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December 16, 2010

**VIA OVERNIGHT MAIL**
Attn: Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
Washington, D.C. 20423-0001

RE: Portland & Western Railroad, Inc. – Petition for Declaratory Order-Certain Rates & Practices as Applied to RK Storage & Warehousing, Inc.

STB Docket No. FD35406 228489

Dear Chief:

Please find enclosed an original and ten (10) copies of Portland & Western Railroad, Inc.'s Motion to File Reply to RK Storage & Warehousing, Inc.'s Response to the Petition for Declaratory Order. The proposed Reply is attached to the Motion as an exhibit per the instructions received from the Surface Transportation Board.

Should you have any questions, please do not hesitate to contact me. A copy has been provided to opposing counsel.



Sincerely,

Alison Tedrick

Alison Tedrick

Enclosure/
Motion to File Reply with Reply attached (original and 10 copies)

C: Larry Davidson (1 copy only)
Timothy J. Coleman (1 copy only)

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**STB Docket No. FD35406**

**PORTLAND & WESTERN RAILROAD, INC.- PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**MOTION TO FILE REPLY TO RK STORAGE& WAREHOUSING, INC.'S RESPONSE TO PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**SUBMITTED ON BEHALF OF PORTLAND & WESTERN RAILROAD, INC. BY**

**P. Campbell Ford, Esquire**
Florida Bar No. 0480495
**Alison Tedrick, Esquire**
Florida Bar No. 0584967
Ford, Miller, and Wainer, P.A.
1835 N. Third Street
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**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**STB Docket No. FD35406**

**PORTLAND & WESTERN RAILROAD, INC.- PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**MOTION TO FILE REPLY TO RESPONSE FILED BY RK STORAGE & WAREHOUSING, INC.**

RK Storage & Warehousing, Inc. ("RK Storage") filed a Response to Portland & Western Railroad, Inc.'s ("PNWR") Petition for Declaratory Order. Within RK Storage's Response, there are several alleged defenses for its nonpayment of demurrage that PNWR is hearing for the first time. PNWR requests the opportunity to respond to these new allegations so that the Surface Transportation Board has a complete record before it and is able to render the proper decision based upon all of the facts. Additionally, there are several misnomers cited by RK Storage that warrant clarification for the benefit of the Surface Transportation Board as well.

Accordingly, PNWR respectfully requests that the Surface Transportation Board allow it to file a Reply to RK Storage's Response to address these issues. **A copy of PNWR's Reply is attached hereto as Exhibit "A".**

**VERIFICATION**

I, Alison A. Tedrick, declare under penalty of perjury that the foregoing is true and correct and that that I am qualified and authorized to file this pleading. Executed on December 16, 2010.

Alison A. Tedrick

Alison A. Tedrick, Esquire

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, D.C. 20423-0001, via United Parcel Service, Timothy Coleman, Esquire *(local counsel for Petitioner)*, 805 S.W. Broadway, 8th Floor, Portland, Oregon 97205 via first class mail, and Larry Davidson, Esquire *(counsel for Respondent)*, 1850 Benjamin Franklin Plaza, One SW Columbia Street, Portland, Oregon 97258 via United Parcel Service, this 16th day of December 2010.

**P. Campbell Ford, Esquire**
Florida Bar No. 0480495
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Attorney for Portland & Western Railroad, Inc.

A

Notes:

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**STB Docket No. FD35406**

**PORTLAND & WESTERN RAILROAD, INC.- PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**REPLY TO RK STORAGE& WAREHOUSING, INC.'S RESPONSE TO PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**SUBMITTED ON BEHALF OF PORTLAND & WESTERN RAILROAD, INC. BY**

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EXHIBIT A

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**STB Docket No. FD35406**

**PORTLAND & WESTERN RAILROAD, INC.- PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**REPLY TO RK STORAGE & WAREHOUSING, INC.'S RESPONSE**

There are several arguments made by RK Storage & Warehousing, Inc. ("RK Storage") in its Response to the Petition filed by Portland & Western Railroad, Inc. ("PNWR") that include new defenses and misnomers which warrant clarification and the entire set of facts in order for the Surface Transportation Board to render the appropriate decision. Accordingly, PNWR responds to RK Storage's Response as follows:

**I. MAXIMUM CAPACITY AT RK STORAGE'S TRACK**

In its Petition, PNWR explains that it can safely spot three (3) regular-sized rail cars at RK Storage's track or two (2) large railcars. RK Storage responds by claiming that PNWR has the ability to spot four (4) 65' railcars at one time and has done so in the past.

