

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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September 27, 2018
Part of
Public Record

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

STB DOCKET NO. AB-1270

**PETITION FOR PARTIAL WAIVER
OF REGULATIONS AND FOR EXEMPTIONS**

**REPLY OF PORT OF BENTON
TO
PETITION TO STAY OR DISMISS ET AL
OF TRI-CITY RAILROAD COMPANY, LLC**

Submitted by
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**I.
INTRODUCTION**

On September 12, 2018, as supplemented on September 19, 2018, Tri-City Railroad Company, LLC (“TCRY”) petitioned the Board to stay or dismiss the Petition for Partial Waiver and For Exemptions previously filed by the Port of Benton, WA (“POB” or “the Port”) on August 28, 2018.¹ POB opposes TCRY’s

¹ Although part of TCRY’s pleading is styled as a “Reply in Partial Opposition,” it is in reality a Petition. The Board should accept POB’s Reply in the interest of compiling a complete record as it does when appropriate. *City of Alexandria, Va.—Petition for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008)

stay or dismissal request as it is contrary to long established agency law.

Moreover, TCRY opposes POB's only substantive waiver request, 49 CFR §1152.22(b) regarding the reports of the physical condition of the Line.

II. BACKGROUND AND STATEMENT OF FACTS

As the Board will recall, POB is a public agency and political subdivision in the State of Washington chartered in 1958 under state statute RCW 53.04.010. It owns a line of railroad which has been leased to TCRY for operation including maintenance since 2002. In addition, both BNSF Railway ("BNSF") and the Union Pacific Railroad ("UP") have had the right to operate over and serve customers on it long before the lease to TCRY. BNSF and UP continue to have those rights today.

On August 28, POB petitioned for a partial waiver of regulations governing railroad abandonments and discontinuances at 49 CFR §1152, Subpart C, and for exemptions from applicable statutory provisions in anticipation of filing an application for the adverse discontinuance of railroad operations conducted by TCRY. It plans to seek discontinuance because of various defaults by TCRY of its lease obligations. Both BNSF and UP are prepared to serve all customers currently served by TCRY.

III. ARGUMENT

TCRY devotes most of its two pleadings to the notion that POB's Petition is premature and should be stayed or dismissed. More specifically, TCRY states in its September 12 Petition at page 5:

“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.”

POB has researched 22 years of Board precedent and it is unaware of any Board, or for that matter, Interstate Commerce Commission precedent, requiring an adverse discontinuance applicant to obtain a judicial ruling that a lease has been *lawfully terminated* before it can initiate an adverse discontinuance proceeding. Moreover, TCRY has not cited any relevant precedent. The closest that it comes precedent-wise is *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, FD 36117 (STB served June 12, 2017). Counsel for POB is familiar with that case as he represented Lake County in that Board proceeding.

There Lake County was considering terminating Lake Railway's lease and operating agreement and in fact did so. Anticipating that the Country would file an adverse discontinuance application at some point in the future, Lake Railway

sought injunctive relief against such a filing by way of a petition for declaratory relief. The Board saw through this tactic and denied Lake Railway's relief noting that there was no immediate prospect of filing a future "hypothetical" adverse discontinuance application. In fact, Lake County never initiated adverse discontinuance proceedings as Lake Railway agreed to vacate the line voluntarily. Furthermore, there was no judicial determination of the lawfulness of Lake County's lease termination. The federal court handling that matter dissolved a temporary restraining order that Lake Railway sought against Lake County's eviction efforts. A breach of contract suit that Lake Railway has filed against Lake County is pending the completion of discovery and is months, if not several years, away from a decision as to whether Lake County's lease termination was lawful.

Requiring POB to first obtain a judicial ruling that its efforts to terminate the TCRY lease are lawful would seriously delay the initiation of adverse discontinuance proceedings.² In fact, the federal preemption shielding any common carrier railroad line such as the Port's from state or local law could be seen as preventing or frustrating the POB's efforts to remove TCRY.³ In all

² TCRY notes in its September 19 "Supplement" that the Port has declared TCRY in default.

³ As the Board has held, "[i]f we grant an adverse abandonment, our exclusive and plenary jurisdiction is removed, thereby enabling the parties to undertake other legal remedies that are otherwise barred to seek to eject the carrier and allow the property to be used for other purposes. As we have frequently stated, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law where no overriding Federal interest exists. *See CSX Corp. and CSX Transportation Inc.-Adverse Abandonment Application-Canadian National*

likelihood, a court hearing any sort of eviction effort would likely direct a line's owner to seek adverse discontinuance authority from the Board before it could allow eviction or may be even determine the lawfulness of the lease. This delay would be contrary to the ICC Termination Act's rail transportation policy goals insofar as it could create uncertainty on the part of rail shippers on the line as to what railroad is their service provider.

