

FD 36037

Before the
SURFACE TRANSPORTATION BOARD

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TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability company,

Petitioner,

vs.

THE CITY OF RICHLAND, of the State of Washington, located in Benton County, Washington; and CITY OF RICHLAND RAILROAD an Unregistered Entity or Tradename,

Respondents.

TCRY'S PETITION FOR DECLARATORY ORDER

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I. SUMMARY OF RELIEF SOUGHT

Tri-City Railroad Company, LLC (“TCRY”) petitions the Surface Transportation Board (“Board”) for a Declaratory Order. TCRY seeks a determination that because the City of Richland (“Richland”) holds itself out as the “City of Richland Railroad” and owns and maintains a rail line to which multiple industry tracks are connected and upon which multiple industries receive rail service from multiple rail carriers, it was required to file notice with the Board prior to construction of and operation upon its railroad. *See* 49 U.S.C. § 10901(a)(4).

TCRY seeks determination that Richland, operating as the City of Richland Railroad, is a rail carrier. TCRY also seeks determination that contracts entered into between Richland and Class I carriers are “interchange commitments”, for which Richland did not comply with the applicable regulation. *See* 49 C.F.R. § 1121.3(d).

TCRY further seeks a determination that Richland’s contracts drafted to avoid the Board’s jurisdiction are void *ab initio*. Finally, TCRY seeks a determination that 49 U.S.C. § 10901(d) is applicable to the rail line constructed and operated by the City of Richland Railroad, since access to the rail line requires crossing TCRY’s rail line.

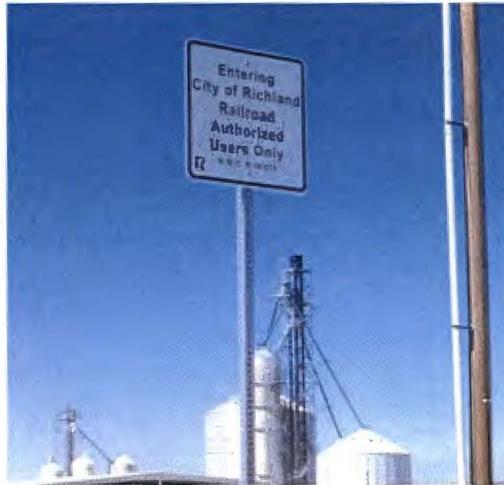
II. PARTIES AND STATUTORY JURISDICTION

A. The Tri City Railroad.

TCRY is a limited liability company organized under the laws of the State of Washington. (See Verified Statement of Randolph Peterson re: Petition for Declaratory Order (“Peterson Stmt.”), ¶ 2) Its headquarters are located in Kennewick, Washington, and its principal place of business is within the State of Washington. (Id.) TCRY is a Class III railroad operating under notice of exemption. (Id.) See FR 4915-00-P.

B. City of Richland.

Richland is a city organized under the laws of the State of Washington, located in Benton County, Washington. Richland operates what it advertises and refers to as the City of Richland Railroad (“CORR”), as depicted in one of its signs, below (Peterson Stmt., ¶ 17):



C. Jurisdiction of the Board.

The Board's jurisdiction over railroads is exclusive, 49 U.S.C. § 10501, and the Board has authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty

“The Board has jurisdiction over rail transportation, regardless of whether the property upon which that transportation is being conducted is owned, leased, or held in easement by the operating railroad.” *Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, STB Finance No. 35196, 2010 WL 691256 at *5 (March 1, 2010).

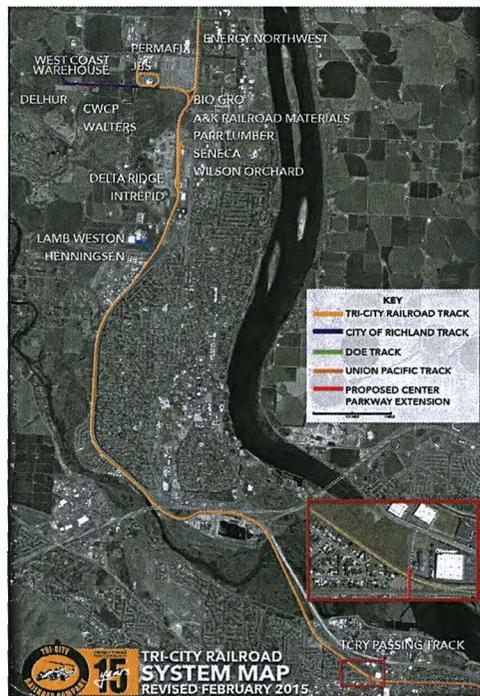
III. STATEMENT OF THE CASE

A. The Trackage TCRY Is Leasing Was Originally Constructed By The Atomic Energy Commission, When It Needed Rail Service To Hanford In 1948 To Aid In Nuclear Weapons Production.

On September 28, 1948, the Interstate Commerce Commission, in the matter *Northern Pacific Railroad Company et al. Trackage Rights, etc.*, FD 15925 (I.C.C. 1948), authorized a plan under which certain railroad trackage would be constructed by the federal government and operated upon by certain railroads existing at the time, in order to provide

service to the Hanford Nuclear Facility for military purposes. (See Peterson Stmt., ¶ 2 Exh. 2)

The Agreement between the federal government and the railroads was modified in the 1950s and 1960s, but persisted in providing that the railroads could operate on the government's track without charge, and with the government maintaining the railroad track. (Id., ¶ 4) The tracks are now known as the "Hanford Trackage," and are depicted in the below rail map. (Id.) As discussed herein, TCRY leases the Hanford Trackage from the Port of Benton, which obtained title in 1998.



