

CLARK HILL Strasburger

246277

Clark Hill Strasburger
1025 Connecticut Avenue, N.W.
Suite 717
Washington, D.C. 20036-4104
T 202 742 8600
F 202 742 8699

John D. Heffner
T (202) 742-8607
F (202) 742-8697
Email: John.Heffner@clarkhillstrasburger.com

ENTERED
Office of Proceedings
August 28, 2018
Part of
Public Record

clarkhill.com

August 28, 2018

BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001



**RE: STB DOCKET NO. AB-1270, Port of Benton, WA,
Adverse Discontinuance of Rail Service,
Tri-City Railroad Company, LLC**

Dear Ms. Brown:

I am submitting on behalf of the Port of Benton, WA, an original and ten copies of a Petition for Partial Waiver of Regulations and for Exemptions in connection with an adverse discontinuance of rail service case that it plans to file in the near future. I am also enclosing with this filing a letter seeking a filing fee waiver on the grounds that the Port is a public agency established under the laws of Washington State. In the interest of expediting the Board's consideration of the Port's Petition, I am attaching a filing fee check payable to the Board for \$2,000.

Finally, I am submitting a copy of this Petition on a computer disk. Please date stamp and return to me one copy of the Petition and fee waiver request letter.

Sincerely yours,

CLARK HILL STRASBURGER

John D. Heffner

FILED
August 28, 2018
SURFACE
TRANSPORTATION BOARD

Enclosures

FEE RECEIVED
August 28, 2018
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**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**

Submitted by
John D. Heffner
Clark Hill Strasburger
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Dated: August 28, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**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**

**I.
INTRODUCTION**

Pursuant to 49 CFR §1152.24(e) (5) and 49 U.S.C. §10502(a) the Port of Benton, WA (“POB”) petitions 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 conjunction with an application that POB intends to file for the adverse discontinuance of railroad operations currently conducted by Tri-City Railroad Company, LLC (“TCR”). As the Board has recognized, several of the regulatory requirements for ordinary railroad initiated abandonments or discontinuances are "inapplicable or unheeded" for an adverse application initiated by a third party such as POB. Accordingly, POB respectfully requests that the Board waive those requirements.

II. BACKGROUND AND STATEMENT OF FACTS

POB is a public agency and political subdivision in the State of Washington chartered in 1958 under state statute RCW 53.04.010. The Port's purpose is to promote economic and industrial development along with multi-modal transportation.

The rail line that will be the subject of this adverse discontinuance application ("the Line") extends nearly 11 miles of main track, approximately 16 miles including sidings and connecting spur tracks, from MP 18.84 at Richland Junction to MP 29.73 at Horn Rapids Road at Richland, WA. The Line was originally constructed around 1947 to provide rail service to the Hanford Nuclear Reservation. Predecessors of BNSF Railway and the Union Pacific Railroad received "equal joint" operating rights to allow them to serve that facility and customers that would even locate on the Line. In 1998, POB acquired the subject Line¹ with BNSF and UP remaining as the carriers operating over it. In 2002 TCR began operating over the Line pursuant to a Lease Agreement dated Aug. 1, 2002.

Most recently, disagreements between POB and TCR have developed with the result that POB contends that TCR is in default of its lease obligations. Specifically, TCR has not maintained the Line and its bridges as required under the

¹ *Port of Benton--Acquisition and Operation Exemption--U.S. Department of Energy Rail Line in Richland, WA*, FD 33653 (STB served Oct. 6, 1998).

terms of the lease. Moreover, TCR has attempted to impose a maintenance surcharge on the Line or its customers without obtaining prior POB consent as the lease requires. Efforts to resolve those defaults have not been successful.

Accordingly, POB wishes to terminate TCR's lease and to evict TCR from the entire Line. 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.

