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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

PORTLAND VANCOUVER JUNCTION RAILROAD, LLC, a Washington limited liability company,

Plaintiff,

v.

CLARK COUNTY, a political subdivision of the State of Washington,

Defendant.

Case No.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff Portland Vancouver Junction Railroad, LLC ("PVJR") alleges as follows:

I. PARTIES

1. PVJR is a limited liability company under the laws of the State of Washington and registered under UBI # 602 885 398. PVJR's principal office is located at 1203 114th Ave. SE, in Bellevue, Washington. PVJR is authorized by the U.S. Department of Transportation, Surface Transportation Board, to acquire by lease and operate 33.1 miles of rail line between milepost 0.0 at or near North Vancouver/Vancouver Junction, Washington and milepost 33.1 at or near Chelatchie, Washington (the "Shortline").

2. Clark County (the "County") is a political subdivision of the State of Washington. Clark County owns the Shortline.

1 limited investment for several decades.

2 **B. The County's historic evaluations of the Shortline.**

3 14. In 1996-97, the County hired Main Line Management Services, Inc. to
4 evaluate the viability of the Shortline.

5 15. On January 28, 1997, Main Line Management Services, Inc. made the
6 following points and recommendations:

7 a. "[Main Line Management Services] believes that while other operators
8 might be interested in the line, the prospect of those operators devoting
significant resources to the line is minimal."

9 b. "While some of these companies (other shortline railroads) have
10 significant marketing and industrial development resources, these
resources will only be brought to bear where the potential return is
11 significant."

12 c. Main Line Management Services, Inc. recommended an arrangement
13 where the County pays a railroad operator a guaranteed profit, with the
railroad receiving a smaller portion of the upside.

14 16. The County rejected Main Line Management Services, Inc.'s
15 recommendation to pay a rail operator; instead, the County commissions a second evaluation five
16 years later.

17 17. In 2002, the County hired MainLine Management, Inc. ("MLM") to
18 evaluate the long-term viability of the Shortline and how to attract other operators should the
19 County allow the then-current lease with the rail operator to expire in January 2004.

20 18. The County tasked MLM with determining the long-term viability of
21 freight operations on the Shortline. In addition, the County asked MLM to assess the
22 attractiveness of the line to other shortline freight operators should the County elect not to renew
23 the maintenance and operating agreement with LINC, another rail operator, in January 2004.

24 19. The County had three priorities in relation to its ownership of the
25 Shortline: (1) keep the rail corridor intact for rail and/or other uses; (2) keep down the cost of the
26 County's ownership of the line; and (3) maintain an operating railroad to assist with industrial

1 development along the corridor.

2 20. On September 6, 2002, MLM published its points and recommendations.
3 According to MLM, the County was rapidly approaching a point of decision on whether the rail
4 line should be retained for rail-served freight operations. According to MLM, every stakeholder
5 in the Shortline stated that the rail line was not marketable due to the considerable question of its
6 long-term viability and a perceived lack of commitment by the County at that time.

7 21. MLM stated the County would not be able to attract any serious interest
8 from a reputable shortline operator under the then status quo. According to MLM, in order to
9 attract a viable shortline operator the County must demonstrate a commitment to the long-term
10 viability of the line as a rail entity through investment and economic development.

11 22. With regard to the Shortline's condition, MLM reported that significant
12 maintenance and capital upgrades would be needed to ensure the Shortline's long-term operating
13 viability upgrades including approximately 500 ties per mile (or approximately 7,000 total ties)
14 and 10 to 12 cars of ballast per mile (or approximately 140 cars of ballast), with associated
15 tamping and rail alignment as well as a long-term rail replacement program.

16 23. A September 30, 2002 "Work Session" memorandum summarized MLM's
17 assessment of the Shortline as follows, "The assessment indicates that it is highly unlikely that
18 we [the County] could attract a qualified and promotional operator due to the poor condition of
19 the line, the small number of freight shippers and carloadings, and the perceived lack of
20 commitment to the line by the County. This situation will limit the options available to the
21 County with respect to the railroad."

22 24. Against this backdrop, the County solicited over 400 short line railroad
23 operators to submit proposals to operate the Shortline. Columbia Basin Railroad Company, Inc.
24 ("CBRC" aka "CBRR"), the predecessor to PVJR, was the only shortline operator interested in
25 the Shortline.
26

1 **C. The County leases the Shortline.**

2 25. On January 31, 2004, the prior operator's lease expired. The County
3 entered into an interim lease arrangement with CBRC while the parties negotiated a long term
4 lease with CBRC to operate the Shortline.

5 26. On February 13, 2004, the County informed the U.S. Department of
6 Transportation, Surface Transportation Board (the "STB"), that the County was in the process of
7 changing common carrier for the Shortline and expected to complete negotiations with CBRC to
8 operate the line.

9 27. On February 24, 2014, the County informed the STB that the County
10 notified all active shippers using the Shortline that CBRC will be the new rail operator.

11 28. According to a November 22, 2004, Staff Report, the County's Board of
12 Commissioners authorized Peter Capell, P.E., Director of Public Works/County Engineer to
13 negotiate and execute the Lease.