There is more than mere railcar size that determines the number of railcars that RK Storage can accommodate at one time. *See* Affidavit of Todd Vincent attached hereto as **Exhibit "1"**. Railcars are connected by track gear and couplers which necessarily add to the length of the railcar. Id. Often, railcars are connected by extended couplers which add five (5) to ten (10) feet to each railcar. Id. When the right combination of railcars arrives at the Willbridge Interchange, which consists of four (4) 65' railcars connected by small track gear and couplers, then RK Storage is able to squeeze and does squeeze these four (4) cars onto RK Storage's track. Id. However, the

number of times that the "right combination" presents itself is few. Id. PNWR refers to RK Storage's track as a three-car track because almost 100% of the time, the track can accommodate only up to three (3) cars at one time. Id. PNWR delivers the maximum number of railcars that it can both safely and efficiently at one time, which is consistent with its customary business practice. Id. If it did not, then this would only cause further problems and congestion at the Linnton Yard, which would be of benefit to no one. Id. Accordingly, RK Storage's defense that it should not pay demurrage since PNWR allegedly had the ability to spot four (4) railcars for all the times that PNWR spotted three (3) cars lacks merit.

## II. PNWR HAS NO CONTROL OVER THE CONSOLIDATION OF RAILCARS

RK Storage alleges, for the first time, that it gets slammed with a huge influx of railcars "courtesy of the railroad" as a result of its railcars being consolidated in locations such as Pasco, Washington. PNWR has absolutely no control over the railcars that arrive at the Willbridge Interchange for RK Storage until the railcars actually arrive there courtesy of the Burlington Northern and Santa Fe Railroad ("BNSF"). Id. PNWR has no way of requesting that only a certain number of railcars be consolidated or delivered to the Interchange on behalf of RK Storage. Id. The consolidation of railcars is controlled by BNSF and beyond PNWR's control. Id. Accordingly, a huge influx of railcars arriving at the Interchange is a reflection of the demands of RK Storage's customers, not of PNWR's service, and any consolidation that occurs on BNSF's watch provides no defense for nonpayment of demurrage to RK Storage.

## III. RK STORAGE MISPERCEIVES THE PRIORITIES OF A RAIL CARRIER

RK Storage makes it very clear in its Response that it just does not approve of, or simply does not understand, the way a railroad must function in order to be as efficient as possible. RK Storage accuses PNWR of "favoring" its larger customers when PNWR is required to make a business decision to spot thirty-five (35) railcars at once when the Willbridge Interchange or Linnton Yard are congested, rather than spot three (3) railcars to RK Storage. While understandable that RK Storage's primary focus is on its own railcars and cargo, PNWR's primary focus, as with any rail carrier, is to run its operation in the most efficient way possible so that it accommodates all of its customers and fulfills the national needs related to freight car use and distribution at the same time. This balance sometimes requires a rail carrier, such as PNWR, to spot cars to a customer with a large track so that the congestion can clear out more quickly. RK Storage fails to grasp the concept that its solution to congestion (spotting only three (3) railcars) is not a solution at all, but only a problem that would add to the congestion, create further backups, and cause the next spot to RK Storage to occur much later than when the large loads of railcars are spotted first. This is not a matter of favoritism, but of efficiency in the interests of all of PNWR's customers and national needs.

## IV. AUTHORITIES FOR CALCULATING DEMURRAGE AND ISSUING DEMURRAGE CREDITS

RK Storage contends that it does not know how demurrage is calculated when a large load of railcars for RK Storage arrives at the Willbridge Interchange. The applicable tariffs describe the method by which demurrage calculated. There is not one formula for when three (3) railcars for RK Storage arrive, and a different formula for when nineteen (19) railcars arrive for RK Storage. The formula is constant. To the

extent that RK Storage claims that it never knows about the demurrage charges until after they are assessed, clearly RK Storage is able to read the applicable tariff and do the math.

RK Storage's issue does not appear to be about how demurrage is calculated when larger loads of railcars arrive at the Interchange, but rather how demurrage is calculated in general. According to RK Storage, the two (2) days free time should not even begin until railcars are spotted on its track, thereby causing demurrage to accrue only when RK Storage fails to unload and release the railcars within forty-eight (48) hours. In other words, RK Storage believes there should be no demurrage incurred while railcars are in constructive placement. This is the formula admittedly used by RK Storage in reaching its incorrect conclusion that it owes PNWR only $5,970.00 in outstanding demurrage. Needless to say, this formula would put any railroad carrier out of business since most are required to pay a third party for the railcars left in constructive placement and there would be no incentive for customers to manage their incoming loads.