III. WAIVER OF DISCONTINUANCE REGULATIONS

In adverse discontinuance of service cases, the Board routinely waives inapplicable or unneeded regulations and exempts parties from the statutory provisions that underlie them. *See, Town of North Judson-Adverse Discontinuance of Service-In LaPorte, Porter, and Starke Counties, IND*, Docket No. AB-1232 (STB served July 27, 2015) (cited as *Town of North Judson*) and *City of Chicago--Adverse Abandonment—Chicago Terminal Railroad in Chicago Illinois*, Docket No. AB-1036 (STB served July 10, 2009) and decisions cited in note 4.

A. Waiver of Discontinuance Regulations.

1. 49 CFR §1152.21 Notice of Intent. Partial waiver is sought to permit filing of the Notice in the form shown in the attached Appendix 2 rather than the prescribed form which is inappropriate for an adverse discontinuance application. These requirements are inapplicable because the line does not appear on any

system diagram map, will not be salvaged, will not be available for other public uses or interim trail use as no abandonment is contemplated, and will not be available for subsidy as train operations will continue.

2. **49 CFR §1152.10 through 49 CFR §1152.14 and 49 CFR §1152.24(e)(1) and 49 CFR §1152.22(a)(5), System Diagram Map requirements** POB seeks a waiver from all requirements in 49 C.F.R. §§1152.10 through 1152.14, 49 C.F.R. § 1152.24(e)(1), and 49 C.F.R. § 1152.22(a)(5), as well as exemption from the underlying the statutory provisions of 49 U.S.C. § 10903(c) as these regulations are inappropriate in an adverse discontinuance proceeding. These provisions require a carrier to maintain, file, and publish a System Diagram Map (“SDM”) identifying all of its railroad lines that are potentially subject to abandonment (or discontinuance) and to require such lines to appear on its SDM for at least 60 days before filing an application. The Board has historically waived the SDM requirement for adverse discontinuance cases where the owner of a line intends to replace the incumbent carrier with another railroad. *Town of North Judson, supra*. In any event POB has never published an SDM because it does not intend to abandon the Line.

3. **49 CFR §1152.21, Draft Federal Register Notice.** Partial waiver is sought to permit filing of this Notice in the form shown in the attached Appendix 3

rather than the prescribed form, which is inappropriate for an adverse discontinuance application.

4. **49 CFR §1152.22(b) Contents of Application: Physical Condition of the Line.** Waiver is sought because an adverse discontinuance applicant generally does not have access to detailed information regarding the physical condition of the involved rail line segment. While POB owns the Line, it has contracted out the maintenance of the Line to a third party. Starting in 1998, it contracted with Livingston Repair Shop to maintain the Line. Between 1998 and 2002 the owner of that company established TCR as a successor entity and entered into the 2002 lease agreement with POB that gave TCR the responsibility for maintenance. POB alleges that TCR not only failed to maintain the Line as per the agreement but failed to provide POB with maintenance records. POB learned of maintenance problems from both BNSF Railway and Union Pacific personnel as well as Federal Railroad Administration officials. POB followed up with x-ray inspections conducted by Aurora/GREX/Holland, which confirmed that the majority of the rail Line has been allowed to fall from a Class 3 FRA standard to a Class 1 FRA standard, with inspections showing some areas that should likely be classified as “excepted track.” The FRA has threatened to take the Yakima River Bridge out of service due to defects and violations, an action that would effectively close the line

5. 49 CFR §1152.22(c) Contents of Application: Service provided.

The regulations require an applicant to describe service provided over the line during the Base Year including the number and frequency of trains operated, the miles of track operated, the average number of locomotive units operated, total tonnage and carloads by commodity group, any overhead or bridge traffic carrier, average crew size, level of maintenance, any important changes in train service undertaken during the two calendar years immediately preceding the filing of the application, and the reasons for decline in traffic. Although POB as the Line's owner has identified in this application the number of miles operated, it does not possess any of the other information that this regulation requires an applicant to provide. While the lease requires TCR to provide some of this information to POB, it has not done so. Accordingly, POB lacks the ability to provide this information.