14 29. On December 20, 2004 the County signed a long term lease with CBRC to
15 operate the Shortline (the "Lease"). The Lease is signed by Mr. Capell. The Lease is "approved
16 as to form" by the Prosecuting Attorney's office. A true and correct copy of the Lease is attached
17 as **Exhibit 1**.

18 30. The Lease's term is 30 years with two 30-year extensions, for a total of
19 90 years.

20 31. The Lease's long term is consistent with MLM's recommendations as well
21 as Clark County Code 2.33A.180 (8) relating to "Limited-Use Parcels" with "Restrictive
22 Characteristics" such as the Shortline.

23 32. In the event the 90 year Lease term is determined to be invalid, the Lease
24 contains a fallback term of no less than 50 years.

1 33. The County warrantied the Lease as follows:

2 "Lessor represents and warrants as of the date of execution of this Agreement, as
3 of the Transfer Date and thereafter during the Term (except to the extent
4 expressly provided otherwise below) the following:

5 "1. It shall have the full power and authority to enter this Agreement;

6 "2. All approvals and other proceedings required to be taken by or on the
7 part of Lessor to authorize Lessor to enter into this Agreement and its
8 Exhibits have been or will be duly taken by the Transfer Date;

9 "3. This Agreement has been executed and delivered by Lessor in
10 accordance with its terms and conditions, and constitutes a valid and
11 legally binding obligation of Lessor, enforceable against Lessor in
12 accordance with its terms; * * * and

13 "4. No provision of this Agreement [the Lease] * * * conflicts with,
14 violates or contravenes any statute, law, rule, regulation, order, writ,
15 injunction or decree or other determination of any court, authority or
16 governmental body as of the date hereof, * * * nor is any provision
17 hereof * * * voidable or unenforceable (nor will it be such) by reason
18 of any provision of, or lack of consent under, any indenture or
19 agreement or instrument to which the Lessor is a party or by which it
20 is bound or affected."

21 34. After executing the Lease, the County made certain oral promises to
22 CBRR. These two promises were (1) a joint effort to secure grant funds to improve the Shortline,
23 and (2) rezoning parcels adjacent to the Shortline. These oral promises are subsequently reduced
24 to writings in subsequent agreements.

25 **D. The County signs subsequent agreements relating to the Lease.**

26 35. On September 27, 2005, the County approved the memorandum of
 understanding regarding a leaseback arrangement with a nonprofit rail operator on the north
 section of the Shortline, BYCX. Under this agreement, the County and CBRR would work
 together to receive grants from state and federal sources to improve the Shortline.

 36. On November 8, 2005, the County approved a second MOU regarding the
 Railroad Industrial Rezone initiative, reaffirming the lease and memorializing the promise made

1 to CBRR to rezone property for potential customers. This promise was consistent with the
2 recommendations made by MLM.

3 37. On June 6, 2006, the County approved the Northline Leaseback
4 Agreement between CBRC and the County for a portion of the rail line, reaffirming the Lease.
5 The 2006 Northline Leaseback Agreement contained warranties enshrining the County's earlier
6 rezone promise.

7 38. On June 7, 2011, the County approved the Northline Leaseback Extension
8 Agreement, reaffirming the Lease.

9 39. On September 14, 2011, the County discussed the Lease and its typicality
10 in relation to other railroad agreements. Mr. Jon Holladay, Clark County Railroad Coordinator
11 attended the meeting. Mr. Halladay's notes state Bill Barron, Clark County Administrator, and
12 Mark McCauley, Public Works Finance and Administration Services Manager, the agency
13 overseeing the Shortline "recounted the manner in which" the Lease and its related agreement
14 "came to be." According to Mr. Holladay's notes, Mr. Barron and Mr. McCauley stated, "[t]he
15 County sought to shift much of the risk of having a railroad to another party and the county
16 sought to entice prospective operators with favorable terms because the railroad required heavy
17 public subsidy at the time due to inadequate business."

18 40. On February 1, 2012, the County approved CBRC's "assignment and
19 transfer of all of CBRR's, rights, title, interest, and obligations in and under the Clark County
20 Lease * * * to [PVJR] and agree[d] that CBRR is hereby released from performing any
21 obligations and from all liabilities under the Clark County Lease," thereby reaffirming the
22 Lease's terms and facilitating the purchase and sale of PVJR by Mr. Eric Temple – PVJR's
23 current owner.

24 41. On November 8, 2016, the County approved an amended Northline
25 Sublease Agreement Extension between the County and BYCX, acknowledging the Lease and
26 the 2012 assignment of the Lease to PVJR.

1 42. On September 12, 2018, the County approved the Northline Leaseback
2 Agreement, Ratification, Amendment and Extension, reaffirming the underlying Lease.

3 43. Despite 14 years of performance under the Lease, and its subsequent
4 ratifications through numerous other agreements, on November 19, 2018, County Council Chair
5 Marc Bolt publicly states that the Lease is invalid primarily because Council Chair Bolt thinks
6 the monetary terms are unfair to the County.