(Id., ¶ 4 Exh. 3)

B. Richland Obtained An Easement For A “Railroad Spur” In 1997 From The Department Of Energy.

Prior to 1999, the Hanford Trackage west of the wye ended in a short spur, depicted below:



(See Peterson Stmt., ¶ 5 Exh. 4)

In 1997, Richland entered into Contract No. R006-97ES13438.000 with the United States Department of Energy (“DOE Easement”). (Id., ¶ 6, Exh. 5) The DOE Easement provides that it is for “the purpose of constructing, repairing and maintaining a railroad spur which connects to the railroad currently owned and operated by DOE[.]” (Id.) (emphasis added).

The DOE Easement provides:

DOE may terminate in whole or in part this easement if it determines that the Grantee's use thereof interferes with or endangers the DOE's operations and programs.

...The Grantee's operations and activities on the Premises shall be so conducted that interference is not caused to the operations of the Government and/or its operating contractors on Government-owned land in the vicinity of the Premises...

...Any property of the Government that is damaged or destroyed as a result of the actions of Grantee, its employees or agents, incident to the use of the Premises or the exercise of any other rights authorized by this easement shall be promptly repaired or replaced by Grantee to the satisfaction of DOE, or in lieu of such repair or replacement Grantee shall, if required by DOE, pay DOE a sufficient sum of money to compensate for the loss sustained by the Government as a result of the damage to or destruction of such Government property.

...Grantee shall obtain all necessary permits, licenses, certification and/or authorizations required for construction, occupancy and operations on the easement. Grantee shall abide by all federal, state and local laws and regulations applicable to the operations on the easement. Grantee shall ensure that its operations are fully protective of the environment and of human health and safety...

(Id., Exh. 5)

By its terms, the DOE Easement was issued pursuant to 42 U.S.C. § 2201(q), entitled "Easements for Rights-of-Way", which provides that

the “Commission is authorized... to grant easements... to any...municipality... for railroad tracks...[provided] that all or any part of such rights-of-way may be annulled or forfeited...for failure to comply with the terms and conditions of any grant hereunder[.]”

C. The Federal Government Transferred Its Railroad Property And Equipment To The Port Of Benton In 1998.

On October 1, 1998, the DOE transferred its interest in the Hanford Trackage to the Port of Benton (“POB”). (See Peterson Stmtnt., ¶ 7) The Indenture provides, *inter alia*, that POB takes title subject to existing easements. (Id., Exh. 6)

D. Richland Constructed Railroad Trackage in 1999.

On February 1, 1999, POB granted Richland an easement “for an access and utility easement for a railroad spur.” (See Peterson Stmtnt., ¶ 8 Exh. 7) (emphasis added) As discussed within the 1999 Easement, the spur described therein extends from the spur described in the DOE Easement. (Id.)

In 1999 Richland constructed railroad tracks of slightly less than 2 miles in length, extending from the easement onto Richland property, with a short, 500’ passing track near the middle of the new rail. (Id., ¶ 9) As of 2002, when TCRY entered into a lease to operate on the Hanford Trackage, no industries were located upon that trackage. (Id.)

E. TCRY Entered Into An Agreement To Be The Operator On The Hanford Trackage And Richland's Spur.

In 2002, POB entered into a Railroad Lease with TCRY for occupancy of certain premises and operation of a common carrier by rail on the Hanford Trackage. (Peterson Stmt., ¶ 10) By its terms, the Railroad Lease provides that TCRY took its leasehold interest on an "as is" basis and subject to the burdens and benefits of existing recorded easements.¹ (Id., Exh. 8)

TCRY also entered into a Service Agreement with Richland, under which TCRY became the operator on Richland's track, for purposes of interchanging with the Class I carriers to provide service to industry which may begin operating on Richland's track. (Id., ¶ 11 Exh. 9)

From 2002 through 2009, TCRY, as operator, provided service to several industries which began to receive service along Richland's new rail. (Id.)

F. In 2010, Richland Began Holding Its Rail Service Out As The "City Of Richland Railroad" And Entered Into Multiple Interchange And Trackage Agreements.

1. *Lawsuit*

In 2009, BNSF Railway Company ("BNSF") commenced suit against TCRY, claiming that under FD 15925 and its progeny, BNSF had

¹ TCRY's predecessor in interest, Livingston Rebuild Company, previously assigned its 1998 lease with the Port of Benton to TCRY.

the right to operate without charge to serve industries directly connected to the Hanford Trackage constructed by the DOE, and that it was not responsible for maintenance of the same. The court ruled in favor of BNSF. (See Peterson Stmt., ¶ 12) See also *BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC.*, 835 F.Supp.2d 1056 (2011).