6. 49 CFR §1152.22(d) Contents of Application: Revenue and Cost

Data. The regulation requires an applicant to provide detailed revenue and cost data for the Base Year and future data for the Forecast Year. POB is unable to provide this information for the same reasons stated above. It lacks access to and has been unable to obtain this information from TCR. As the applicant only seeks TCR's discontinuance and rail service will continue to be provided by BNSF

Railway and the Union Pacific Railroad, the requirements to provide subsidy information and a return on value do not apply.

7. **49 CFR §1152.22(e) Contents of Application: Rural and Community Impact.** This regulation requires an applicant to identify by name and population the communities served, the significant users by name, address, principal commodities handled by tonnage and carloads, a general description of alternate sources of transportation services, and, in the case of abandonment, whether the right of way is appropriate for other public purposes. While POB will provide some of this information in its application, it lacks detailed information about the customers and the traffic they generate. Accordingly, POB seeks a waiver from this requirement.

8. **49 CFR §1152.29(e)(2), One year Authorization Limit for Notice of Consummation.** Waiver is sought because an applicant for an adverse discontinuance does not have control over the timing of consummation until it obtains control of the property from the railroad which may take well more than one year. *See, City of Chicago, Ill -Adverse Abandonment - Chicago Terminal R.R. In Chicago, Ill*, STB Docket No. AB-1036, at 3 (served July 8, 2009).

9. **49 CFR §1152.22(f), Environmental and Historic Report.** Waiver is sought because rail service would be continued by BNSF Railway and Union

Pacific Railroad following termination of service by TCR. In any event the Board does not require the preparation and service of environmental and historic reports where the only activity contemplated is discontinuance of rail service and not abandonment and does not result in significant changes that exceed the thresholds established in Section 1105.7. *Lackawaxen-Honesdale Shippers Ass’n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa.*, AB 1110 (STB served Jan. 23, 2014, slip op. at 4).

B. Exemptions from Statutory Provisions

1. **49 U.S.C. §10904, Offer of Financial Assistance.** Exemption is sought because a decision authorizing adverse discontinuance is irreconcilable with an offer of financial assistance (“OFA”) for continued rail operation. As the Board has recognized in past cases, the OFA provisions serve no useful purpose in an adverse abandonment or discontinuance case. *Chicago Terminal, supra*, at 6-7. If the Board grants POB’s application, it would be withdrawing its exclusive jurisdiction over the Line to permit the application of state or local real estate law so POB could commence eviction proceedings. BNSF Railway and Union Pacific Railroad have stated their willingness to provide all service required over the Line. In any event, this exemption request meets the statutory criteria of 49 U.S.C. §10502 because the application of the OFA provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) OFA provisions are not

needed to protect shippers from the abuse of market power. In fact, as will be shown when the application is filed, the on-line shippers will be submitting letters in support of discontinuance.

2. **49 U.S.C. §10905, Public Use.** Exemption is sought because this application does not involve any abandonment of the track or right of way.

3. **49 U.S.C. §10903(c)(2), System Diagram Map.** Exemption is sought to correspond with waiver of SDM regulations discussed above.

4. **49 U.S.C. §10903(a)(3)(B) and (a)(3)(D), Service and Posting of Notice of Intent.** Exemption is sought to correspond with waiver of related regulation discussed above.

IV.
CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board's discontinuance regulations should be waived, and statutory provisions should be exempted, to the extent sought above.

