

CLARK HILL

Sloane S. Carlough
T: 202.640.6673
F: 202.640.6690
Email: scarlough@clarkhill.com

Clark Hill PLC
1001 Pennsylvania Avenue NW
Suite 1300 South
Washington, DC 20004
T 202.772.0909
F 202.772.0919

clarkhill.com

247814

May 24, 2019

VIA ELECTRONIC FILING

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

ENTERED
Office of Proceedings
May 24, 2019
Part of
Public Record

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

Dear Ms. Brown:

Hereby transmitted is a Petition to Intervene and Reply Comments of the Port of Benton, Washington for filing with the Board in the above referenced matter.

Sincerely,

CLARK HILL PLC



Sloane S. Carlough

SC:

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TRI-CITY RAILROAD COMPANY, LLC,)		
Complainant)	)	
	)	STB Docket No.
v.)	)	NOR 42163
CITY OF RICHLAND, WASHINGTON)	)	
And)	)	
CITY OF KENNEWICK, WASHINGTON)	)	
Defendants)	)	

PETITION TO INTERVENE AND
REPLY COMMENTS OF THE PORT OF BENTON, WASHINGTON

Submitted By
Sloane S. Carlough
John D. Heffner
Clark Hill, PLC
1001 Pennsylvania Ave., N.W.
Suite 1300 South
Washington, D.C. 20004

202-640-6673

Dated: May 24, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TRI-CITY RAILROAD COMPANY, LLC,)	
Complainant)	
	STB Docket No.
v.)	NOR 42163
CITY OF RICHLAND, WASHINGTON)	
And)	
CITY OF KENNEWICK, WASHINGTON)	
Defendants)	

**PETITION TO INTERVENE AND
REPLY COMMENTS OF THE PORT OF BENTON, WASHINGTON**

Pursuant to 49 U.S.C. §10501(b), 49 U.S.C. §1321(b)(4), 49 CFR §1111 *et al*, and 49 CFR §1112.4 the Port of Benton (“the Port” or “POB”) petitions the Board to intervene in the above-captioned “complaint” proceeding and request for a preliminary injunction. The Port requests that the Board deny the relief sought by Tri-City Railroad Company, LLC (“TCRY”) against the City of Richland and the City of Kennewick (“the Cities”) as moot or, in the alternate, accept its comments in opposition.

**I.
STATEMENT OF INTEREST AND BACKGROUND**

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 as well as a nonoperating common carrier railroad. Its purpose is to promote economic and industrial development along with multi-modal transportation. It

owns a line of railroad known as the “Hanford Site Rail System Southern Connection” between MP 18.84 at Richland Junction and MP 29.73¹ at Horn Rapids Road in Richland, WA. The Port had leased the subject line to Complainant-Petitioner TCRY under a lease dated August 1, 2002, and has since provided notice of termination in a letter dated December 19, 2018. By application filed February 27, 2019, accepted for processing by the Board in a decision served March 19, 2019, POB seeks a ruling for the adverse discontinuance of service by TCRY.

This latest in a long series of filings in various proceedings initiated by TCRY before the Board and in the courts, involves the condemnation of land for a road crossing on TCRY’s tracks, property that the Port owns. The property in question lies between Richland Junction at 18.84 and Steptoe Street at MP 19.63. TCRY’s position is that the Cities’ condemnation efforts are preempted under the ICC Termination Act (“ICCTA”).

II. ARGUMENT

Pursuant to 49 CFR §1112.4, POB seeks to intervene to present its views on the instant dispute. The Board rules of practice generally provide that

¹ TCRY refers to this track as the Horn Rapids Spur and gives the mileposts as MP 28.3 to MP 46.6. The Port, as well as UP and BNSF, have been using “updated” milepost numbers for at least a decade. Coincidentally, TCRY has always used these numbers as well on their own published timetables. The Port is not sure why TCRY refers to the old numbers on any documentation any longer.

“(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

(1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and

(2) Would not unduly broaden the issues raised in the proceeding.

b) The petition to intervene shall set out:

(1) The petitioner's interest in the proceeding;

(2) Whether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding; and

(3) The petitioner's request, if any, for relief.”

Accepting the Port’s comments will neither delay the Board’s handling of TCRY’s request nor broaden the issues. In fact, for the reason stated below it may expedite the matter insofar as the Board may consider TCRY’s request moot. POB has a clear interest in this matter as *it* is the owner of the subject track that is the subject of TCRY’s filing. Hence it should be entitled to intervene. POB also opposes the relief sought for the reasons identified below. Finally, POB requests that TCRY’s request be denied.

TCRY has styled its request as a “complaint” as well as a request for a preliminary injunction. In reality, it is really a request for a declaratory ruling that the Cities’ condemnation effort is preempted under the ICCTA. Should the Board grant the Port’s adverse discontinuance application, TCRY would be subject to Washington state law and the Port could proceed to evict TCRY from the Port’s line. For that very reason, TCRY’s request would be moot. Assuming that the Board adheres to its statutory schedule for deciding discontinuance or

abandonment applications, a decision would likely be issued on or about June 15, 2019. Assuming further the Board grants the adverse discontinuance request, the Board would not likely have considered, let alone decided, the merits of TCRY's "complaint." For the Board to entertain this request would simply be a waste of its resources. Accordingly, the Board should either deny the request as moot or hold the matter in abeyance pending a decision on the outcome of the adverse discontinuance case.

