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June 7, 2019

By e-filing

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

Re: STB Docket No. NOR 42163, *Tri-City Railroad Company, LLC v. City of
Richland and City of Kennewick, Washington*

Dear Ms. Brown:

Hereby forwarded is a Response To Port Of Benton Petition To Intervene And Rebuttal
To Reply Comments under 49 C.F.R. § 1104.13(a) for filing with the Board in the above
referenced matter.

Respectfully submitted,



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

TMcF:mg:1789\efSTB1

cc: all parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC,	)	
Complainant,	)	
v.	)	STB DOCKET NO.
CITY OF RICHLAND, WASHINGTON,	)	NOR 42163
and	)	
CITY OF KENNEWICK, WASHINGTON,	)	
Defendants.	)	

**RESPONSE TO PORT OF BENTON PETITION TO INTERVENE AND REBUTTAL
TO REPLY COMMENTS
UNDER 49 CFR § 1104.13(a)**

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

Complainant

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Attorneys for Complainant

DATE FILED: June 07, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC,	)	
Complainant,	)	
v.	)	STB DOCKET NO.
CITY OF RICHLAND, WASHINGTON,	)	NOR 42163
and	)	
CITY OF KENNEWICK, WASHINGTON,	)	
Defendants.	)	

**RESPONSE TO PORT OF BENTON PETITION TO INTERVENE AND REBUTTAL
TO REPLY COMMENTS
UNDER 49 CFR § 1104.13(a)**

Pursuant to 49 C.F.R. § 1104.13(a), TRI-CITY RAILROAD COMPANY, LLC (TCRY) hereby responds to the PORT OF BENTON, WASHINGTON (the Port) in their PETITION TO INTERVENE AND REPLY COMMENTS regarding TCRY's complaint against the CITY OF RICHLAND, WASHINGTON and the CITY OF KENNEWICK, WASHINGTON (the Cities), STB Docket No. NOR 42163 and respectfully request the denial of the Port's petition on the following grounds and in the alternative request the acceptance of TCRY's rebuttal to the Port's reply:

I.

REQUESTED RELIEF

The Board is asked to deny the Port's petition to intervene for failing to adhere to the criteria outlined in 49 CFR § 1112.4, specifically subsection (a)(2). It appears that the Port is attempting to turn the Board's focus from the requested relief TCRY has asked for against the

Cities, into something that the Port would like to focus on, their attempted adverse discontinuance of TCRY's rail service set out in STB Docket No. AB-1270. The Port's petition is in violation of 49 CFR § 1112.4 which states the Board may grant a petition to intervene in a proceeding set for modified procedure if intervention would not unduly broaden the issues raised in the proceeding *Id.*(a)(2) which is what the Port is attempting to do.

II.

ARGUMENT IN SUPPORT OF DENIAL OF PORT'S PETITION

The sole focus of TCRY's complaint and petition to the Board for the issuance of a preliminary injunction is to help keep intact the Board's exclusive jurisdiction over railroad operations pursuant to 49 U.S.C. § 10501(b) and its decision finding that a crossing at Richland Junction was federally preempted in *Tri-City Railroad Company -- Petition for Declaratory Order*, 2016 WL 5904750 (STB Docket No. FD 35915, decision served on September 14, 2016) in support of TCRY's common carrier operating rights.

The Port would like to distract the Board from TCRY's requested relief for preliminary injunction and focus the Board's attention on a matter that unduly broadens the issue raised in TCRY's original complaint and petition.

TCRY's complaint and petition are clear in regard to what they are requesting. The Port is clear in its request for intervention. The Port would like the Board to stay its decision regarding its exclusive jurisdiction over railroad operations concerning an at-grade crossing

through TCRY's interchange while the Port awaits what they hope is a future favorable decision by the Board on its adverse discontinuance petition.

The Port misconstrues the "statutory schedule for deciding discontinuance or abandonment applications," suggesting that the Board arrive at a decision around June 15 in support of their argument that the Board should hold in abeyance TCRY's present complaint and petition. The abandonment of rail lines and discontinuance of rail service by common carriers are governed by 49 U.S.C. 10903 *et seq.* and 49 CFR § 1152.26 outlines "the process for Board consideration and decisions in abandonment and discontinuance application proceedings from the time the application is filed *until the time of the Board's decision on the merits.*"

The Board has broad discretion in the amount of time it takes to come to a decision on the merits, making a June 15 decision date arbitrary. What the Port is probably eluding to is subsection (a) of 49 CFR § 1152.26 that allows for a decision by the Board prior to 110 days after filing or waiting at least 120 days in order for offers of financial assistance. There is no set schedule for the Board to arrive at its decision, making the Port's argument of an imminent decision by the Board on the Port's adverse discontinuance proceeding ring hollow. The Port would like to assist the Cities in an end run, circumventing the Board's previous decision regarding the Cities attempted condemnation of TCRY's leasehold rights at its interchange.¹ TCRY continues to utilize the subject parallel track at its interchange on an almost daily basis.