With the exception discussed below, TCRY does not appear to object to any of POB's other waiver or exemption requests as inappropriate. It opposes the Port's request for a waiver of 49 CFR §1152.22(b) stating that the Port has both verbal and documentary information on the line's physical condition. TCRY submits with its September 12 Petition an attachment from its Executive Vice President Lisa Anderson. In response, POB attaches a statement from its in house counsel David Billetdeaux addressing her points. Ms. Anderson as much as states that the Port has no in depth knowledge of the line's physical condition when she admits in paragraph 3 that "TCRY has no contractual obligation to provide such records." She also confirms in paragraph 6 of her responses that the lease does not require TCRY to provide the Port with detailed financial and operating information. While she claims in paragraph 7 that the Port has knowledge of rural

Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002).

and community impact information, it lacks the sort of detailed evidence required for a discontinuance application.

IV.
CONCLUSION

The Board should deny TCRY's request to stay or dismiss POB's Petition for Waiver and Exemptions as contrary to long established agency law and procedure. Similarly, it should reject TCRY's only substantive waiver request, 49 CFR §1152.22(b).

Respectfully submitted,



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September 27, 2018

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that I have this 27th day of September 2018 served a copy of the foregoing Reply of the Port of Benton, WA, to Tri-City Railroad's "Petition to Stay or Dismiss and Reply in Partial Opposition to Petition for Partial Waiver of Regulations And For Exemptions" by email and US Mail on:

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ATTACHMENT

Port of Benton counsel David Billetdeaux's responses to Lisa Anderson statements:

1. TCRY requested that the Port approve a maintenance toll fee, but did so with an effective date already in place. The Port requested documentation to prove that the tariff was reasonable and would not be a breach of terms within the POB/TCRY Lease. Further, the Port needed time to discussion at a regularly scheduled Port Commission meeting. The items requested by the Port were not provided by TCRY. Instead, some Washington State reports relating to toll booths on automobile highways were produced.
2. The one customer Ms. Anderson speaks of is not on Port of Benton owned trackage. BNSF and UP have the rights to deliver cars directly to the gates of Preferred Freezer, the company in question. BNSF and UP would even deliver inside the gates of Preferred Freezer, and Preferred Freezer has the capability to move cars themselves, but TCRY is standing in the way of commerce and will not allow this to occur.
3. TCRY has not provided maintenance records or financial information for at least several years (likely 5 or more years, but without a very thorough review of all documents in our possession I am only comfortable saying the last several years). The Port contends there is a reasonable business expectation that our Lessee provide documentation that the Port requests when it relates to the safety of the line, and to making sure business is being conducted within the bounds of the Lease, since certain activities of TCRY could negatively impact the Indenture requirements under which the Port accepted the trackage from the Department of Energy.
4. The Paul Gangstad reports were from 12-06-2017 and included a number of odd statements inconsistent with ALL other inspection data. The FRA conducted another inspection February 27 – March 1, 2018, and found 116 defects and issues a civil violation to TCRY. May 15, 2018, another FRA inspection was conducted over the Yakima River Bridge (Bridge 44.4), with additional defects and another civil violation. The Bridge is now ordered to 5mph due to lack of maintenance. The entirety of the track has now been unilaterally designated "excepted track" by TCRY despite a Lease obligation to keep the rail line at an FRA Class 3 standard; the standard at which the Port obtained the rail line from DOE.
5. TCRY suggested a bridge outage in an email to the FRA. Receiving complaints from railroads and shippers down the line after TCRY announced a 72-hour bridge outage would take place approximately two weeks from the day of their announcement, which did not leave enough time for shippers to re-route product. TCRY's own president, in earlier correspondence to the Port, (paraphrasing) stated that no bridge outages should occur for tie replacement work so that common carrier status is not put in jeopardy. The Port sought a bridge safety management program, permits, and a scope of work from TCRY in order for the Port to be able to protect its own asset. These documents have never been delivered. Instead, TCRY simply announced that the bridge work is now on hold indefinitely, despite the fact that all bridge work was supposed to be completed within thirty (30) days of the 5-15-2018 FRA report.
6. The maintenance issue, and whether documentation must be provided, is being disputed in the current Federal litigation. The Port believes it has a right to such information as the owner of the assets.

7. We only have limited information from 3rd party consultant reports paid for by the Port. TCRY has not provided the Port with this information.
 8. Incorrect. This is the complete system map using TCRY's own timetable and MP numbers.
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