2. *Richland Banned TCRY from direct access to shippers along the CORR.*

In December, 2010, Richland terminated TCRY's existing agreement as the operator and maintainer of the Richland railroad; demanded that TCRY agree to eliminate its only passing track on its system, located at its interchange point with the two Class I carriers, so that Richland could construct a new, unrelated at-grade crossing ("Center Parkway"); and demanded that TCRY pay an access fee going forward to serve customers on the CORR. (Id., ¶ 13, Exh. 11)

TCRY refused to sign the agreement. (Id.) As a consequence, Richland banned TCRY from accessing any shippers on the CORR. (Id.) Presently, TCRY is allowed to serve shippers on the CORR only as handling carrier for the Union Pacific. (Id., ¶ 14)

As described below, Richland presented similar contractual demands to BNSF and Union Pacific.

3. *Richland attempted to contract around the Board's jurisdiction.*

On January 5, 2011, Richland and BNSF entered into a contract entitled "City of Richland Standard Form Railroad Track Use Agreement" which provides, among other things, that BNSF would cease doing business with TCRY at TCRY's interchange location on the Hanford Trackage. (Id., ¶ 15 Exh. 12). Although the contract implicates TCRY's business and operations, TCRY is not a party to this contract. (See Id., Exh. 12) Significantly, although Richland was specifically aware of the Board's jurisdiction, it attempted by contract to exempt itself, as can be seen below:

Section 1.1. City hereby grants to Railroad non-exclusive permission to operate its trains, locomotives, cars and equipment with its own crews over the Track for the purposes set forth herein. Railroad's use of the Track shall be in common with such other user or users of the Track as City has heretofore admitted, or may at any time in the future admit, to use of all or any

portion of the Track, provided that City shall require such user or users to comply with all Legal Requirements (as defined in Section 9.1) applicable to such user's or users' use of the Track. Subject to the foregoing, City shall retain the exclusive right to grant to other persons the right to use all or any portion of the Track, provided that such use does not unreasonably interfere with the rights granted to Railroad herein.

...

Section 2.1. Railroad's use of the Track shall be limited to the movement of goods by rail to and from an Industry via tracks of such Industry that connect to the Track.

Section 2.2. Railroad shall not knowingly and intentionally permit the loading or unloading of railcars on the Track by any party within its control, and shall not enter into agreements or arrangements with any person for the storage of empty or loaded railcars on the Track or any portion thereof, without the prior written consent of City.

...

Section 4.1. For so long as City permits Railroad reasonable use of the Track, as compensation for Railroad's use of the Track, Railroad shall pay to City annually at the beginning of each calendar year a fee of Fifteen Thousand Dollars (\$15,000) (hereinafter referred to as the "Annual Fee") which shall be payable regardless of Railroad's use of the Track during that year.

...

Section 4.3.

A. Railroad agrees that as part of the consideration for obtaining City's permission to use the Track herein, Railroad shall, subject to Legal Requirements, as of the Effective Date and during the term of this Agreement, permanently relocate any interchange receipt operations between Railroad and another rail carrier at Richland Junction to an alternate interchange location except that Railroad may, in emergency situations only, interchange cars at Richland Junction. For purposes of this provision, an emergency situation includes, but is not limited to, the following: Force Majeure events or other Acts of God; movement of High or Wide loads; movement or handling of rail security-sensitive materials (as such term is defined in 49 CFR Part 1580, as amended, supplemented or replaced) in compliance with Legal Requirements or other safety requirements; track or other mechanical conditions necessitating a change in interchange location. Except as required by law or as provided in this Section 4.3.A, Railroad shall not, during the term of this Agreement, enter any agreement to deliver cars in interchange to any other railroad at Richland Jct.

...

Section 4.4. City acknowledges that the compensation provided for in this Section 4 shall be the sole consideration for the right to use the Track, and in no event shall City impose any additional charges tariffs, or surcharges on Railroad or any customer or receiver of Railroad as a condition of use of the Track for the provision of rail transportation service except to the extent expressly set forth below. Notwithstanding the foregoing, City may assess additional charges, tariffs, or surcharges for maintenance, operating and dispatching costs associated with the Track if all of the following conditions are satisfied: (i) City provides Railroad with advance written notice of the proposed charges, tariffs or surcharges and detailed information concerning City's costs, including the deficit not covered by the then current Annual Fee; and (ii) City, Railroad and any other users of the Track are not able to negotiate, within 60 days of City providing notice in (i) above, an updated Annual Fee in lieu of the proposed charges to the mutual satisfaction of the parties.

...

Section 9.2. City and Railroad agree that the Track is excepted trackage under 49 U.S.C. Section 10906 and that no approval, authorization or exemption from the Surface

Transportation Board (hereinafter referred to as the "STB") is required for Railroad to use the Track or to discontinue its use of the Track. Railroad agrees that it will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

...

Section 17.12. The parties expressly agree that this Agreement and any rights and obligations under this Agreement shall not be deemed an “interchange commitment” as such

term is defined in Bill No. S-2889 dated December 9, 2009 entitled “the Surface Transportation Board Reauthorization Act of 2009.”