Turning now to the merits of TCRY's request, the Port wishes to help the Board to understand the pertinent facts. The Cities have been engaged in a dispute with TCRY over "Center Parkway" for years. The Cities originally had a proposal for this area that did have a slight impact on rail (which would have increased the grade by about 1% and reduced a passing area slightly). The Port did not back this original plan because it did have some negative impact to the Port's infrastructure or on TCRY. TCRY petitioned the Board for and obtained a ruling that the ICCTA preempted the Cities' original condemnation attempt. Subsequently 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.

The Board should also deny TCRY's request for injunctive relief. Under the

precedent the Board follows in determining whether or not to grant injunctive relief, a party seeking an injunction must show that (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. *Union Pacific Railroad-Petition for a Declaratory Order and Preliminary Injunction*, FD 36197, STB served June 29, 2018 (*denying* the request). 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. Similarly, the latest request should not harm other parties such as adjacent landowners. The Port believes that the term "public interest" encompasses its views and those of the customers served by the line, and the Port for itself does not believe that granting the requested relief is in the public interest.

III. CONCLUSION

Accordingly, the Port requests that the Board deny the relief sought by Tri-City Railroad Company, LLC as moot or, in the alternate, accept its comments in opposition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sloane Carlough". The signature is fluid and cursive, with the first name "Sloane" and last name "Carlough" clearly distinguishable.

Sloane S. Carlough
John D. Heffner
Clark Hill, PLC
1001 Pennsylvania Ave., N.W.
Suite 1300 South
Washington, D.C. 20004

202-640-6673

Dated: May 24, 2019

CERTIFICATE OF SERVICE

I, Sloane S. Carlough, hereby certify that a copy of the foregoing Petition to Intervene and Reply Comments dated May 24, 2019 was sent by U.S. Mail to all parties of record in this proceeding.

Ryan M. Best
Attorney for Peterson & Tri-City Railroad Co. , LLC
Best Law, PLLC
905 Riverside Avenue
Suite 409
Spokane, Washington, 99201

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112

Honorable Jay Inslee
Office of The Governor
P.O. Box 40002
Olympia, WA 98504-0002

Office of General Counsel
National Railroad Passenger Corporation (AMTRAK)
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4214

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive
Olympia, WA 98504-7250

Ms. Martha P. Rico-Parra
Secretary
United States Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

Mr. Rick Potts, Chief
Conservation and Outdoor Recreation Div.
River, Trails and Conservation Assistance Program
National Park Service
1849 C Street, N.W. (Org 2220)
Washington, D.C. 20240

Headquarters
Military Surface Deployment and Distribution Command
Transportation Engineering Agency
ATTN: SDTE-SA (Railroads for National Defense)
1 Soldier Way, Building 1900 W
Scott AFB, IL 62225

United States Department of Transportation
Federal Railroad Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

US Department of the Interior
National Park Service
Land Resources Division
1849 C Street, N.W.
Washington, D.C. 20240

US Department of Agriculture
Chief, Forest Service
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0003

Rick Rose
ConAgra Foods Lamb Weston
8701 W. Gage Blvd.
Kennewick, WA 99336

Bill Friend, Warehouse Manager
Henningsen Cold Storage Company
2025 Saint Street
Richland, WA 99354

TCRY
Attn: Lisa Anderson
P.O. Box 6106
Kennewick WA 99356

Kevin Sheckla
West Coast Warehouse
P.O. Box 1187
Richland, WA 99352

Lisa Anderson
10 N Washington
P.O. Box 6106
Kennewick, WA 99336

Perma-Fix Northwest, Inc.
2025 Battelle Blvd.
Richland, WA 99354

Preferred Freezer Services
Ed Gottschalk, Plant Manager
2800 Polar Way
Richland, WA 99354

DelHur Industries
John Doyle
2935 Kingsgate Way
Richland, WA 99354

Central Washington Corn Processors
Dennis Kylo
427 W. 1st Avenue
Spokane, WA 99201

Certified DEF, Inc.
Attn: Phil Adams
50 W Forest Street
Suite 204
Brigham City, UT 84302

Schaeffer Industries
Attn: Clark Taylor
Executive Vice President & General Counsel
141 S. Western Coil Road
Linden, UT 84042

Packaging Corporation of America
Katy Conlan, Manager
101 South Capitol Blvd, Suite 800
Boise, ID 83702

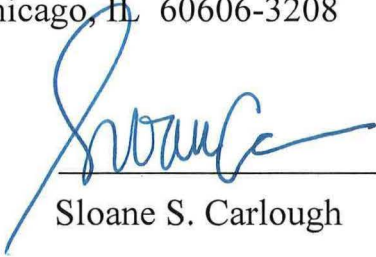
ATI Richland
Kevin O'Connor, Plant Manager
3101 Kingsgate Way
Richland, WA 99354

WHECO Corporation
Jeff Williams
2989 Kingsgate Way
Richland, WA 99354

Mike Connerly
Energy Northwest, Turbine Coordinator
Reactor and Major Maintenance
P.O. Box 968
Richland, WA 99354

Peter W. Denton
Attorney for BNSF Railway Company
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036-1795

Robert A. Wimbish, Esq.
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208



Sloane S. Carlough

Dated: May 24, 2019