

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35915

TRI-CITY RAILROAD COMPANY—PETITION FOR  
DECLARATORY ORDER

Decided: August 31, 2015

By petition filed on March 19, 2015, Tri-City Railroad Company, LLC (TCRY), seeks a declaratory order concerning efforts by two Washington State communities to bisect TCRY's tracks with a proposed at-grade street crossing. TCRY, a Class III rail carrier, operates on approximately 16 miles of track, which is owned by the Port of Benton.<sup>1</sup> The track runs through the City of Kennewick and the City of Richland (collectively the Cities).<sup>2</sup> TCRY asks for a finding that 49 U.S.C. § 10501(b) preempts actions by the Cities to condemn and acquire a right-of-way for a proposed at-grade crossing, which would bisect TCRY's main and passing tracks.<sup>3</sup>

In a decision served May 21, 2015, the Board found that a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under § 10501(b), and also found that the record was incomplete.<sup>4</sup> The Board, therefore, instituted a declaratory order proceeding under the modified procedure rules at 49 C.F.R. pt. 1112 and directed that all replies to TCRY's petition would be due on June 8, 2015 and that TCRY's rebuttal would be due on June 17, 2015.<sup>5</sup>

On June 1, 2015, the Cities requested an extension of the procedural schedule, asking that the deadline for replies be extended to June 15, 2015, and the deadline for TCRY's rebuttal be extended to June 24, 2015.<sup>6</sup> The Board subsequently approved this extension of the procedural schedule on June 4, 2015. The Board received the Cities' reply on June 15, 2015, and TCRY's rebuttal on June 24, 2015.

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<sup>1</sup> TCRY Pet. 4, Mar. 19, 2015.

<sup>2</sup> Id.

<sup>3</sup> Id. at 1-2, 46-7.

<sup>4</sup> Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2 (STB served May 21, 2015).

<sup>5</sup> Id.

<sup>6</sup> The Cities' Letter 1, June 1, 2015.

On June 30, 2015, the Cities filed a letter requesting leave to file a reply to TCRY's rebuttal. The Cities state that TCRY's rebuttal introduced verified statements from three new witnesses.<sup>7</sup> The Cities contend that these witnesses introduced new facts and material to which the Cities did not have the opportunity to respond.<sup>8</sup> The Cities request the opportunity to address these new facts.<sup>9</sup>

On July 2, 2015, TCRY submitted a letter responding to the Cities' request to reply to TCRY's rebuttal.<sup>10</sup> TCRY notes that the Cities' request is not consistent with 49 C.F.R. § 1112.2, which prohibits replies to rebuttal material.<sup>11</sup> TCRY also states that it will not file a responsive pleading to the Cities' request unless directed to do so by the Board.<sup>12</sup>

In the present case, the parties have submitted an extensive record for the Board to consider in making its determination on the merits of the underlying issues. While the Board's modified procedures do not allow for replies to rebuttal material, the Board has the discretion to admit additional pleadings in the interest of creating a more complete record.<sup>13</sup> Here, in order to clarify the arguments presented and ensure a fully developed record regarding the proposed condemnation action, the Board will grant the Cities' request to file a supplemental pleading. TCRY will not be prejudiced by this action because the Board is providing TCRY the opportunity to rebut the Cities' supplemental filing.<sup>14</sup> The Cities shall file their reply by September 15, 2015, and TCRY shall file its rebuttal by September 30, 2015. The record in this matter shall be closed on September 30, 2015.

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<sup>7</sup> The Cities' Letter 1, June 30, 2015.

<sup>8</sup> Id.

<sup>9</sup> Id. The Cities also disagree with TCRY's assertion that the Cities did not challenge all material allegations of fact contained in TCRY's petition for declaratory order. The Board does not reach that argument here, as the Board is granting the Cities' request on the grounds of developing a more complete record.

<sup>10</sup> Although the letter is dated July 1, 2015, it was not filed with the Board until July 2, 2015.

<sup>11</sup> TCRY's Letter 1, July 2, 2015.

<sup>12</sup> Id.

<sup>13</sup> See 49 C.F.R. § 1112.2. See also Bhd. of Maint. of Way Emp. and Soo Line Sys. Div., Bhd. of Maint. of Way Emp. v. Soo Line R.R. and Wisc. Cent. Ltd., 3 S.T.B. 1076, 1077 n.3 (1998).

<sup>14</sup> For this reason, the Board has not requested that TCRY file a substantive response to the Cities' request for leave to file a reply.

It is ordered:

1. The Cities' request for leave to file a reply is granted.
2. The Cities' reply is due September 15, 2015.
3. TCRY's rebuttal is due September 30, 2015.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.