

Karl Morell & Associates
655 15th Street, NW, Suite 225
Washington, DC 20005
(202) 595-9045
karlm@karlmorell.com

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

Re: Finance Docket No. 36037 Tri-City Railroad Company,
LLC. – Petition For Declaratory Order

Dear Ms. Brown:

Attached for filing please find the Reply of BNSF Railway Company.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36037

TRI-CITY RAILROAD COMPANY, LLC, -- PETITION FOR DECLARATORY ORDER

REPLY OF BNSF RAILWAY COMPANY

James M. Mecone
Assistant General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 78131

Karl Morell
Karl Morell & Associates
Suite 225
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 595-9045

Attorneys for:
BNSF Railway Company

Dated: July 14, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36037

TRI-CITY RAILROAD COMPANY, LLC, -- PETITION FOR DECLARATORY ORDER

REPLY OF BNSF RAILWAY COMPANY

BNSF Railway Company ("BNSF"), hereby replies in opposition to the Petition For Declaratory Order ("Petition") filed by Tri-City Railroad Company, LLC ("TCRY") on May 25, 2016. TCRY seeks a ruling from the Surface Transportation Board ("Board") that the City of Richland should have obtained construction authority from the Board prior to constructing the trackage near the City of Richland ("Richland Trackage"), that the City of Richland should have obtained crossing authority and that the City of Richland failed to comply with the Board's regulations governing interchange commitments.

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. *See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); FD 355832, *CSX Transp., Inc. – Pet. For Declaratory Order*, slip op. at 3, (not printed) served July 31, 2015 ("*CSX Transp.*").

I. TCRY FAILS TO ALLEGE A LEGITIMATE UNCERTAINTY OR CONTROVERSY.

TCRY presents no legitimate uncertainty or controversy for the Board to resolve.

Although it makes numerous allegations regarding the Richland Trackage and the relationship between the City of Richland and railroads operating on and around such trackage, TCRY fails to identify the significance of its allegations for rail operations and services on the Richland Trackage and the trackage constructed at the request of the Atomic Energy Commission to serve the Hanford Nuclear Facility (“Hanford Trackage”). As described below, TCRY’s allegations, even if accepted as true, offer no support for a potential change to operations utilized to serve shippers on the Richland Trackage (“Richland Shippers”). BNSF and Union Pacific Railroad Company (“UP”) serve the Richland Shippers by accessing the Richland Trackage through trackage rights obtained in an agreement with the Atomic Energy Commission and authorized by the Board in Finance Docket No. 15925, and not through any crossing rights or other authority associated with the construction of the Richland Trackage. And for the purposes of these railroads the Richland Trackage is excepted track under 49 U.S.C. § 10906, a status which is determined separately from the status of the trackage for the City of Richland. Thus no Board authority is required for BNSF and UP to operate on the Richland Trackage, and any ruling on the status of the trackage with respect to the City of Richland will not alter the lawfulness of current operations performed on the Richland Trackage. Finally, due to the commercial growth experienced by the Richland Shippers and the effectiveness of rail operations conducted on the

Richland Trackage, and the lack of any justification for disruption of the current operational structure, even if the Board grants the Petition, the most logical remedy available to the Board is the grant of retroactive construction authority to the City of Richland. Accordingly, because current operations and service on the Richland Trackage are performed pursuant to authority unaffected by the outcome of the Petition, TCRY fails to present a legitimate case or controversy or identify any other significant public policy issue, and the Board should decline to consider the Petition.

II. THE PETITION REFLECTS TCRY'S SELF-SERVING MOTIVES AND FRIVOLOUS ATTEMPTS TO REDUCE COMPETITION.

Rather than an assertion of a legitimate uncertainty or controversy, the Petition is an ineffective attempt by TCRY to interfere with the lawful rail operations of its competitors and monopolize rail service on the Hanford Trackage and the Richland Trackage. The portion of the Hanford Trackage that connects with the Richland Trackage is owned by the Port of Benton and leased by TCRY. TCRY characterizes the Hanford Trackage and the Richland Trackage as competitive options for shippers considering locations in the Tri-Cities Washington area. Petition at 25. The Petition is a not so subtle, but misdirected, attempt to disrupt BNSF's rail service to and from customers located on the Richland Trackage so that TCRY can gain a competitive advantage in serving customers over the Hanford Trackage.

This is not the first time TCRY has attempted to interfere with the lawful rail operations of its competitors and monopolize rail service in the Hanford area. In 2009, TCRY erected a

barrier which physically prevented BNSF from reaching customers located along the Hanford Trackage. BNSF was forced to seek relief in Federal District Court. The Court found that under a 1947 Agreement and a 1961 Agreement BNSF and UP had equal joint rights to operate over the Hanford Trackage and that TCRY's lease with the Port of Benton was subject to BNSF's and UP's rights. *BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC*, 835 F.Supp.2d 1056 (2011). The Court issued a declaratory judgment recognizing BNSF's and UP's rights to provide rail service over the Hanford Trackage and granted BNSF's request for a permanent injunction precluding TCRY from blocking direct service over the Hanford Trackage by BNSF and UP.¹

Id.