Respectfully submitted,



John D. Heffner
Clark Hill Strasburger
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Dated: August 28, 2018

APPENDIX 1

MAP

[illegible]

TCRY Station Table

Siding Length	Station No's	Mile Post Location	Stations	Rule 4.3 Opr's
		18.74	Union Pacific	
1800	00200	18.84	Richland Jct.	J
	00201	19.63	Steptoe Street	
		19.74	Irrigation Canal Bridge	
		19.96	Columbia Park Trail Overpass	
		21.00	Yakima River Bridge	
		21.14	Pedestrian Bike Path	
547	00205	21.51	City Dock	
		22.03	Jadwin Avenue	
		22.64	Berry's Overpass Bridge	
		23.60	Duportail Street	
		24.47	Cemetery Road	
		25.45	Van Giesen Street	
	00209	26.04	Airport Way	
	00210	26.46	Lamb Weston	
845	00211		ConAgra	
	00212	26.92	Saint Street	
		26.97	State Highway 240	
	00300	27.40	TCRY Yard	B,C,P,
	00310	28.59	N Ladder	T
	400	W28.9	City Track	
		29.22	Battelle Blvd.	
	00350	29.73	Horn Rapids Road	

APPENDIX 2

Draft Notice of Intent

BEFORE THE SURFACE TRANSPORTATION BOARD

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

STB DOCKET NO. AB-1270

The Port of Benton (“POB” or “Applicant”) gives notice that on or about October 15, 2018, about it intends to file with the Surface Transportation Board, Washington, DC 20423, an application for permission for the discontinuance of service by the incumbent carrier Tri-City Railroad Company, LLC (“TCR”) over a line of railroad known as the Southern Connection (“the Line”) extending from railroad milepost 18.84 near Richland Junction to MP 29.73 near Horn Rapids Road, which traverses through United States Postal Service ZIP Codes 99336, 99352, and 99354, a distance of 10.89 miles, in Benton County, Washington. The Line includes the stations of Richland Junction (MP 18.84), Steptoe Street (MP 19.63), Irrigation Canal Bridge (MP 19.74), Columbia Park Trail Overpass (MP 19.96), Yakima River Bridge (MP 21.0), Pedestrian Bike Path (MP 21.14), City Dock (MP 21.51), Jadwin Avenue (MP 22.03), Berry’s Overpass Bridge (MP 22.64), Duportail Street (MP 23.60), Cemetery Road (MP 24.47), Van Giesen

Street (MP 25.45), Airport Way (MP 26.04), Lamb Weston (MP 26.46), ConAgra (no milepost), Saint Street (MP 26.92), State Highway 240 (MP 26.97), TCRY Yard (MP 27.40), N. Ladder (MP 28.59), City Track (MP W28.9), Battelle Blvd. (MP 29.22), and Horn Rapids Road (MP 29.73).

The reason for the proposed discontinuance is that TCR is in default of its obligations under the lease with POB, the Line's owner, and POB believes this dispute cannot be resolved through negotiations. Accordingly, POB intends to commence an eviction proceeding against TCR once the Board approves this application. Based on information in our possession, the line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

To the extent that any railroad employees are adversely affected by this action, the interest of railroad employees will be protected by conditions imposed in *Oregon Short Line Railroad – Abandonment, Goshen Branch*, 360 I.C.C. 91 (1979).

The application, when filed, can be viewed following its filing on the Board's website, www.stb.gov, or a copy can be obtained from POB's counsel, whose name and address appear below. The application will include the applicant's entire case for discontinuance. Any interested person, after the application is filed on or about October 15, 2018, may file with the Surface

Transportation Board written comments concerning the proposed discontinuance or protests to it identifying it by the proceeding's docket number. These filings are due 45 days from the date of filing of the application. Persons who may oppose the discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons opposing the proposed discontinuance that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the following: (1) the protestant's name, address and business; (2) the protestant's interest in the proceeding including their use of the Line or the public interest represented; (3) the protestant's reasons for protesting or commenting on the proposed discontinuance including their reliance on the involved service; and (4) any rebuttal of material submitted in the application.

