

By notice served on March 19, 2019, the Board accepted the application (the “Application”) filed by the Port of Benton, WA (“POB” or “the Port”) requesting that the Board authorize the adverse discontinuance of operating authority held by Tri-City Railroad Company, LLC (“TCRY”) over a line of railroad known as the “Hanford Site Rail System Southern Connection” or more simply “the Line” owned by the Port between MP 18.84 at Richland Junction and MP 29.73 at Horn Rapids Road at Richland, WA.¹ Pursuant to the schedule established by the Board in its notice, the Port respectfully submits its Rebuttal to TCRY’s Reply in Opposition to Application for Adverse Discontinuance (“Reply”), dated April 15, 2019. The Port submits with this Rebuttal a verified statement of David Billetdeaux, counsel to the Port.

The evidence in the record of this proceeding demonstrates that the public convenience and necessity requires a grant of the Port’s Application. The Port requests that the Board promptly issue a decision to that effect thereby removing the preemptive shield of the ICC Termination Act so that the Port may use state law remedies to evict TCRY from the Line.

¹ The Port had filed its Application on February 27, 2019.

II. STATEMENT OF FACTS

By now the Board is familiar with the facts in this proceeding so they will only be repeated for the sake of clarity. POB is a public agency and political subdivision in the State of Washington chartered in 1958 under state statute RCW 53.04.010, as well as a non-operating common carrier railroad. The Port's purpose is to promote economic and industrial development along with multi-modal transportation. TCRY is a Class III short line common carrier railroad authorized by the Board to operate over the Line.²

The United States Government's Atomic Energy Commission ("AEC"), now the US Department of Energy ("DOE"), originally constructed the Line in 1947 to provide rail service to the Hanford Nuclear Reservation. The AEC granted predecessors of BNSF Railway ("BNSF") and the Union Pacific Railroad ("UP") "equal joint" operating rights to allow them to serve that facility and those other customers that would eventually locate on the Line.³ Pursuant to an Indenture dated October 1, 1998, POB acquired the Line from DOE with BNSF and UP remaining as the carriers operating over it and continuing to have equal access to

² *Tri-City Railroad Company, L.L.C.—Lease and Operation Exemption-Rail Line of the Port of Benton in Richland, WA*, FD 33888, STB served June 23, 2000.

³ *Northern Pacific Railway, Et Al. Trackage Rights Etc.*, FD 15925 (ICC served 1948).

all customers.⁴ Pursuant to a 10-year Lease Agreement dated August 1, 2002 (the “Lease”), and subject to the rights of BNSF and UP to operate over the Line, TCRY began operating over the Line and providing local service for its own account.⁵ All of TCRY’s interline service is provided through interchange with BNSF and UP. Reply at 1.

BNSF and UP have been exercising their rights since 2009 and 2017 respectively, to provide direct service over the Line to shippers that have requested such service. Reply at 3, 14. According to TCRY, in 2018, TCRY handled 119 carloads of traffic over the Line, BNSF handled approximately 4,500 carloads, and UP handled approximately 3,500 carloads. Reply at 16.

In the past several years, numerous disagreements have developed between POB and TCRY including disagreements relating to TCRY’s failures to maintain the Line as required under, and TCRY’s imposition of charges in violation of, the Lease, resulting in substantial litigation between TCRY, on the one hand, and both the Port and BNSF, on the other.⁶ Unable to resolve these disputes amicably through negotiation, POB provided TCRY with notice that TCRY was in default of its Lease obligations. Based on the default, and the failure of TCRY to cure, the

⁴ See *Port of Benton--Acquisition and Operation Exemption--U.S. Department of Energy Rail Line in Richland, WA*, FD 33653 (STB served Oct. 6, 1998).

⁵ That agreement automatically renewed at the end of the 10-year term absent any material defaults.

⁶ Styled as *BNSF Railway Company v. Tri-City & Olympia Railroad Company, LLC*, CV-09-5062-EFS (E.D. Wash.)(cited as *BNSF*). UP also intervened in that case in support of plaintiffs.

Port decided to terminate TCRY's Lease and to evict TCRY from the entire Line. However, before the Port can do so, it must first have the Board determine that discontinuance of service by TCRY is required by the public convenience and necessity.