Given TCRY's failure to identify a legitimate case or controversy in its Petition, and its ulterior motives, the Petition should be denied. *Cf.* FD 35950, *Norfolk Southern Railway Co. – Petition for Declaratory Order* (not printed), served February 29, 2016; *CSX Transp; FD 35853, SEA-3, Inc. – Petition for Declaratory Order* (not printed), served March 17, 2015.

The disingenuousness of TCRY's requested relief is demonstrated by the Petition itself. TCRY readily admits that from 2002 through 2009, it was an operator over the Richland Trackage and TCRY continues to operate over the Richland Trackage today as a handling carrier

¹ Even after BNSF prevailed in this matter, TCRY imposed unjustified restrictions on BNSF operations on the Hanford Trackage which conflicted with the terms and conditions of the preliminary injunction and operating plan authorized by the Federal Court. When BNSF challenged these restrictions, the Port of Benton resolved the dispute in favor of BNSF.

for UP. TCRY and UP, however, never obtained authority from the Board to operate over the Richland Trackage. TCRY fails to explain why the City of Richland should have obtained construction authority from the Board for the Richland Trackage, as TCRY now maintains, but TCRY and UP did not need to obtain operating authority from the Board. TCRY was either previously of the view that no construction authority from the Board for the Richland Trackage was needed and thus no operating authority was needed by TCRY or TCRY blatantly operated over the Richland Trackage without prior approval of the Board. In other words, the Petition is either a subterfuge to interrupt BNSF's and UP's operations over the Richland Trackage or TCRY comes before the Board with unclean hands. In either event, the Board should not entertain TCRY's Petition for Declaratory Order.

III. TCRY'S ALLEGATIONS CONCERNING CROSSING AUTHORITY REFLECT A MISUNDERSTANDING OF THE LAW AND OPERATIONS ON THE RICHLAND TRACKAGE AND HANFORD TRACKAGE.

TCRY also argues that the City of Richland has failed to obtain authority to cross the Hanford Trackage to serve customers on the Richland Trackage. Assuming that crossing authority over the Hanford Trackage is needed, TCRY's argument fails in two fundamental respects. BNSF and UP have independent authority, through trackage rights addressed in Docket No. 15925, to operate over the Hanford Trackage and thus do not need to rely on any authority of the City of Richland to cross that Trackage to serve customers on the Richland Trackage. Moreover, the portion of the Hanford Trackage that connects with the Richland Trackage is

owned by the Port of Benton and it is the Port and not TCRY that is the proper party to object to any crossing of the Hanford Trackage. No crossing authority under 49 U.S.C. § 10901(d) is needed if the owner of the crossed track does not object to the crossing. The Port of Benton has raised no objections to BNSF or UP crossing the Hanford Trackage.

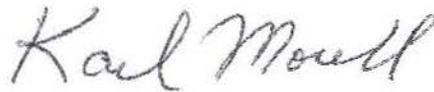
IV. THE CITY OF RICHLAND'S AGREEMENTS WITH BNSF AND UP CONTAIN NO INTERCHANGE COMMITMENT FOR PURPOSES OF 49 C.F.R. 1121.3(d).

TCRY further argues that the contracts between the City of Richland and the Class I carriers contain interchange commitments which have not been authorized by the Board. TCRY's argument in this regard demonstrates a fundamental misunderstanding of interchange commitments. The agreements referenced by TCRY simply identify the location where interchanges shall take place. There is nothing in either agreement that limits "future interchange with third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the ... rental, positive economic inducement or other means...." See 49 C.F.R. § 1150.33(h). Both BNSF and UP have the ability to interchange with TCRY on the Hanford Trackage or other trackage owned and operated independent of the City.

In light of TCRY's failure to identify any legitimate case or controversy in its Petition, and its frivolous and unjustified attempt to interfere with the lawful rail operations of its competitors and monopolize rail service in the Hanford area, there is strong justification for a Board decision to decline TCRY's request for a declaratory order proceeding. Should the Board

decide otherwise, BNSF respectfully urges the Board to avoid any action that would disrupt rail service over the Richland Trackage, or impede BNSF and UP access to the customers located on the Richland Trackage, which is authorized independently of the issues raised in the Petition. As the Petition demonstrates, there are currently 13 rail served customers located along the Richland Trackage and there are more customers contemplating locating on that Trackage. According to TCRY, from January 1, 2013 through May 2016, 6,074 carloads were delivered to customers on the Richland Trackage. Consequently, any disruption of service over the Richland Trackage would have a significant adverse impact on freight rail transportation operations and the customers located along the Richland Trackage.

Respectfully submitted,



James M. Mecone
Assistant General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 78131

Karl Morell
Karl Morell & Associates
Suite 225
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 595-9045

Attorneys for:
BNSF Railway Company

Dated: July 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2016, I caused a copy of the foregoing Reply to be served by first-class mail, postage prepaid, on

William C. Schroeder
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505

Robert Wimbish
Fletcher & Sippel LLC
29 N Wacker Drive
Suite 920
Chicago, IL 60606

Heather Kintzley
City Attorney
City of Richland
975 George Washington Way
Richland, WA 99352



Karl Morell