III.

TCRY'S REBUTTAL IN THE ALTERNATIVE TO THE PORT'S REPLY

¹ See Tri City Herald article caption "The Port of Benton is moving to evict Tri-City Railroad in the latest effort to extend Center Parkway across its railroad tracks to Tapteal Drive." (Appendix 1)

The Port has attempted to enlist the Board's assistance and at the same time circumvent the Board's process by filing its petition for adverse discontinuance of TCRY's operating authority, whereby if successful, would allow for the City of Richland to move forward with its condemnation effort of TCRY's leasehold interests at Richland Junction in contravention with a prior Board decision preempting those efforts. This cooperative plan by the City of Richland and the Port are well documented in the current federal case *U.S. v. Port of Benton County*, USDC, ED WA, waed-2-2017-cv-00191.

TCRY disagrees with the Port's assertion that for the Board to "entertain this request would simply be a waste of its resources." (Port's petition at 5). TCRY believes that the Board has a keen interest in protecting its exclusive jurisdiction over railroad operations as well as not allowing state courts to disregard its previous decisions.

The Port holds itself out to be a "non-operating" common carrier, but professes that "the most recent track plan would have no adverse impact on the operations of any railroad using the Port's track." (*Id.* at 5). The Port further states that it "did not back this original plan because it did have some negative impact to the Port's infrastructure or on TCRY." (*Id.* at 5).

The Board was unequivocal in its order of September 14, 2016, stating, "the Board concludes that an at-grade crossing at the proposed location would unreasonably interfere with TCRY's present and future railroad operations on one of the tracks at issue and that, therefore, condemnation of the railroad right-of-way to permit construction of an at-grade crossing at that location pursuant to state law is preempted under § 10501(b)." (STB Docket No. FD 35915 at 1). The Port would like to be the arbiter, along with the Cities, in removing the authority from the Board in determining whether or not the Cities "new design" for an at-grade crossing

would interfere with TCRY's railroad operations, circumventing the Board's previous decision and undermining its exclusive authority. This is evidenced in a letter from the Port's executive director to the City of Richland's public works director (both of whom are personally named defendant's in *U.S. v. Port of Benton County*, USDC, ED WA, waed-2-2017-cv-00191) where the Port makes no mention of the Board's decision preempting a crossing at the proposed location. (Appendix 2).

The Port laments that "after further litigation in state court, the cities came up with a better plan that the Port believes has no negative impact to TCRY (or the Port as the line's owner) and which in fact benefits TCRY by adding a passing track." (Port's petition at 5).

First, the Cities did not come up with the "better plan" after further litigation in state court. The Cities developed the new design during the pendency of their requested extension of their Ninth Circuit Appeal of the Board's September 14, 2016 decision (TCRY Complaint and Petition Appendix 7 at 8).

Second, it wasn't until TCRY petitioned the Washington State Superior Court to dismiss the Cities condemnation action on May 11, 2018 (*Id.* Appendix 5) did the Cities put forth their "better plan" to the State Court by way of response on May 16, 2018 (*Id.* Appendix 7 at 8).² The State Court mistakenly inserted themselves into the shoes of the Board and determined on January 11, 2019 that the Cities "better plan" was not federally preempted as applied to an at-grade crossing at the exact same location as the "original design." (*Id.* Appendix 6).

Third, the Port's assertion that the Cities new design "in fact benefits TCRY by adding a passing track" is completely erroneous as evidenced in the Cities response to TCRY's motion to

² An additional impetus surrounding the Cities' reluctance to bring the new crossing design in front of the Board is their desire to evade paying TCRY's legal fees pursuant to RCW § 8.25.075 as result of TCRY's successful litigation of the original design in front of the Board, which now total over \$200,000. (*Id.* Appendix 7 at 2)

dismiss under section “D,” “The Cities’ proposed relocated parallel track” (*Id.* Appendix 7 at 8) and also the Port’s own letter to the City on July 17, 2017. (Appendix 2). The Cities’ did not propose to “add” a passing track, their proposal consisted of relocating the existing passing track.

The Port attempts to address the four factors the Board utilizes in determining whether to grant injunctive relief, which are, the petitioner (1) it is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest....as found in *Union Pacific Railroad –Petition for Declaratory Order and Preliminary Injunction*, 2018 WL 3209461 (STB Docket No. FD 36197, decision served June 29, 2018).

