

SERVICE DATE – OCTOBER 31, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1270

PORT OF BENTON COUNTY, WASH.—ADVERSE DISCONTINUANCE OF RAIL
SERVICE—TRI-CITY RAILROAD COMPANY, LLC

Digest:¹ The Board grants an application filed by the Port of Benton, Wash., for “adverse” discontinuance of the operating authority of Tri-City Railroad Company, LLC, over a rail line in Richland, Wash.

Decided: October 30, 2019

On February 27, 2019, the Port of Benton, Wash. (Port), filed an application under 49 U.S.C. § 10903 asking the Board to find that the public convenience and necessity require or permit the “adverse” discontinuance of operating authority held by Tri-City Railroad Company, LLC (Tri-City), a Class III carrier, over approximately 10.89 miles of main line track (16 miles including sidings and connecting spur tracks), extending between milepost 18.84 at Richland Junction, and milepost 29.73 at Horn Rapids Road in Richland, Wash. (the Line).² Notice of the application was served and published in the Federal Register on March 19, 2019 (84 Fed. Reg. 10,169). On April 15, 2019, Tri-City filed a reply in opposition to the Port’s application.³ On April 29, 2019, the Port filed its rebuttal. For the reasons set forth below, the Board will grant the Port’s application.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

² Prior to filing the application, the Port filed a petition seeking exemptions from several statutory provisions as well as waivers of certain Board regulations that were not relevant to its adverse discontinuance application or that sought information not available to the Port; the Board granted the Port’s petition in part on October 31, 2018. See Port of Benton Cty., Wash.—Adverse Discontinuance of Rail Serv.—Tri-City R.R. (October 2018 Decision), AB 1270 (STB served Oct. 31, 2018). On February 6, 2019, the Port filed a petition for an additional waiver, which the Board also granted. Port of Benton Cty., Wash.—Adverse Discontinuance of Rail Serv.—Tri-City R.R., AB 1270 (STB served Feb. 21, 2019).

³ On May 8, 2019, Tri-City filed a letter supplementing its April 15 reply.

(continued . . .)

BACKGROUND

According to the Port, the Line was constructed in 1947 by the Atomic Energy Commission (AEC), now the U.S. Department of Energy, to provide rail service to the Hanford Nuclear Reservation. (Appl. 4.) The AEC granted predecessors of BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) operating rights to serve that facility and other customers that would locate on the Line. (*Id.*) The Port acquired the Line in 1998⁴ and simultaneously entered into an agreement with Tri-City's predecessor for the latter to maintain the Line at the Port's expense; meanwhile, BNSF and UP remained as operators on the Line. (*Id.* at 4-5.) Tri-City has been operating over the Line pursuant to a lease agreement with the Port dated August 1, 2002 (the Lease),⁵ which requires Tri-City to maintain the Line at its own expense.⁶ (*Id.* at 5.) At the end of its initial 10-year term in 2012, the lease automatically renewed for a second 10-year term. (*Id.*, V.S. Keck at 2, Attachment 1.)

The Port states that, in the past several years, numerous disagreements have developed between the Port and Tri-City, resulting in litigation between Tri-City and the Port as well as between Tri-City and BNSF. (Appl. 5.) According to the Port, the parties have been unable to resolve these disagreements through negotiation, and the Port has provided Tri-City with notice that Tri-City has committed material breaches of its Lease obligations and is in default. (*Id.*) The Port alleges that Tri-City has failed to maintain the Line and its bridges as required by the Lease, has failed or refused to provide the Port with plans to address deferred track maintenance, and has failed or refused to provide the Port with requested financial information showing maintenance costs or supporting its claims for the need to impose maintenance surcharges (surcharges Tri-City purportedly attempted to impose without first obtaining the Port's consent, as is required by the Lease). (*Id.* at 5-6.) The Port further states that on one or more occasions, Tri-City has erected blockades to prevent BNSF or UP from serving customers on the Line. (*Id.* at 6.) As a result, the Port has decided to terminate Tri-City's Lease and evict Tri-City from the Line. (*Id.*) According to the Port, service to customers will not be affected because both BNSF and UP hold operating rights to serve all customers and have stated their willingness to provide all service once Tri-City ceases operations. (*Id.*)

The Port submitted letters from two shippers that support the Port's application: DelHur Industries, Inc., which describes an instance when Tri-City used locomotives to block BNSF from delivering freight to its facility, (Appl., Ex. B); and Central Washington Corn Processors,

⁴ See Port of Benton—Acquis. & Operation Exemption—U.S. Dept. of Energy Rail Line in Richland, Wash., FD 33653, slip op. at 1 (STB served Oct. 6, 1998).