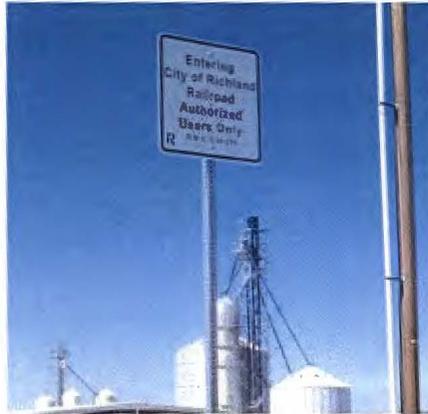
(Id., Exh. 12)

In April 2011, Richland and Union Pacific signed a similar “City of Richland Standard Form Railroad Track Use Agreement”, under which Richland paid \$2.1 million dollars to Union Pacific, Union Pacific agreed to eliminate its operations and interchange with TCRY at the Richland Junction, and Union Pacific agreed to pay to Richland an annual fee for access to the CORR.² (Id., ¶ 16 Exh. 13)

TCRY can find no record that Contract No. 22-11, an “interchange commitment” for the purposes of federal regulations, was ever filed with or approved by the Board. *See* 49 C.F.R. § 1121.3(d)(1); 49 C.F.R. §1150.43(h).

Around the time the above agreements were executed, the sign depicted below, apparently directed at TCRY, was posted by Richland / CORR. As can be seen, it cites Richland’s criminal trespass ordinance:

² The contract between Richland and Union Pacific does not contain the same language addressing the Board’s jurisdiction that is contained in paragraphs 9.2 and 17.12 of the contract between Richland and BNSF.



(Id., ¶ 17 Exh. 14)

G. Richland Attempted To Eliminate Portions Of TCRY's Trackage And Operations.

In 2013, Richland removed a portion of the rail it had constructed on and extending from its DOE/POB easement, and replaced it with a main track and parallel passing track, approximately 3,500 feet long. (Id., ¶ 18) During the same time frame, Richland filed a petition with the Washington State Utilities and Transportation Commission to, among other things, remove TCRY's only parallel passing track.³ (Id., ¶ 19) TCRY petitioned the Board for a Declaratory Order on the above matter concerning the interference with current or planned railroad operations, which is currently pending. *See* FD 35915.

³ In later proceedings, Richland dropped its request that the passing track be removed, and instead sought to impose significant restrictions on its use in conjunction with a proposed new at-grade arterial crossing.

H. Richland Continues To Expand Its Railroad To New Territory And Shippers Without Notice To, Or Authorization By The Board.

1. *Richland sought approval from state agencies to construct its railroad.*

In furtherance of Richland's ongoing expansion of the CORR, "in preparation for a proposed rail loop which will connect to the existing Tri-City's railroad track to the north," Richland sought and received approval from the Washington State Department of Ecology to fill in certain wetlands for the purposes of constructing new rail. (Id., ¶ 20 Exh. 15) As demonstrated by the factual history, it is significant that Richland has consistently sought to comply with state authority in building its railroad while avoiding the Board's jurisdiction.

2. *The CORR presently serves 13 shippers, with plans for expansion.*

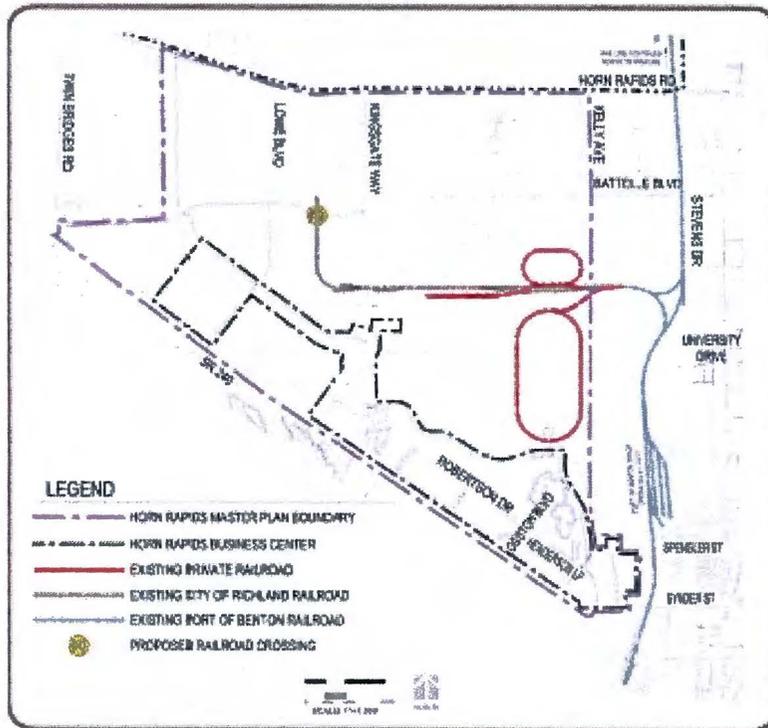
Richland continues to enter into agreements with Industries for those Industries to connect Industry spurs to the CORR main line. For example, Richland granted a rail spur easement to Del Hur Industries for Del Hur to construct and connect a rail spur to the Richland's rail line. (Id., ¶ 21 Exh. 16)

Presently, there are 13 shippers on the CORR, which itself continues to expand to serve new shippers in territory which previously did not receive rail service:



(Id., ¶ 23 Exh. 17)

In Richland’s City Council January 2016 Master Plan Update, it identifies the “City of Richland Railroad” connecting to and extending from the “Port of Benton Railroad”, and being connected to “existing private railroad”.