Service to customers will not be affected because both BNSF and UP already hold operating rights to serve all customers, already are handling over 98% of the carloads of traffic moving to and from the Line, and have stated their willingness to provide all service once TCRY service ceases. Application at Exhibits D, E. Moreover, while the customers TCRY still serves have access to two Class 1 carriers via TCRY, they would continue to have access to the same two Class 1 carriers through their direct service rights.

III. LEGAL ARGUMENT

A. The Port has Satisfied its Burden of Proof

Any person with a "proper interest" can bring an adverse abandonment application. *See State of South Dakota, ex, rel. Dept. of Transp. – Adverse Discontinuance of Operating Authority – Napa-Platte Reg'l RR Auth.*, 2008 WL 3153713, at *2 (STB Docket No. AB-1253, decision served June 25, 2018)(cited as *South Dakota*); *Jacksonville Port Auth. – Adverse Discontinuance – in Duval Cnty., Fla.*, 1996 WL 396950, at *4 (STB Docket No. AB-469 STB served July 17, 1996)(cited as *Jacksonville*). The Port as the non-operating carrier owner-landlord

of the Line, clearly is a party with a proper interest and was entitled to file the Application commencing this proceeding. *South Dakota, supra* at 2.

Simply stated, POB has satisfied its burden of proof under the Interstate Commerce Commission Termination Act's ("ICCTA's") public convenience and necessity test. The Board utilizes the public convenience and necessity standard to decide adverse abandonment and discontinuance cases. Under this standard, the Board balances the competing benefits and burdens of discontinuance or abandonment on all interested parties, including the railroad, 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.*, Docket No. AB-124 (Sub-No. 2) et al., slip op. at 4 (STB served May 3, 2004) (citing *City of Cherokee v. ICC*, 727 F.2d 748 (8th Cir. 1984)); *see also N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1183 (D.C. Cir. 2004)(cited as *NYCH*). As part of the analysis, "the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." 49 U.S.C. § 10903(d). In discontinuance proceedings involving disputes between public landlords and tenant railroads, the Board has focused on whether shippers would lose service or service options, and the impact that any such loss would have on the community. *See South Dakota, supra* at 2; *Tacoma Eastern Railway Company, Adverse Discontinuance of Operations Application*,

Docket AB-548, slip op. at 5 (STB served on Oct. 16, 1998)(cited as *Tacoma*); *Cheatham Cnty. Rail Authority, "Application and Petition" for Adverse Discontinuance*, 1992 WL 322925, slip op. at 4, (ICC Docket No. AB-379X, ICC served Nov. 4, 1992)(cited as *Cheatham*).

The record contains sufficient evidence to support a finding by the Board that the requested adverse discontinuance of rail service should be granted.⁷ First, most importantly, if the Port's request were granted, service to customers would not be affected because both UP and BNSF hold operating rights to serve all customers and have stated their willingness to provide all service once TCRY service ceases. Application at Exhibits D, E. TCRY does not deny that BNSF and UP have authority to provide rail service to and from the Line, and that BNSF and UP are currently handling approximately 8,000 of the 8,119 carloads that were handled over the Line in 2018. There can be no credible suggestion that BNSF and UP would not have the financial or operational capability to handle the additional 119 carloads. Additionally, as noted, shippers using TCRY have the option of having the interline portion of their moves handled by either UP or BNSF; however, that would still be the case since both BNSF and UP have equal access to the Line. Accordingly, no service is being discontinued or adversely affected.

⁷ Contrary to TCRY's assertions (Reply at 8), it is the Board's and not the Port's role to perform that balancing test.

TRCY's Reply includes letters from six "supporting shippers" (Appendices 9-14) that it claims oppose the adverse discontinuance and are entitled to weight because they are located "on line." It should be noted that Calbag Resources (Reply at Appendix 9) is not a current shipper, and the letter does not note the time period when it was an active shipper, or how many carloads it was shipping. With respect to the other letters, while they indicate that they are satisfied with TCRY's service, they do not specifically indicate that they oppose the discontinuance or that they believe that BNSF or UP would not, or could not, provide them with replacement common carrier service. Although it is not clear the importance of whether the customer is located on-line (as opposed to whether the customer receives service to, from or over the line), the Port notes that at least two of the shippers are likely only receiving transload services from the Line. For example Cost Less Carpet (Reply at Appendix 11) is located approximately 10 miles away, and Great Northwest Transport, LLC (Reply at Appendix 14) is located 20 miles from the Line. Billetdeaux V.S. at 1. Moreover, it is clear that the support statements are from only a small subset of the customers that are shipping cars to, from or over the Line, since they can represent no more than 119 of the 8,119 cars handled in 2018.