7 44. In numerous public statements, the County doubts the Lease's validity.

8 45. Despite demand, the County refuses to retract these public statements.

9 **E. CBRR's and PVJR's maintenance and improvements to the Shortline in**
10 **reliance on the Lease.**

11 46. In 2004, the Shortline's track is the worst track category under the Federal
12 Railroad Administration classification. MLM's 2002 report noted the Shortline needed physical
13 and economical improvements in order to be viable. In the intervening 14 years, PVJR (and its
14 predecessor CBRR) improved the line.

15 47. A January 7, 2008 memo from the Clark County Railroad Advisory Board
16 to Senator Craig Pridemore stated that "PVJR has expended [by that time] nearly \$1 million of
17 its own private monies to increase maintenance, boost marketing, and improve infrastructure of
18 the line." This same memo notes PVJR "helped significantly increase (by over 1000%) freight
19 shipment growth" on the Shortline.

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1 48. A January 2011 "Market Study" prepared by the Clark County Budget
2 Office for the Clark County Department of General Services summarized \$3,456,855 in
3 Shortline rail improvements between 2006 and 2010 as follows:

| Year | Funds | Investment |
|------|-------------|--|
| 2006 | \$329,221 | Track upgrades caused by CBRR |
| 2007 | \$119,636 | Ties, ballast, surfacing |
| 2008 | \$885,046 | Track upgrades caused by CBRR |
| 2009 | \$292,492 | Ties, ballast, crossing upgrades, engineering, drainage repair & maintenance |
| 2010 | \$1,830,460 | Ties, rail drainage repair |

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9 49. Since this January 2011 report, the following table shows an additional
10 \$2,839,184 in track upgrades:

| Year | Amount |
|---------------------|----------------|
| 2010 Track Upgrades | \$637,810.11 |
| 2012 Track Upgrades | \$1,137,500.00 |
| 2015 Track Upgrades | \$595,793.50 |
| 2019 Track Upgrades | \$468,081.22 |

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15 50. The 2019 track upgrade projects are about to commence. PVJR
16 anticipates a \$1.5 million total budget for 2019.

17 51. Further, on March 6, 2019, Sen. Steve Hobbs, Chair of the Senate
18 Transportation Committee, recommended \$14 million to improve the Shortline. This
19 grant money allows PVJR to install brand-new rail on the 14 miles currently in use,
20 extending the line's lifespan by well over 100 years, far longer than the Lease term. Once
21 installed, the lower portion of the line will be brand-new and nearly as good as BNSF's
22 main line.
23

24 52. In summary, in 2004 the Shortline had the worst-track category
25 and now, because of PVJR's and its predecessor's efforts, the Shortline will soon have the
26 best track category. This is a direct result of having a long-term lease in place.

1 **IV. CAUSE OF ACTION**

2 **FIRST CAUSE OF ACTION**

3 **(Declaratory Relief)**

4 53. PVJR realleges paragraphs 1-52 above as though fully set forth in this
5 section.

6 54. Through its public statements, the County has raised doubt as to the
7 Lease's validity.

8 55. Despite demand, and being shown the extensive history of the Lease and
9 its associated documents, the County refuses to retract its public statements that the Lease is
10 invalid.

11 56. PVJR cannot operate the Shortline under a cloud of uncertainty with
12 regard to the Lease's validity as asserted by the County, the lessor; no user of rail services will
13 commit to using the Shortline operated by PVJR where the County, as lessor, states the Lease is
14 invalid.

15 57. PVJR requests the Court grant declaratory judgment against the County,
16 declaring the Lease is valid and enforceable for its entire term, 30 years with two 30-year
17 extensions, for a total of 90 years.

18 58. Alternatively, PVJR requests the Court grant declaratory judgment against
19 the County, declaring the Lease is valid and enforceable for no less than 50 years.

20 59. Additionally, PVJR requests the Court grant declaratory judgment against
21 the County, declaring the Lease is valid and any attempt to invalidate the Lease violates the
22 Interstate Commerce Act and the sole authority granted to the STB over the Shortline's
23 operations.

24 60. The Lease contains a prevailing party fee provision. As such, PVJR is
25 entitled to its reasonable attorneys' fees and costs for bringing this declaratory relief action.
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1 **V. RELIEF REQUESTED**

2 THEREFORE, plaintiff asks that the Court award it the following relief:

- 3 1. A judgment declaring the Lease is valid for its entire term, 30 years with
4 two 30-year extensions, for a total of 90 years;
- 5 2. Alternatively, a judgment declaring the Lease is valid for no less than
6 50 years;
- 7 3. Additionally, a judgment declaring the Lease is valid and any attempt to
8 invalidate Lease violates Interstate Commerce Act and the sole authority granted to the STB over
9 rail operations.
- 10 4. An award of PVJR's reasonable attorneys' fees and costs incurred bringing
11 this action; and
- 12 5. For all such other and further relief, whether legal or equitable, as this
13 Court finds warranted under the facts and the law.

14 DATED this _____ day of March, 2019.

15 MILLER NASH GRAHAM & DUNN LLP

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