⁵ See Tri-City R.R.—Lease & Operation Exemption—Rail Line of the Port of Benton in Richland, Wash., FD 33888, slip op. at 1 (STB served June 23, 2000).

⁶ As the Board noted in the October 2018 Decision, the mileposts used to identify the Line in this proceeding differ from the mileposts used in Docket No. FD 33653, see October 18 Decision, AB 1270, slip op. at 2 n.2, and in Docket No. FD 33888. While the Port has not explained the discrepancy, Tri-City also states in its reply that the Line extends from milepost 18.84 at Richland Junction to milepost 29.73 at Horn Rapids Road. (Tri-City Reply 1.) Accordingly, the adverse discontinuance authority granted herein applies only to Tri-City's operation of the Line from milepost 18.84 to milepost 29.73.

Inc., which states that its relationship with Tri-City deteriorated to a point where it refuses to allow Tri-City to serve its facility and instead built a facility that would be served directly by BNSF and UP (Appl., Ex. C). The Port also submitted letters from BNSF and UP in support of the application, which also describe concerns with Tri-City's maintenance and operation of the Line. (Appl., Ex. D & Ex. E.)

Tri-City opposes the Port's application, arguing that § 10903, viewed in light of the rail transportation policy of 49 U.S.C. § 10101, requires denial of the application, (Tri-City Reply 4-6), and that the Port has failed to satisfy its burden of proof under § 10903, (*id.* at 7-14). According to Tri-City, it maintains the Line in accordance with the Lease, and there are no grounds for terminating the Lease, the validity of which is currently being litigated in court. (Tri-City Reply 2, 4); U.S. ex rel., Peterson v. Port of Benton Cty., Case No. 2:17-cv-00191-TOR (E.D. Wash.). Tri-City further asserts that, because the Port's application is based on the claim that Tri-City breached the Lease, which Tri-City believes was not lawfully terminated, granting the application would require the Board to interpret the Lease and decide issues of state contract law that are currently before a federal court. (Tri-City Reply 8-10.) Tri-City also argues that it provides superior rail service to its shippers and that the statements of six shippers in support of Tri-City's continued operations make it clear that shippers would be seriously harmed by loss of Tri-City's service, which would not be adequately replicated with the inherent local service limitations of Class I carriers like BNSF and UP.⁷ (*Id.* at 4, 11, Apps. 9-14.)

Tri-City also argues that the application should be denied on equitable grounds which, it asserts, can be considered under § 10903. (*Id.* 14-16.) Tri-City asserts that BNSF, UP and the Port unfairly deprived Tri-City of interchange revenues while at the same time making no contributions to the extensive maintenance costs associated with using Tri-City's lease track. (*Id.* 3-4, 14-16.) According to Tri-City, based on 2018 maintenance costs and traffic, the failure of BNSF and UP to pay a fair share of maintenance costs left Tri-City with \$492,672⁸ in track and bridge maintenance costs that should have been paid by BNSF and UP. (*Id.* at 4, 16.)

On rebuttal, filed April 26, 2019, the Port argues that it has satisfied its burden of proof under the public convenience and necessity test, and that there is no basis for denying its application on equitable grounds. (Rebuttal 5-6, 13-14.) The Port also argues that it is seeking adverse discontinuance in order for the Board to remove its preemptive shield so the Port can seek a remedy under state law, not for the Board to enforce a private contract. (*Id.* at 10.)

⁷ The statements consist of emails from: Calbag Resources LLC; Columbia River Carbonates; Cost Less Carpet; A&K Railroad Materials, Inc.; Bio-Gro, Inc.; and Great Northwest Transport, LLC. (Tri-City Reply, Apps. 9-14.)

⁸ In calculating this amount, Tri-City states that it transported only 119 cars in 2018, compared to approximately 4,500 cars transported by UP and approximately 3,500 cars transported by BNSF. (Tri-City Reply 15-16.)

PRELIMINARY MATTERS

The Board received several filings after the record closed in this proceeding. On April 26, 2019, BNSF requested leave to late-file comments consisting of a verified statement of Christopher Randall, Shortline Market Development Director, in response to Tri-City's reply. The verified statement addresses allegations in Tri-City's reply regarding BNSF and the responsibility to pay for maintenance costs on the Line.