TCRY discounts the shipper statements supporting the Application (Exhibits B and C) because the shippers are not located directly on the Line. What TCRY

avoids mentioning is that the shippers are located on the City of Richland industrial spur which connects to the end of Line, and that all traffic to and from the industrial spur must move over the Line.⁸ Billetdeaux V.S. at 2. These shippers specifically discuss the issues that they had and have with TCRY, and why they support the discontinuance request. The dissatisfaction with TCRY of other shippers (served both directly from the Line and from the City of Richland industrial spur) is shown by their decisions to have their traffic now handled by BNSF and UP without TCRY's involvement. Application at Exhibits C, D.

Second, there will be no negative impact on rural and community development, since no service would be discontinued and the community would not be adversely affected. Further, it should be noted that the Port is a public agency that acquired the Line for the preservation and development of rail service for the benefit of the community, and its actions and desires for the Line should be given weight accordingly when considering the impact of the proposed discontinuance on the public and the community.

Third, though TCRY's plight is unfortunate, the Board's primary job is to protect the public against unnecessary discontinuance, cessation, or interruption of rail service, and not to protect individual carriers from the results of their own

⁸ In reporting the number of cars that have used the Line for which it wants maintenance contributions, TCRY includes the cars moving to and from customers served from the City of Richland industrial spur. Reply at 16.

actions. Indeed, it is TCRY itself that has interrupted service, sometimes intentionally, on a number of occasions.⁹

Although TCRY references the same public convenience and necessity standard as the Port (Reply at 7), TCRY goes on to assert, without any balancing, that “TCRY’s active operation of the Rail Line in and of itself dictates denial of the Application.” Reply at 5. However, the precedent cited by TCRY to bolster its claim in opposition to discontinuance is irrelevant and misleading since the cases cited involved abandonments where service would be terminated or lost rather than discontinuances where service would be continued. Reply at 5-6.

For example, TCRY refers to the Board’s decision in *Yakima Interurban Lines Assn. – Adverse Abandonment – in Yakima County, WA* 2004 WL 2635686, at *3, (STB Docket No. AB-600, decision served November 19, 2004), *pet. to reopen den.*, 2005 WL 2237179 (STB served Sept.15, 2005)(cited as *Yakima*). In *Yakima*, the Board denied abandonment because the carrier took steps to attract traffic, thus there was potential for continued operations. *Id.* at *4. TCRY also relies on *NYCH* for the proposition that even if only a small amount of traffic is being handled by the carrier the adverse abandonment should be denied. Reply at 5. *NYCH* was also an abandonment case where all service would be lost, and in that case the amount of traffic being handled by the carrier was much more

⁹ See *BNSF*; see also Application at Exhibits C, D.

substantial (1600 carloads, not the 160 carloads cited by TCRY) than the amount of traffic being handled by TCRY. *See* Reply at 5; *see also supra* at 1179.

As discussed above, however, in this case, no shippers will lose service if the adverse discontinuance is granted. The Board permitted an abandonment in *Paulsboro Refining Company LLC – Adverse Abandonment – in Gloucester County, N.J.*, (STB Docket No. AB-1095, slip op. at 5, STB served Dec. 2, 2014)(cited as *Paulsboro*), even though a carrier was willing to provide continued rail service. The Board noted that the particular situation involved a landlord/tenant dispute, thus “the agency’s line of cases on that point is more analogous.” *Id.* The situation at hand is a matter of discontinuance, and is also a landlord/tenant dispute, so whether or not TCRY has traffic currently, or is attracting additional traffic is not determinative, since the traffic will still be handled. In such cases, the Board has granted adverse discontinuance despite the tenant railroad providing some service or desiring to continue to provide service. *See Tacoma; Jacksonville; Cheatham, supra.*