(Id., ¶ 24 Exh. 18 p. 24)

Richland continues to advertise sale of commercial property along its railroad. (Id., ¶ 25 Exh. 19)

3. *Carload activity to shippers on the CORR is increasing.*

Prior to 2009, service was provided pursuant to the agreement between Richland and TCRY; post-2009, BNSF has been providing direct service to shippers on the CORR rail line, crossing TCRY to reach the CORR. The below chart divides inbound/outbound carloads handled directly by BNSF, or by UP with TCRY as its handling carrier:

City of Richland Railroad
Rail Traffic

For the Period: January 1, 2002 - May 4, 2016

Customer	Delivered by Tri-City Railroad 1/1/02 - 8/23/09	Delivered by BNSF 8/24/09 - 5/4/16	Delivered by Tri-City Railroad 8/24/09 - 5/04/16	Total Carloads
WALTERS	115	318	257	690
CENTRAL WASHINGTON CORN PROCESSORS	0	2334	939	3273
PREFERRED FREEZER SERVICES	0	449	1823	2272
DEL HUR INDUSTRIES	0	690	0	690
WEST COAST WAREHOUSE	11	18	323	350
NORTHSTAR BIO FUELS (JBS)	0	0	336	336
GAVILON	144	33	24	201
SAFETY-KLEEN	100	0	0	100
HENNINGSEN - POB TRANSLOAD	21	0	67	88
CERTIFIED DEF	0	0	20	20
CITY OF RICHLAND	0	17	0	17
PACIFIC ECOSOLUTIONS	16	0	0	16
CH2M HILL	2	0	0	2
CHPRC	2	0	0	2
CITY LOOP	0	2	0	2
COST LESS CARPET	0	0	1	1
PERMAFIX	1	0	0	1
Total Carloads	412	3859	3790	8061

(Id., ¶ 26 Exh. 20)

As depicted below, between January 1, 2013 and May, 2016, shippers on the CORR have received 6,074 carloads, all of which had to cross TCRY's system.

City of Richland Railroad
 Carload Activity
 January 1, 2013 - May 4, 2016

Customer	IN-TOTAL	DR-LOADS	TOTAL
WEST COAST WAREHOUSE (WCW)	16	288	304
DEL HUR	83		83
WALTERS	259	48	307
CITY OF RICHLAND	17		17
CENTRAL WASHINGTON CORN PROCESSORS (CWCP)	2334	396	2732
PREFERRED FREEZER SERVICES	449	1823	2272
CITY LOOP	2		2
CERTIFIED DEF	0	20	20
COST LESS CARPET	0	1	1
NORTHSTAR BIO FUELS (JBS)	0	336	336
TOTAL	3160	2914	6074

(Id., ¶ 27 Exh. 21)

I. Richland Has Neither Obtained Permission From TCRY To Expand The Scope Of Its Rail Spur Easement, Nor To Cross TCRY To Reach The CORR.

No shippers were located on CORR's rail in 2002 when TCRY entered into the Railroad Lease with POB. Since the commencement of TCRY's lease, Richland has not sought from TCRY, and TCRY has not granted a license or easement modifying or expanding the scope of Richland's 1997 and 1999 railroad spur easements to allow a rail line. (Id., ¶ 28) Moreover, Richland has never sought permission from TCRY to permit the transit of rail traffic across its system to reach CORR. (Id.)

IV. POINTS AND AUTHORITIES

A. The Board Has Jurisdiction Over The Construction, Acquisition, And Operation Of A Rail Line.

“Congress has delegated to the [Board] exclusive jurisdiction to regulate ‘transportation by rail carriers’ and ‘the construction, acquisition, operation, abandonment, or discontinuance’ of rail facilities... with the instruction that the agency ‘ensure the development and continuation of a sound rail transportation system.’” *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C.Cir. 2009) (internal citation omitted).

The jurisdiction of the [Board] over –
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). *See also City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005); *United Transp. Union Ill.-Legis. Bd. V. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999).

Here, the question is whether the trackage constructed and owned by Richland, and which Richland operates as the CORR, is a “rail line”. As described *infra*, the determination of how the trackage is characterized is a question within the Board’s exclusive jurisdiction.

B. The CORR Is Subject To 49 U.S.C. § 10901.

1. *The trackage constructed by Richland and operated as the CORR is a rail line.*

As has been described by the Board, there are three types of railroad track:

(1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U.S.C. 10901 to construct or acquire and operate, or 49 U.S.C. 10902 to acquire and operate, and an appropriate environmental review under the National Environmental Policy Act (NEPA) and the Board’s environmental rules at 49 CFR Part 1105; (2) ancillary track, such as “spur,” “industrial” or “switching” track, which does not require prior authorization from the Board to construct or remove under 49 U.S.C. 10906 (or an environmental review under NEPA), but is subject to the Board’s jurisdiction under 49 U.S.C. 10501(b) so that most state and local regulation of such track is preempted; and (3) so-called “private” track, which is not part of the national rail transportation system or subject to the Board’s jurisdiction because the track is not intended to serve the general public.

Suffolk & Southern Rail Road LLC-Lease and Operation Exemption Sills Road Realty, LLC, FD 35036 at n. 1 (S.T.B. November 16, 2007).

“The key test to determine whether construction and use of a track requires Board approval (and an environmental review under NEPA) is whether the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory not served by the carrier or already served by another carrier.” *Suffolk & Southern Rail Road LLC-Lease and Operation Exemption Sills Road Realty, LLC* FD 35036 (S.T.B. November 16, 2007) (citing *Texas & Pac.Ry.v. Gulf, Etc., Ry.*, 270 U.S. 278 (1926)).