On August 9, 2019, Tri-City filed a petition for leave to supplement the record with information that updates Tri-City's traffic and maintenance evidence. The petition asserts that Tri-City has moved 95 cars in the first seven months of 2019, compared to 119 cars in all of 2018, and describes new and potential shippers and traffic that are not yet moving over the Line. (Pet. to Supp. 1.) The petition also states that, in the first seven months of 2019, BNSF and UP transported 11,544 cars over the Line, including 24 unit trains, and that the Line experienced record volume in July 2019. (*Id.* at 2.) According to Tri-City, the increased traffic volume could not have taken place if the Line was not adequately maintained or if maintenance had entirely ceased. (*Id.*)

On August 15, 2019, the Port filed a reply in opposition to Tri-City's petition to supplement. The Port argues that the record closed on April 29, 2019, and that Tri-City has neither provided a good cause justification for allowing the submission of the additional information nor shown that the information is necessary to provide a complete factual record. (Port Reply 1.) According to the Port, allowing Tri-City to supplement the record with traffic updates would open the door to either party continuing to present the Board with never-ending updates. (*Id.* at 2.) The Port further argues that the supplemental information offered by Tri-City does not constitute proper evidence under the Board's rules. (*Id.* at 1-2 (citing 49 C.F.R. § 1114.1).)

In the interest of compiling a more complete record, the Board will grant both BNSF's request and Tri-City's petition for leave to supplement.

DISCUSSION AND CONCLUSIONS

The statutory standard governing discontinuances of operations is whether the present or future public convenience and necessity require or permit the proposed discontinuance. 49 U.S.C. § 10903(d). The Board may consider an "adverse" application to discontinue operations so long as the applicant establishes that it has a proper interest in the proceeding. See Bos. & Me. Corp.—Adverse Discontinuance—New Eng. S. R.R., AB 32 (Sub-No. 100), slip op. at 3 (STB served Apr. 30, 2010).⁹

⁹ The Port, as the owner of the Line, has a proper interest in the proceeding. See State of S.D.—Adverse Discontinuance of Operating Auth.—Napa Platte Reg'l R.R. Auth., AB 1253, slip op. at 2 (STB served June 27, 2018) (granting an adverse discontinuance application filed by the line's owner).

In implementing the public convenience and necessity standard, the Board balances the competing benefits and burdens of discontinuance or abandonment on all interested parties, including the railroads involved, 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., AB 124 (Sub-No. 2) et al., slip op. at 4 (STB served May 3, 2004); City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry., AB 878, slip op. at 7 (STB served Aug. 10, 2005). The Board must also consider whether the discontinuance would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d).

Many of the arguments the parties present revolve around whether Tri-City’s maintenance and operation of the Line constitute material breaches of the Lease that would warrant the notice of termination of the Lease that the Port sent to Tri-City in late 2018. However, as the cases cited by Tri-City explain, the Board does not undertake to interpret or enforce contracts, as such issues are for an appropriate court to decide.¹⁰ See City of Peoria, AB 878, slip op. at 6.

Therefore, the Board makes no findings on the merits of the competing claims concerning the Lease asserted by the Port and Tri-City. However, unless the Board removes its exclusive and primary jurisdiction, a court may not evict or remove a rail carrier under state law. City of Peoria, AB 878, slip op. at 5-6 (and cases cited therein). Thus, by filing for adverse discontinuance, the Port properly seeks to have the Board remove its exclusive and primary jurisdiction with respect to Tri-City’s operating authority so that it may pursue eviction under state law.

The Board finds that the public convenience and necessity supports granting the Port’s application for adverse discontinuance as it would preserve the interests of the shippers on the Line, the communities involved, the other railroads involved, and interstate commerce generally.¹¹ This is not a case in which a property owner is seeking to oust a railroad to put the property to a non-rail use. Because BNSF and UP already transport nearly all of the traffic moving over the Line and have indicated that they would serve those customers currently served by Tri-City if an appropriate court finds Tri-City breached and/or defaulted on the Lease,

¹⁰ See Tri-City Reply 9 (citing Kansas City S. Ry. Co.—Adverse Discontinuance Application—a line of Arkansas & Missouri R.R. Co., AB 103 (Sub-No. 14), slip op. at 7 (STB served Mar. 26, 1999) (denying adverse discontinuance based on balancing the interests and stating the Board will not interpret or enforce operating agreements or contracts); Tacoma E. Ry.—Adverse Discontinuance—a line of City of Tacoma, in Pierce, Thurston & Lewis Ctys., AB 548, slip op. at 7 & n.12 (STB served Oct. 16, 1998) (granting adverse discontinuance based on balancing the interests and stating that disputes about contract obligations and termination can be resolved in other appropriate forums)). Moreover, because the Board is not deciding any contract issues that are pending in the court proceeding, granting the application will not result in “piecemeal litigation.” (Tri-City Reply 9-10.)