**B. Purpose of Adverse Discontinuance Case is to Remove the
“Preemptive Shield”**

The purpose of this adverse discontinuance case is to remove the “preemptive shield” so the Port can seek a remedy under state law, not to enforce a private contract as TCRY would have the Board believe. Reply at 9. Federal

preemption precludes the Port's ability to evict TCRY from the Line under state landlord and tenant law. As TCRY indicates, it is the "policy of the United States Government to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public" (Reply at 4), but the proposed discontinuance would not hinder that goal as no shippers will lose any service or service options. Moreover, it is also the policy to reduce regulatory barriers to exit from the industry, and to encourage honest and efficient management of railroads. 49 USC § 10101 (7), (9). And it is clear that the Board does not allow its jurisdiction to be used as a bar to state law remedies in the absence of an overriding federal interest. *Paulsboro*, *supra* at 4.

Before POB could evict TCRY under state law, it must first remove that preemptive shield by obtaining discontinuance authority. *See Tacoma*, slip op. at 7; *see also* discussion at pages 10-11 of Application. No Board or Interstate Commerce Commission precedent holds that a court ruling finding a lease terminated is a precondition to filing an adverse discontinuance application. In fact, there is a long line of cases where the Board has "found that a tenant's services were no longer wanted or needed and there was no federal interest in retaining the agency's jurisdiction." *Paulsboro* slip op. at 5 n. 16, citing *Tacoma*; *Jacksonville*; *Cheatham*.

Accepting TCRY's position would mean that adverse applications would be delayed for months or even years. On the other hand, a decision granting the Application would merely facilitate the local litigation, but not compel eviction. TCRY incorrectly argues that the lease has not been lawfully terminated and that it is the subject of court litigation. Reply at 9. POB is not asking the Board to interpret or enforce a private contract, which would result in "piecemeal litigation." *Id.* On the contrary, consistent with longstanding ICC and Board precedent, the Port is merely identifying various defaults or other practices in cases where adverse discontinuances were granted.

A brief recap of the civil litigation between TCRY and its owner Randall Peterson and the Port is relevant. Those plaintiffs filed a *Qui Tam* suit in Eastern District of Washington against POB making various assertions, irrelevant here, to which POB counter-claimed seeking a determination as to the validity of the Lease.¹⁰ The case is not likely to be heard until 2020. Thus, the Board should not wait for the federal court to issue its decision prior to proceeding with the case at hand. To do so would delay this adverse discontinuance case indefinitely causing service disruptions and confusion for on-line customers

¹⁰ See Complaint, *United States of Am. et al. v. Port of Benton County et al.*, No 2:17-cv-00191-TOR, (E.D. Wash. 2017).

C. No Basis for Denial on Equitable Grounds

Being unable to demonstrate that the adverse discontinuance should not be granted on the basis of the public convenience and necessity standard, TCRY asserts that the Application should be denied on “equitable grounds.” Reply at 14-16. There is no basis for the Board to do so.

First the alleged inequitable conduct goes to the enforceability of the Lease and whether the termination of the Lease by the Port was proper. As such, these issues will be determined as part of the litigation over the Lease termination and eviction. The Board should not wade into these issues.

However, that is not say that the Port believes that is has acted inequitably. TCRY alleges that the Port and its “allies” have been “starving TCRY of revenues and continuing to saddle TCRY with burdensome track and maintenance costs.” Reply at 14. This is incorrect. For years, POB tried to work cooperatively with TCRY to resolve problems. *Billetdeaux V.S.* at 1. Unfortunately, the Application is POB’s last resort. Though not relevant to the Board’s determination, TCRY alleges that the Port made an “unfounded” claim that “BNSF and UP were not obligated to pay any share of maintenance costs because this is contrary to industry practice. Reply at 3. However, the claim is not “unfounded” because the Court in *BNSF* stated that “[t]he relative rights of the parties are actually quite simple: The United States granted BNSF and UP’s predecessors in interest full rights to operate

on the Richland Trackage, and TCRY took possession of the Richland Trackage subject to these rights.” *Id.* at 1066-67. As found by the Court, BNSF and UP’s rights were determined by the 1947 agreement, which provides:

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 use by them or either of them during the term of said line B-C. After all said annual payments to be made by the Pacific Company and Union Company have been made, the Pacific Company and Union Company shall continue to have the rights to operate over the trackage without further payments.