The Port again misconstrues TCRY’s request in its entirety based on their comments regarding element (1) of the four factor test. The “non-operating” common carrier Port states, “Whether or not TCRY would prevail on the merits of the latest request is doubtful because the most recent track plan would have no adverse impact on the operations of any railroad using the Port’s track.” (Port’s petition at 6). The Port fails to realize that TCRY’s petition is not grounded in the Board making a determination on whether or not the Cities’ “most recent plan” is in fact a “better plan”, it is a request to enjoin the Cities’ from moving forward with their condemnation efforts at TCRY’s interchange until the Board has had a chance to review the Cities’ “most recent plan” and make the determination for itself under its exclusive jurisdiction per 49 U.S.C § 10501(b) to do so, versus the desire of the Port and the Cities to allow the Benton County Superior Court to usurp that authority. If the Cities’ desire their “most recent plan” to be addressed, they need to petition the Board to reopen its decision from September 14, 2016.

Then, if the Board grants their petition they can put forth their “most recent plan” to the Board allowing it to determine whether or not it is in fact a “better plan” that does not interfere with TCRY’s current or future railroad operations at Richland Junction.

The Port forewent addressing element (2), thereby conceding that if the Board fails to grant TCRY’s petition for preliminary injunction TCRY would suffer irreparable harm. (*Id.* at 6).

The Port addresses element (3) by stating that “the latest request should not harm other parties such as adjacent landowners.” (*Id.* at 6) Therefore the Port concedes that granting TCRY’s request for preliminary injunction “should not harm other parties.” (*Id.* at 6)

The Port claims to insert their views to encompass that of the “public interest” and of the “customers served by the line” in their failed attempt at addressing element (4), where they state that the “requested relief is not in the public interest.” (*Id.* at 6). The Port provides zero evidence in support of their assertion.

CONCLUSION AND REQUESTED RELIEF

The Port has failed to adhere to the criteria outlined in 49 CFR § 1112.4(a)(2) for their petition to intervene in TCRY’s complaint and petition for preliminary injunction against the Cities. The Port’s main purpose is to direct the Board’s focus to their adverse discontinuance petition thereby unduly broadening the scope of TCRY’s petition for preliminary injunction. TCRY’s preliminary injunction request is very narrow in its basis. It is only attempting to support the authority of the Board and give the Board the opportunity to take back the authority the State Court mistakenly usurped.

It is hereby requested that the Board deny the Port's petition to intervene and in the alternative if the Board decides to grant the Port's petition to intervene then TCRY requests that the Board accept its rebuttal to the Port's reply.

Respectfully submitted,

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

Petitioner

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DATE FILED: June 07, 2019

APPENDIX 1

TRI CITY HERALD ARTICLE

≡ SECTIONS



Tri-City Herald

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LOCAL

Products worth millions need these aging Richland tracks. Inspectors say some are near failure.

The Port of Benton is moving to evict Tri-City Railroad in the latest effort to extend Center Parkway across its railroad tracks to Tapteal Drive.

SEPTEMBER 16, 2018 01:21 PM

APPENDIX 2

KELLER CORRESPONDENCE



July 17, 2017

Mr. Pete Rogalsky
Public Works Director
City of Richland
PO Box 190
Richland, WA 99352

Re: Center Parkway Crossing-Passing Track Modification

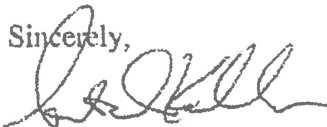
Dear Mr. Rogalsky,

Thank you for your recent presentation to the Port of Benton Commission concerning the proposed modifications to the passing track. The presentation was very informative and it addressed the concerns raised by the users of the Port of Benton Railroad related to the previous proposals for modifications to the Port's passing track.

The Port Commission also considered the responses of its consulting engineers and the railroad companies which operate over the Port's Railroad. The Commission is aware the Washington Utilities and Transportation Commission has approved an at-grade crossing for Center Parkway in this location.

The Port Commission has determined the proposed modifications to the Port's passing track will improve the safety, utility and efficiency of the Port Railroad and the proposed modifications would mitigate the impacts which an at-grade crossing for Center Parkway crossing might have upon railroad operations.

Please let me know if you need any further information from the Port.

Sincerely,

Scott D. Keller, OPM®
Executive Director

C: Port Commission and Counsel
TCRY, BNSF and UP

CERTIFICATE OF SERVICE

I hereby certify that on June 07, 2019, I served the foregoing Response To Port Of Benton Petition To Intervene And Rebuttal To Reply Comments Under 49 C.F.R. § 1104.13(a) by e-mail and first-class, U.S. mail, postage prepaid, on the following:

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