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February 26, 2020

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

ENTERED
Office of Proceedings
February 26, 2020
Part of
Public Record

Re: Finance Docket No. 36261, Ballard Terminal Railroad Company, L.L.C. –
Petition for Declaratory Order

Dear Ms. Brown:

On February 25, 2020, the City of Seattle attempted to submit two Orders of the King County Superior Court, each of which was issued on February 11, 2020, in *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.* (“BTRC”), No. 19-2-01794-5 SEA. The City of Seattle hereby re-submits the first Order, which was inadvertently excluded from the posted filing.

In the enclosed first Order, the King County Superior Court granted the City of Seattle’s Second Motion for Partial Summary Judgment, filed January 3, 2020. The Superior Court held that constructing the so-called “Missing Link” (to complete the Burke-Gilman Trail) and associated relocation of the tracks at BTRC’s expense as needed to accommodate the construction is authorized as a public improvement under Section 4 of the Franchise. The Superior Court also held, however, that “[t]he disputed issue of BTRC’s alleged claim of interference with railroad operations, however, remains preserved and unresolved.”

In accordance with the enclosed first Order, the parties will be conferring with the Superior Court about resolving BTRC’s “alleged claim of interference with railroad operations.” We will, of course, advise the Board if the Superior Court takes any action with respect to that alleged claim.

Respectfully submitted,



Michael F. McBride
Attorney for the City of Seattle

cc (via email):

Joshua C. Allen Brower, Esq.

Patrick J. Schroeder, Esq.

Judge Averil Rothrock
Friday, January 31, 2020 at 9:00 AM
With Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

CITY OF SEATTLE, a Washington municipal
corporation, acting through its Department of
Transportation;

Plaintiff,

v.

BALLARD TERMINAL RAILROAD
COMPANY, L.L.C., a Washington limited
liability company;

Defendant.

NO. 19-2-01794-5 SEA

ORDER GRANTING CITY OF SEATTLE'S
SECOND MOTION FOR PARTIAL
SUMMARY JUDGMENT

This matter came on before the Court on the City of Seattle's ("City") Second Motion for Partial Summary Judgment, filed January 3, 2020. Defendant Ballard Terminal Railroad Company, L.L.C. ("BTRC") opposed the motion. This Court considered the pleadings, records, and files herein, including:

1. *City of Seattle's Second Motion for Partial Summary Judgment* (January 3, 2020);
2. *Declaration of Tadas Kisielius in Support of the City of Seattle's Motion for Partial Summary Judgment*, with exhibits attached thereto (January 3, 2020);
3. *Declaration of Dustin DeKoekkoek in Support of the City of Seattle's Motion for Partial Summary Judgment*, with exhibits attached thereto (January 3, 2020);

- 1 4. *Defendant’s Opposition to City of Seattle’s Second Motion for Partial Summary Judgment*
2 (January 21, 2020);
3 5. *Declaration of Joshua Brower in Support of BTRC’s Opposition to the City’s Second*
4 *Motion for Partial Summary Judgment*, with exhibits attached thereto (January 21, 2020);
5 and
6 6. *City of Seattle’s Reply in Support of Its Second Motion for Partial Summary Judgment*
7 (January 27, 2020).

8 The Court heard argument of counsel for the parties on January 31, 2020.¹

9 **I. ANALYSIS AND CONCLUSIONS OF LAW**

10 1.1 The City’s *Second Motion for Partial Summary Judgment* is a proper and timely
11 motion for partial summary judgment and not a motion for reconsideration.² The doctrine of
12 collateral estoppel may not be premised on a partial summary judgment determination and does
13 not bar this Court’s consideration of the Motion. This Court has jurisdiction to interpret the
14 Franchise. By interpreting the Franchise to resolve the contract dispute presented, the Court will
15 not be resolving issues concerning managing or governing rail transportation, i.e., issues
16 concerning the regulation of rail transportation. See *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*,
17 559 F.3d 212, 220 (4th Cir. 2009). Federal law provides that contract interpretation is generally a
18 matter for state courts. *Id.*

19 1.2 BTRC operates the Ballard Line pursuant to the Franchise granted by Ordinance
20 118734, adopted on September 29, 1997, which granted BTRC the right to operate the Ballard
21 Line on City-owned property, including alongside and within public rights-of-way. The Franchise
22 governs the parties’ rights and obligations with respect to the entirety of the Ballard Line.