“It is well established that the determination of whether a particular track segment is ‘railroad line,’ requiring the Commission’s authorization pursuant to § 10901(a), or a ‘spur, industrial, team, switching, or side’ track, exempt from Commission jurisdiction pursuant to § [10906], turns on the intended use of the track segment, not the label or cost of the segment.” *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C.Cir. 1983) (footnote omitted). “[T]rack segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad’s service into new territory, must be approved by the Commission pursuant to section 10901(a).” *Id.* at 368. “[T]rack segments which are merely incidental to, and not required for, a railroad’s service between points of shipment and delivery are exempted from the requirements of section 10901(a)[.]” *Id.*

The question of whether trackage falls under section 10901 or section 10906 “is to be established with reference to the intended use of the track in question.” *United Transportation Union – Illinois Legislative Board v. Surface Transportation Board*, 169 F.3d 474, 477 (1999) (citation omitted).

If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad ... although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.

Id. at 477-78 (quoting *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 278 (1926)). If railroad trackage allows a railroad “to extend its operations to reach new customers and not merely to serve existing customers more efficiently”, that trackage is a “railroad line” and is governed by sections 10901 and 10902, rather than being a “spur” under section 10906. *Id.* at 478.

In determining whether a particular track segment is railroad line or excepted track, the Board’s decisions have relied on certain indicia, including: the length of the line; whether it serves more than one shipper; whether it is stub-ended; whether it was built to invade another railroad’s territory; whether the shipper is located at the end of the line; whether there is regularly scheduled service; traffic volume; who owns and

maintains the line; whether the line was constructed with light-weight rail; the condition of the line; what the line is used for (*i.e.*, switching, loading, and unloading); and whether there are stations on the line. *See ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co.*, FD 34126 (S.T.B. Dec. 26, 2001); *Chi. SouthShore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind.*, FD 33522 (S.T.B. Dec. 17, 1998); *S. Pac. Transp. Co.—Exemption—Aban. of Serv. in San Mateo Cty., Cal.*, AB 12 (Sub-No. 118X) (I.C.C. Feb. 20, 1991).

The Board’s determination “regarding the proper characterization of the tracks as a rail line or spur” is reviewed “under the high level of deference accorded to an agency’s reasonable interpretation of the statutes which the agency administers.” *United Transportation Union*, 169 F.3d at 476 (citation omitted).

In *State of Minnesota By Burlington Northern Railroad Company v. Big Stone-Grant Industrial Development And Transportation LLC*, 990 F.Supp. 731 (D.Minn. 1997) *aff’d*, 131 F.3d 144, a party sought to construct new railroad trackage in order to serve new industries; BNSF objected, arguing that the proposed new trackage was not industry track or a spur, as claimed by the constructing party, but rather was a rail line. *Id.* at 732, 734. Rejecting the claim that the new trackage was industry or spur and exempt under 10906, the Court explained:

If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof,' ... If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction.

...

The proposed new line at issue in this case is not an industrial track. Its purpose is not for loading, reloading, storage or switching. Rather, it will extend the line of TCW into new territory and allow TCW to serve new industries. It will also invade territory served by BN and will divert business from BN.

Id. at 735 (quoting *New Orleans Terminal Company v. Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942, 87 S.Ct. 974, 17 L.Ed.2d 873 (1967)).

Here, much as in *Minnesota*, the track in question is not ancillary to existing rail service, and its purpose is not for loading, storage, or switching. Indeed, the contractual agreements between Richland and the Class I carriers specify that loading, unloading, and storage on the CORR are forbidden, and that instead the carriers are to provide service to industries which connect industry track to the CORR. (See Peterson

Stmnt., Exh. 11 and 12). The CORR extends into new territory which did not previously receive rail service, and serves 13 new industries. The CORR is in direct market competition with TCRY, and presently allows market competitors to cross TCRY to reach the CORR without Richland obtaining statutory compliance or providing statutory compensation. Service on the CORR is regular, as is set forth in the traffic volume charts, *supra*. The rail line is owned and exclusively maintained by Richland. (Id.) The rail line is not light rail, but rather is track for unit train freight service, constructed to a Class 2 standard, with a per car weight restriction of 286,000 lbs. (Id.) Richland charges an access fee to the Class I carriers; those carriers charge tariffs to shippers on the CORR for rail service. (Id.) Richland reserves the right to impose additional tariffs on the service provided by the Class I carriers, and reserves the right to revoke the Class I carriers' ability to perform their common carrier obligations to shippers. (Id.)

The indicia of a rail line being present, the Board should find that the CORR is a rail line, subject to 49 U.S.C. § 10901.

2. *Richland failed to obtain certification from the Board for creation of a new rail line.*

“Under 49 U.S.C. § 10901(a)(4), a non-rail carrier cannot acquire a railroad line without the STB’s authorization. The statute specifically

states that ‘in the case of a person other than a rail carrier, [a person may] acquire a railroad line only if the Board issues a certificate authorizing such activity[.]’” *Heartland Bus. Bank v. Escanaba & Lake Suer. Ry.*, No. 2:09-cv-243, 2010 WL 2539657, at *2 (W.D. Mich. June 15, 2010).