RK Storage also complains that PNWR cites no authority regarding how demurrage credits are to be distributed. There is no requirement that PNWR provide demurrage credits to RK Storage, so there is nothing PNWR can point to as authority, other than its own management trying to be fair to RK Storage. PNWR provided 229 credit days (free time) to RK Storage in the thirteen (13) months alone where outstanding demurrage is due. This is equivalent to more than $15,000 in credit during these thirteen (13) months, when calculated in accordance with the applicable tariffs. This amount obviously does not include all of the free time credited to and monies saved by RK Storage during the months where demurrage was either paid by RK Storage or not charged at all. If PNWR had not provided credits to RK Storage, RK Storage would

gripe about the demurrage bills, but when PNWR does extend credits to RK Storage, RK Storage gripes about the credits. Clearly, PNWR simply cannot win.

## V. RK STORAGE'S CALCULATION OF UTILIZATION OF ITS TRACK IS INACCURATE

RK Storage states several times how its track is "underutilized" by PNWR, sometimes by 50% to 70%. However, RK Storage calculates this percentage with the assumption that there are at least three (3) railcars that are capable of being delivered (either in constructive placement or having arrived at the Willbridge Interchange) every day, Monday through Friday (60 railcars per month). This is not an accurate reflection of the utilization of RK Storage's track. The number of railcars available for spotting in any given month must be considered.

For instance, the invoices attached to the Petition for December 2006 demonstrate that twelve (12) cars were spotted to RK Storage that month. According to RK Storage's calculations which are based upon an alleged capability of spotting sixty (60) railcars per month, RK Storage would accuse PNWR of underutilizing its track eighty percent (80%) of that month. Yet, in actuality, PNWR spotted 100% of the railcars that were available in December 2006 as there were only twelve (12) cars to spot, between those arriving at the Interchange during December 2006 and those that were in constructive placement from November 2006.

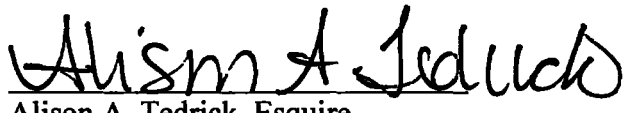
Congestion at the Interchange, RK Storage's failure to maintain its track (pictures of which are attached to the Petition) and unload its railcars in a timely fashion, and a large influx of railcars arriving at the Interchange for RK Storage in any given month easily account for any month where all railcars available in a certain month were not spotted that same month.

## VI. PNWR DOES NOT KEEP OLDER CARS IN CONSTRUCTIVE PLACEMENT TO MAKE A PROFIT

To the extent that RK Storage accuses PNWR of delivering new railcars in order to make a profit from the older railcars continuing to sit in constructive placement and collect demurrage, this simply is not true. This misnomer is already addressed in PNWR's Petition as RK Storage often requested the spotting of certain newer railcars first or congestion at the Interchange was so bad, that spotting new railcars was the only way PNWR could ensure spotting to RK Storage. If PNWR was in the business of making a profit by not following its practice of delivering the older railcars first, then PNWR would also be in the business of not issuing thousands of dollars in demurrage credit to RK Storage. The amount of time that railcars remain in constructive placement depends upon several factors which are addressed in PNWR's Petition, including but not limited to the number of incoming cars for RK Storage on any given day, congestion at the Interchange, RK Storage's requests for newer cars first, and RK Storage's track conditions which are shown in the pictures included in the Petition.

## VERIFICATION

I, Alison A. Tedrick, declare under penalty of perjury that the foregoing is true and correct and that that I am qualified and authorized to file this pleading. Executed on December 16, 2010.



Alison A. Tedrick, Esquire

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, D.C. 20423-0001, via United Parcel Service, Timothy Coleman, Esquire *(local counsel for Petitioner)*, 805 S.W. Broadway, 8th Floor, Portland, Oregon 97205 via first class mail, and Larry Davidson, Esquire *(counsel for Respondent)*, 1850 Benjamin Franklin Plaza, One SW Columbia Street, Portland, Oregon 97258 via United Parcel Service, this 16th day of December 2010.

**P. Campbell Ford, Esquire**
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Attorney for Portland & Western Railroad, Inc.