See Reply at Appendix 14 (emphasis added). Thus, the Port’s assertion that BNSF and UP were not obligated under the Agreement to make any additional payments for use of the Line was not unfounded, and the Port has not acted inequitably in requiring TCRY to comply with the terms of the Lease.

V.

CONCLUSION

As the record shows, the Port has satisfied its burden of proof. Proper application of the public convenience and necessity standard requires that the Board grant the Port’s request for the adverse discontinuance of service by TCRY. The Port requests that the Board issue a decision to that effect thereby removing the preemptive shield of the ICC Termination Act so that the Port may use state

law remedies to evict TCRY from the Line if it is unwilling to vacate the premises voluntarily.

Respectfully submitted,



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Dated: April 29, 2019

VERIFICATION

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

Executed on April 29, 2019.



David J. Billetdeaux
General Counsel

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Rebuttal to Reply in Opposition to the Adverse Application for Discontinuance dated April 29, 2019 was sent by U.S. Mail to all parties of record in this proceeding.

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John D. Heffner

Dated: April 29, 2019

VERIFIED STATEMENT
OF
DAVID J. BILLETDEAUX

My name is David J. Billetdeaux. I am the in-house counsel to the Port of Benton ("POB" or the "Port") which is a public agency and political subdivision in the State of Washington chartered in 1958 under state statute RCW 53.04.010 as well as a nonoperating common carrier railroad. I have been actively involved in all the Port's railroad activities since July 1, 2017. Thus, I have personal knowledge of most matters and details involving the line of railroad known as the "Hanford Site Rail System Southern Connection" (the "Line") owned by the Port, as well as all the carriers operating on the Line.

Three carriers operate over the Line, including Union Pacific ("UP"), BNSF Railway Company ("BNSF") and the Tri-City Railroad Company, LLC ("TCRY"). The total number of cars handled on the line is approximately 8,100, and TCRY handles approximately 119 cars. This year, the Port believes the number of cars handled will approach 9,000, but believes TCRY's total number of cars handled will be reduced from their current 119. The Port has for years tried to work cooperatively with TCRY to resolve various ongoing problems, but to no avail. Unfortunately, litigation has ensued, and the Port's last resort is to terminate the lease with TCRY, which can only be successful with the granting of the Application for Adverse Discontinuance.

In TCRY's Reply, it contends that all of its support letters are from shippers on the Line. Reply at Appendix 4, page 4. However, they are not on the Line, and in fact, their traffic would have to be trucked to or from a transload facility on the Line. For example, Cost Less Carpet is located approximately 10 miles away and Great Northwest Transport, LLC is located 20 miles from the Line. Calbag Resources, LLC is also not currently located on the Line, as it was a

Hanford Site subcontractor not currently shipping. In addition, to the best of my knowledge, I've seen no evidence of shipments to or from Bio-Gro, Delta Ridge, Seneca Falls, Agro Gypsum, Columbia River Carbonates, Cost Less Carpet, or Great Northwest Transport.

TCRY discounts the Port's supporting shipper statements because they are not directly on the Line. What TCRY avoids mentioning is that the shippers are located on the City of Richland industrial spur which connects to the end of Line, and that all traffic to and from the industrial spur must move over the Line. With respect to the Port's supporting shippers, Central Washington Corn Processors was formerly served directly by TCRY from 2009 to late 2015. However, their service deteriorated so badly that this customer refused to allow TCRY to serve their facility. More specifically, TCRY denied Central Washington Corn Processors the ability to receive cars from BNSF thus limiting its access just to UP. Ultimately, TCRY refused any service to CWCP from UP as well. This shipper has since moved to a location where it receives direct BNSF service. In the case of DelHur Industries, it is located on a siding owned by the City of Richland but TCRY advised that all shipments had to go through TCRY. TCRY then blocked BNSF access to this customer's siding on at least one occasion.

VERIFICATION

STATE OF WASHINGTON)
)
CITY OF RICHLAND)

DAVID J. BILLETDEAUX being duly sworn according to law, hereby deposes and states that he holds the position of IN-HOUSE COUNSEL with affiant, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information, and belief.



Subscribed to and sworn to before me, a Notary Public, in and for the County of Benton in the State of Washington, this 26th day of April 2019.



Notary Public

My Commission expires: 11/27/2021