¹¹ Tri-City suggests that the Port did not directly address the balancing test under § 10903 (See Tri-City Reply 8); however, the record presented in the parties’ filings provides more than sufficient evidence for the Board to weigh the factors that it considers under the statute.

enabling the Port to evict Tri-City, rail service and rural and community development should not be adversely affected by Tri-City ceasing its operations over the Line. Indeed, given the service already provided by BNSF and UP, there should be little impact on the shipping public if Tri-City is ultimately evicted.

The Board recognizes that Tri-City has submitted (unverified) communications describing generally positive experiences with Tri-City's service, but none of those shippers state that they oppose the application for adverse discontinuance, let alone "make it clear that shippers would be seriously harmed by loss of [Tri-City's] personalized local service," as Tri-City claims. (See Tri-City Reply 11.) Granting discontinuance adversely affects Tri-City only to the extent that it allows the Port to pursue eviction of Tri-City in court. Tri-City would be able to defend its interests in the Lease in that forum. To be clear, the granting of the Port's application for adverse discontinuance alone does not prevent Tri-City from continuing to operate; there would also have to be, for example, an adverse court judgment evicting Tri-City from the Line. See Bos. & Me. Corp., AB 32 (Sub-No. 100), slip op. at 3; City of Peoria, AB 878, slip op. at 6.

Tri-City's argument that § 10903 dictates denial of the application is not persuasive. Tri-City argues that its active operation of the Line in and of itself brings this case in line with Board precedent generally denying adverse abandonment when the carrier is operating over the line. (Tri-City Reply 5 (citing Salt Lake City Corp.—Adverse Aban.—in Salt Lake City, Utah, AB 33 (Sub-No. 183) (STB served Mar. 8, 2002); N.Y.C. Econ. Dev. Corp.—Adverse Aban.—New York Cross Harbor R.R. in Brooklyn, N.Y., AB 596 (STB served Nov. 23, 2004)).) Those adverse abandonment cases, however, are inapposite, as they involve requests to end all service over the subject lines. Here, the Port seeks to discontinue only Tri-City's service, while BNSF and UP currently operate on the Line (providing the vast majority of the service) and will continue to do so.

Tri-City argues that equitable considerations—in particular the actions of the Port, BNSF, and UP allegedly seeking to discontinue Tri-City's service on a "de facto" basis by leaving Tri-City with less revenues to pay for maintenance costs without contribution from BNSF and UP, (see Tri-City Reply 14-15)—compel the denial of the application. The Board makes no findings on those allegations, as claims relating to any party's contractual right to operate on the Line, contractual obligation to pay maintenance costs, or just compensation for maintenance costs as described by Tri-City can and should be litigated in the appropriate court rather than before the Board.

In approving this application, the Board must ensure that affected railroad employees will be adequately protected. 49 U.S.C. § 10903(b)(2). Accordingly, any employee adversely affected by the discontinuance of service shall be protected under Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

In the October 2018 Decision, the Board exempted this transaction from the offer of financial assistance (OFA) statute at 49 U.S.C. § 10904 and waived the corresponding OFA regulations at 49 C.F.R. § 1152.27; therefore, OFAs will not be entertained. The October 2018

Decision also waived compliance with environmental review requirements;¹² accordingly, no environmental assessment was prepared in this proceeding. See 49 C.F.R. § 1105.6(c), 1105.8(b).

For the reasons discussed above, the Board finds that the Port, as the owner of the Line, has a proper interest in this proceeding; the present or future public convenience and necessity require or permit the discontinuance of operations by Tri-City over the Line; and discontinuance of operations by Tri-City would not result in a serious, adverse impact on rural and community development. Accordingly, the Board will grant the Port's application for adverse discontinuance.

It is ordered:

1. BNSF's request for leave to late-file comments is granted.
2. Tri-City's petition for leave to supplement the record is granted.
3. The Port's application for adverse discontinuance of rail service by Tri-City is granted, subject to the employee protective conditions set forth in Oregon Short Line.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹² Because there will be an environmental review during any future abandonment, this discontinuance does not require an environmental review.