Certification authorizing construction of, and operation upon a railroad line is a prerequisite to any rail carrier obtaining rights to cross an existing railroad line. *See Keokuk Junction Ry. Co. v. Surface Transportation Board*, 292 F.3d 884, 885-86 (2002).

“The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval under 49 U.S.C. § 10901, even if the acquiring entity is a noncarrier, including a state.” *New Mexico Department of Transportation – Acquisition Exemption*, FD 34793, 2006 WL 308726 (S.T.B. February 6, 2006) (citing *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 135 (1980), *aff’d sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982)).

Here, Richland has constructed and has been operating the CORR without obtaining certification from the Board. Lacking certification, Richland should neither be permitted to continue operating the CORR unregulated, nor to have rail traffic cross TCRY to reach the CORR without complying with the requirements of the statute, described in the next section.

3. *Richland failed to comply with 49 U.S.C. 10901(d), to obtain permission to cross another rail line to reach the CORR.*

Even where a non carrier has been issued a certificate, the crossing of a rail line to reach the new rail line may be blocked by the crossed carrier unless the provisions of 49 U.S.C. § 10901(d) are complied with:

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

49 U.S.C. § 10901(d).

There is no indication that enacting the crossing statute Congress meant to provide a means by which a new carrier could avail itself of a significant portion of an incumbent carrier's right-of-way in lieu of obtaining its own right-of-way, regardless of the difficulties it would otherwise face. Had Congress meant to provide for a new

competitor to access the private property of an incumbent rail carrier to that degree, it presumably would have discussed such a significant change.

HolRail, LLC V. Surface Transp. Bd. 515 F.3d 1313, 1316 (D.C. Cir 2008) (quoting STB Finance Docket No. 34421 (Sub-No. 1) at 1).

Here, Richland neither obtained certification nor complied with the requirements of the statute, vis-à-vis TCRY, in order to obtain the right for rail traffic to cross TCRY to reach the CORR. Richland should be required to comply with the requirements of 49 U.S.C. § 10901(d) as a condition precedent to receiving any further rail traffic which must cross TCRY to reach the CORR.

C. CORR Has Retained Such Control Over Rail Operations And Common Carrier Obligations On Its Rail Line That It Has Become A Rail Carrier.

When a political subdivision of a state acquires a rail line, it become a rail carrier subject to the Board's jurisdiction if: it has non-exclusive, non-permanent operating agreements with other rail carriers; if it retains control over issues of maintenance and improvement; or if it retains the right to approve or interfere with the other rail carriers on the rail line acquired by the political subdivision. *See Santa Cruz Regional Transportation Commission – Petition for Declaratory Order*, FD 35491, 2011 WL 3667482 (S.T.B. August 22, 2011).

“[T]he fundamental test for determining whether a party is a common carrier is whether there has been a holding out to the public as a common carrier[.]” *See Status of Bush Universal, Inc.*, 342 I.C.C. 550, 564 (1973).⁴ The Board has blocked agreements that did not leave the carrier free from interference and able to conduct its operations. *See Orange Cnty. Transp. Auth.—Acquisition Exemption—The Atchison, Topeka & Santa Fe Ry. Co.*, 10 I.C.C.2d 78, 1994 WL 114003 (Mar. 28, 1994); *S. Pac. Transp. Co.—Abandonment Exemption—L.A. Cnty.*, 8 I.C.C.2d 495, 1992 WL 125050 (May 6, 1992).

[T]he proper inquiry is not the parties’ intent in the transaction, but whether the practical result of the transaction would overly burden the ability of the carrier to fulfill its common carrier obligations.

Yreka Western R.Co. v. Tavares, 2012 WL 2116500, at *3-5 (E.D.Ca. June 4, 2012). For the purposes of § 10901, “the Board will find there has been jurisdictional acquisition if the rights acquired by the purchaser are ‘so extensive that the noncarrier has acquired control of the rail line[.]’” *Brotherhood of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 814 (D.C.Cir. 2011).

⁴ “There is no statutory definition of the term ‘common carrier.’ However, as a general matter, the term ‘common carrier’ is a well-understood concept arising out of common law, and it refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation.” *American Orient Express Ry. Co. LLC – Petition for Declaratory Order*, FD 34502, 2005 WL 3552968 (S.T.B. December 29, 2005) (citations omitted).

Here, the contractual agreements between Richland and the Class I carriers reserve for Richland authority and control over operations on the CORR, including the ability to revoke the carriers' ability to serve existing shippers. (*See* Peterson Stmt., Exh. 11 and 12). The contracts, by their terms, are neither exclusive nor permanent. (*Id.*) Richland charges an access fee to the Class I carriers; those carriers charge tariffs to shippers on the CORR for rail service. (*Id.*) Richland reserves the right to impose additional tariffs on the service provided by the Class I carriers, and reserves the right to revoke the Class I carriers' ability to perform their common carrier obligations to shippers. (*Id.*) Richland retains exclusive control over maintenance. (*Id.*)

Richland holds itself out as the CORR, and retains exclusive control over its rail line. When Richland is operating its rail line as the CORR, it should be considered a rail carrier, subject to the same laws and regulations applicable to TCRY and other rail carriers, and within the Board's jurisdiction.