23 ¹ BTRC filed for Partial Summary Judgment—Specific Performance on January 3, 2020, and the City opposed
BTRC’s motion. The Court heard oral argument of that motion and the City’s Second Motion for Partial Summary
Judgment at the same time, and had before it all of the materials filed for both motions. The Court issued separate
orders deciding those motions on the same day.

² The Court did not previously interpret the Franchise. Even if the City’s motion sought reconsideration, which it does
not, the Court can entertain such motions concerning partial summary judgment orders at any time without regard to
the 10-day time limit in CR 59.

1 1.3 The Franchise at Section 4 reserved and memorialized the City's right to construct
2 public improvements, including trails, "across, underneath or above" throughout the Ballard Line's
3 railroad facilities. Section 4 reserved and memorialized the City's right to require relocation or
4 removal of railroad facilities, at BTRC's expense, to accommodate the "construction, repair,
5 renewal, maintenance, or inspection" of any public improvement. These rights reserved by the
6 City in Section 4 apply to that portion of the line where the City today intends to construct the
Missing Link.

7 1.4 The Court's holding in this order that Section 4 applies to that portion of the tracks
8 where the City now intends to construct the Missing Link is consistent with Resolution 29474 and
9 the Court's previous interpretation of the Operating Agreement. The Court previously held that
10 the parties did not reach a meeting of the minds expressed in the 1997 Operating Agreement
11 regarding the location and construction of the Missing Link. The Operating Agreement was held
12 to express no agreement concerning where the Missing Link would, or would not, be located. This
13 determination does not preclude the Court's interpretation of the Franchise as set forth above. The
Franchise clearly and necessarily applies to the entirety of the Ballard Line.

14 1.5 Extrinsic evidence argued by BTRC at pages 10-11 of its Opposition does not
15 support a different interpretation regarding the applicability of Section 4 to the tracks at issue. This
16 evidence shows that when negotiating the Franchise, the City was reluctant to modify its standard
17 franchise rights and expressed a desire not to resolve the precise location of the Missing Link
18 before entering the agreements. The Franchise as granted reserved to the City the option of
19 *electing* to assume a share of costs for removal or replacement of track due to any such public
20 improvement that, among other conditions, requires the removal of more than 100 feet of track.
21 This provision, together with the provision that "Grantee shall, at its own cost and expense,
22 remove, relocate" tracks, is not ambiguous and does not allow for incorporation of different terms
23 from the Operating Agreement. The Court also contrasts the provision in Section 10(b) of the
Franchise that incorporates into that section "additional conditions consistent with this section"

1 from the Operating Agreement. No like provision is found in Section 4. BTRC has identified no
2 specific term in the Operating Agreement that it argues should be incorporated into the Franchise.
3 The Court cannot substitute statements made in negotiations to vary or alter the terms actually
4 contained in the Franchise.

5 1.6 The City's exercise of construction rights under Section 4 of the Franchise is subject
6 to the Franchise's provision that the City's rights "shall, however, be exercised in such manner as
7 not to interfere with the safe operation of locomotives, cars and trains on said tracks." BTRC has
8 alleged a claim of interference regarding construction of the Missing Link, and proffered sufficient
9 evidence in support of its claim. BTRC's claim is preserved. The parties dispute the proper forum
10 for resolution of that issue.

11 II. ORDER

12 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the
13 City's Second Motion for Partial Summary Judgment is **GRANTED**. No genuine issue of material
14 fact precludes partial summary judgment to the City. Construction of the Missing Link and associated
15 relocation of the tracks at BTRC's expense as needed to accommodate the construction is authorized
16 as a public improvement pursuant to Section 4 of the Franchise. The disputed issue of BTRC's alleged
17 claim of interference with railroad operations, however, remains preserved and unresolved.

18 Any relief requested that the Court has not specifically granted is denied.

19 DATED this _____ day of _____, 2020.

20 _____
Judge Averil Rothrock

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-01794-5
Case Title: CITY OF SEATTLE vs BALLARD TERMINAL RAILROAD CO

Document Title: ORDER ON CITY'S SECOND PMSJ

Signed by: Averil Rothrock
Date: 2/11/2020 9:00:00 AM

A handwritten signature of Averil Rothrock in black ink, enclosed within a rectangular border. The signature is written in a cursive style.

Judge/Commissioner: Averil Rothrock

This document is signed in accordance with the provisions in GR 30.

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