1

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**STB Docket No. FD35406**

**Re: PORTLAND & WESTERN RAILROAD, INC.- PETITION FOR DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED TO RK STORAGE & WAREHOUSING, INC.**

**SECOND AFFIDAVIT OF TODD VINCENT IN SUPPORT OF PORTLAND & WESTERN RAILROAD, INC.'S PETITION FOR DECLARATORY ORDER**

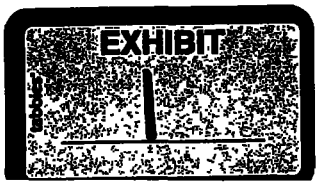
Before me, the undersigned authority, this day personally appeared Todd Vincent, who being first duly sworn by me, deposes and says:

My name is Todd Vincent. I am over eighteen (18) years of age. I have personal knowledge of the following matters.

1. I have worked in the railroad industry for 13.5 years and for Portland & Western Railroad, Inc. ("PNWR") in Portland, Oregon since 1997. I have been a Trainmaster for PNWR since October 2007. Prior to that, I was a Road Foreman of Engines (January 2007 – October 2007), Locomotive Engineer (1999 – 2006), and Conductor (1997-1999).

2. As the Trainmaster, I supervise PNWR's crews that transport railcars for PNWR's customers from the Willbridge Interchange on the Astoria District ("Willbridge Interchange") in Portland, Oregon to the Linnton Yard, in Portland, Oregon, to ensure that the transporting, switching, spotting, and pick-up of the railcars is done safely and efficiently.

3. Since my employment with PNWR, I have always been involved with PNWR's process for providing rail service, whether by supervising or performing the rail



service itself. As such, I am familiar with PNWR's customary business practices and procedures for the delivery of railcars to its customers, which has remained the same since my employment.

4. I previously executed an affidavit for PNWR to file with the Surface Transportation Board that stated that RK Storage's track at the Linnton Yard (#1408) can safely accommodate two (2) or three (3) railcars at the most at one time. It is my understanding that RK Storage & Warehousing, Inc. ("RK Storage") has alleged that its track can accommodate four (4) 65' railcars at one time.

5. The number of railcars that can be spotted at one time depends upon more than just the mere size of the actual railcar. The type and size of the draft gear and couplers being used must also be considered as these add to the length of the railcars. For example, extended couplers often accompany the railcars, which add another five (5) to ten (10) feet on to each railcar.

6. To the extent that RK Storage is suggesting that PNWR could have been spotting four (4) railcars to RK Storage's track for all the times that it spotted three (3), this is not true.

7. If the right combination of cars comes in (four (4) 65' railcars that all have small draft gear and couplers), then PNWR is able to squeeze (and does squeeze) these four (4) railcars onto RK Storage's track. However, it is rare that the "right combination" of railcars presents itself, which is why the maximum number of cars PNWR is able to spot at one time is almost always three (3). This is also why we generally refer to RK Storage's track as a three-car track.

8. It is the customary business practice of PNWR to spot as many railcars on RK Storage's track that will fit. PNWR does not simply decide to spot three (3) cars if it could safely and efficiently spot four (4) railcars. This would only add to the congestion that is often at the Interchange and Linnton Yard and would cause PNWR to be less efficient.

9. It is also my understanding that RK Storage attributes railcars being consolidated in Pasco, Washington to it getting "slammed" with a huge influx of railcars. PNWR has no control over any of RK Storage's railcars until Burlington Northern and Santa Fe Railroad ("BNSF") delivers the railcars to the Willbridge Interchange. It is BNSF that regulates the consolidation of the railcars, and PNWR cannot demand that fewer railcars be delivered to the Interchange for RK Storage or otherwise have any voice as to any of the incoming railcars. PNWR has no control over incoming cars. The only way PNWR can reject an incoming car is if, after it arrives at the Willbridge Interchange, RK Storage rejects the railcar.

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FURTHER AFFIANT SAYETH NAUGHT.

TODD VINCENT

STATE OF Oregon
COUNTY OF Marion

SWORN TO AND SUBSCRIBED before me for the purposes set forth therein by Todd Vincent who first took an oath and who is either personally known to me or who produced the type of identification described below, this 16th day of December, 2010.

(Signature of NOTARY PUBLIC, State of Oregon)

SEAL

Personally known X or,
produced _____ as identification

OFFICIAL SEAL
STEPHEN W EIGEL
NOTARY PUBLIC - OREGON
COMMISSION NO. 426589
MY COMMISSION EXPIRES MARCH 4, 2012