D. Richland's Contracts With Class I Carriers Contain Unauthorized Interchange Commitments.

Even when a proposed construction, acquisition, or transaction is exempt, the party to the transaction must file a notice of exemption with the Board. *See* 49 C.F.R. § 1121.1; 49 U.S.C. § 10502. In seeking an

exemption, the party filing the petition “shall provide” information about interchange commitments:

(d) Interchange Commitments.

(1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (“interchange commitment”). If such a provision exists, the following additional information must be provided (the information in paragraphs (d)(1)(ii), (iv), (vii) of this section may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b)):

- (i) The existence of that provision or agreement and identification of the affected interchange points; and
- (ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement;
- (iii) A list of shippers that currently use or have used the line in question within the last two years;
- (iv) The aggregate number of carloads those shippers specified in paragraph (d)(1)(iii) of this section originated or terminated (confidential);
- (v) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (d)(1)(iii) of this section;
- (vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;
- (vii) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(viii) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

49 C.F.R. § 1121.3(d)(1)(i ~ viii).

As described above, Richland entered into written contracts under which Class I carriers would be prohibited from interchanging with TCRY on the Hanford Trackage. The regulations governing interchange commitments require that the Board be apprised of an interchange commitment when a petition is filed for authorization to construct or operate on a new rail line. Here, Richland never sought the requisite authorization to construct and operate on its new rail line. Richland likewise failed to apprise the Board or seek authorization for the interchange commitment it entered into, and the same should be considered void *ab initio*.

E. Richland's Contractual Attempts To Avoid The Board's Jurisdiction Are Void.

As part of Richland's contract with one of the Class I carriers, Richland attempted to avoid the Board's jurisdiction by inserting the following provisions into its 'City of Richland Standard Form Railroad Track Use Agreement':

Section 9.2. City and Railroad agree that the Track is excepted trackage under 49 U.S.C. Section 10906 and that no approval, authorization or exemption from the Surface

Transportation Board (hereinafter referred to as the "STB") is required for Railroad to use the Track or to discontinue its use of the Track. Railroad agrees that it will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

...

Section 17.12. The parties expressly agree that this Agreement and any rights and obligations under this Agreement shall not be deemed an "interchange commitment" as such

term is defined in Bill No. S-2889 dated December 9, 2009 entitled "the Surface Transportation Board Reauthorization Act of 2009."

(Peterson Stmt., Exh. 12)

The determination of the legal status of railroad trackage is within the purview of the Board. *See United Transportation Union*, 169 F.3d at 476. It is mandatory that a party notify the Board of any agreement which would, *inter alia*, limit interchange with a third-party carrier. *See* 49 C.F.R. § 1121.3(d). There is no regulatory provision entitling a party to ignore the relevant CFRs.

The provisions included in Richland's contracts, expressly drafted in an attempt to avoid the Board's jurisdiction, should be held invalid as a matter of law.

V. CONCLUSION

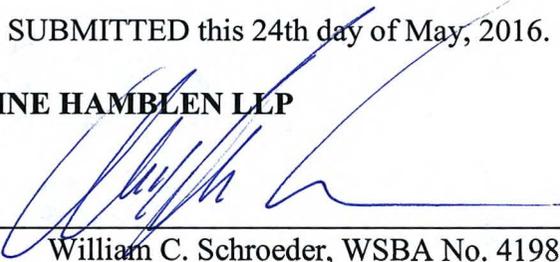
TCRY requests that the Board hold the following:

1. Richland's railroad, operated under the name CORR, is a rail line;

2. Richland failed to obtain certification under 49 U.S.C. § 10901 to construct or acquire a rail line as a non carrier;
3. Richland failed to comply with 49 U.S.C. § 10901(d), since access to its rail line requires crossing TCRY.
4. Richland, while operating its railroad as the CORR, is a rail carrier subject to the Board's jurisdiction.
5. The interchange commitments entered into by Richland, limiting TCRY's interchanges with the Class I carriers, are subject to 49 C.F.R. § 1121.3(d), with which Richland has not complied.
6. Richland's attempts by contract to avoid the Board's jurisdiction, and operation of 49 U.S.C. § 10901 and 49 C.F.R. § 1121.3(d), are void.

RESPECTFULLY SUBMITTED this 24th day of May, 2016.

PAINE HAMBLEN LLP

By: 

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CERTIFICATE OF SERVICE

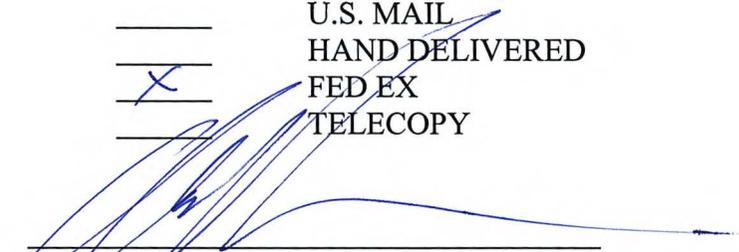
I hereby certify that on this 24th day of May, 2016, I caused to be served a true and correct copy of the foregoing **PETITION FOR DECLARATORY ORDER**, by the method indicated below and addressed to the following:

Heather Kintzley
Richland City Attorney
975 George Washington Way
PO Box 190 MS-07
Richland, WA 99352

U.S. MAIL
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The City of Richland
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WILLIAM C. SCHROEDER