Comments or protests need to be notarized or verified, and an unbound original and ten copies are required to be filed with the Secretary of the Board, at 395 E Street, S.W., Suite 100, Washington, D.C. 20024, together with a certificate of service attesting that copies of the comments or protests have been served on Applicant's counsel in this matter, John D. Heffner, Clark Hill Strasburger, 1025 Connecticut Ave., N.W., Suite 717, Washington, D.C. 20036 or

john.heffner@clarkhillstrasburger.com. Written comments and protests must indicate the docket number, STB AB-1270.

Except as otherwise set forth in 49 CFR §1152, each document filed with the Board must be served on all parties to the discontinuance proceeding. Comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed discontinuance should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to § 1152.25.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Government Assistance and Compliance at (202) 245-0230 or refer to the text of the discontinuance regulations at 49 CFR §1152.1 *et seq.*

APPENDIX 3

Draft Federal Register Notice

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB DOCKET NO. AB-1270

The Port of Benton (“POB” or “Applicant”) gives notice that on or about October 15, 2018, it intends to file with the Surface Transportation Board, Washington, D.C. 20423, an application seeking the adverse discontinuance of service by the incumbent rail carrier Tri-City Railroad Company, LLC, on a rail line of railroad known as Southern Connection (“the Line”) extending from railroad milepost 18.84 near Richland Junction to MP 29.73 near Horn Rapids Road, which traverses through United States Postal Service ZIP Codes 99336, 99352, and 99354, a distance of 10.89 miles, in Benton County, Washington. The Line includes the stations of Richland Junction (MP 18.84), Steptoe Street (MP 19.63), Irrigation Canal Bridge (MP 19.74), Columbia Park Trail Overpass (MP 19.96), Yakima River Bridge (MP 21.0), Pedestrian Bike Path (MP 21.14), City Dock (MP 21.51), Jadwin Avenue (MP 22.03), Berry’s Overpass Bridge (MP 22.64), Duportail Street (MP 23.60), Cemetery Road (MP 24.47), Van Giesen Street (MP 25.45), Airport Way (MP 26.04), Lamb Weston (MP 26.46), ConAgra

(no milepost) , Saint Street (MP 26.92), State Highway 240 (MP 26.97), TCRY Yard (MP 27.40), N. Ladder (MP 28.59), City Track (MP W28.9), Battelle Blvd. (MP 29.22), and Horn Rapids Road (MP 29.73). The reason for the proposed discontinuance is that TCR is in default of its obligations under the lease with POB, the Line's owner, and POB believes this dispute cannot be resolved through negotiations. Accordingly, POB intends to commence an eviction proceeding against TCR once the Board approves this application.

The Line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it. The application, when filed, can be viewed following its filing on the Board's website, www.stb.gov, or a copy can be obtained from POB's counsel, whose name and address appear below. The Applicant's entire case for discontinuance will be filed with the application.

Any interested person may file with the Surface Transportation Board its written comments or protest concerning the proposed discontinuance within 45 days after the application is filed identifying it by the proceeding's docket number. Persons who may oppose the discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence should file comments. Persons opposing the proposed discontinuance that do wish to participate actively

and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the following: (1) the protestant's name, address and business; (2) the protestant's interest in the proceeding including their use of the Line or the public interest represented; (3) the protestant's reasons for protesting or commenting on the proposed discontinuance including their reliance on the involved service; and (4) any rebuttal of material submitted in the application.

Written comments and protests must indicate the proceeding designation STB No. AB 1270 and should be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board (Board), Washington, DC 20423-0001, no later than December 1, 2018, 45 days after the date that POB files its application. Interested persons may file a written comment or protest with the Board to become a party to this discontinuance proceeding. A copy of each written comment or protest shall be served upon the representative of the Applicant, John D. Heffner, Clark Hill Strasburger, 1025 Connecticut Ave., N.W., Suite 717, Washington, D.C. 20036 or john.heffner@clarkhillstrasburger.com. The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the discontinuance proceeding. 49 CFR §1104.12(a).

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Government Assistance and Compliance at (202) 245-0230 or refer to the text of the discontinuance regulations at 49 CFR §1152.1 *et seq.*