

**UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD**

---

**FINANCE DOCKET NO. 36261**

---

**BALLARD TERMINAL RAILROAD COMPANY, L.L.C. –  
PETITION FOR DECLARATORY ORDER**

---

**JOINT STATUS REPORT OF THE CITY OF SEATTLE, WASHINGTON AND  
BALLARD TERMINAL RAILROAD COMPANY, L.L.C. IN RESPONSE TO  
DECISION SERVED HEREIN ON JUNE 27, 2019**

Patrick Downs  
Assistant City Attorney  
Seattle City Attorney's Office  
701 Fifth Avenue, Suite 2050  
Seattle, Washington 98104-7097  
(206) 684-8200  
[patrick.downs@seattle.gov](mailto:patrick.downs@seattle.gov)

Michael F. McBride  
Van Ness Feldman, LLP  
1050 Thomas Jefferson Street, NW  
Suite 700  
Washington, DC 20007-3877  
(202) 298-1800  
[mfm@vnf.com](mailto:mfm@vnf.com)

Tadas A. Kisieliuss  
Dale Johnson  
Clara Park  
Van Ness Feldman, LLP  
719 Second Avenue, Suite 1150  
Seattle, WA 98104  
(206) 623-9372  
[tak@vnf.com](mailto:tak@vnf.com)  
[dnj@vnf.com](mailto:dnj@vnf.com)  
[cpark@vnf.com](mailto:cpark@vnf.com)

**Attorneys for the City of Seattle, Washington**

Joshua C. Allen Brower  
Brower Law PS  
1111 Third Avenue, Ste 3000  
Seattle, WA 98101-3292  
(206) 498-1804  
[josh@browerlawps.com](mailto:josh@browerlawps.com)

Patrick J. Schneider  
Foster Garvey PC  
1111 Third Avenue, Ste 3000  
Seattle, WA 98101-3292  
(206) 447-4400  
[pat.schneider@foster.com](mailto:pat.schneider@foster.com)

**Attorneys for Ballard Terminal Railroad Company, L.L.C.**

June 29, 2020

**SECOND JOINT STATUS REPORT IN RESPONSE TO DECISION  
SERVED HEREIN ON JUNE 27, 2019**

Pursuant to ordering paragraph no. 2 of the Board's Decision served on June 27, 2019, the City of Seattle, Washington ("Seattle") and Ballard Terminal Railroad Company, L.L.C. ("Ballard Terminal") provide this status report of the litigation in the Superior Court of King County, Washington ("Superior Court litigation")<sup>1</sup> between Seattle and Ballard Terminal.

On February 11, 2020, the Superior Court issued an "Order Granting the City's Second Motion for Partial Summary Judgment" (the "Partial Summary Judgment Order") and an "Order Denying Defendant BTRC's Motion for Partial Summary Judgment and Specific Performance," which resolved certain issues and claims raised by Seattle and by Ballard Terminal, respectively. In accordance with ordering paragraph no. 2 of the Board's Decision served on June 27, 2019, copies of the two February 11, 2020 orders were submitted herein to the Board on February 25-26, 2020.

The Partial Summary Judgment Order concluded,

Construction of the Missing Link and associated relocation of the tracks at BTRC's expense as needed to accommodate the construction is authorized as a public improvement pursuant to Section 4 of the Franchise. The disputed issue of BTRC's alleged claim of interference with railroad operations, however, remains preserved and unresolved.

In response to the Partial Summary Judgment Order, on May 15, 2020, Ballard Terminal filed "Defendant's Motion for Summary Judgment: Re Preemption" with the Superior Court ("Ballard Terminal Motion"). The Ballard Terminal Motion asked the Superior Court, consistent with the Board's Decision authorizing the state court to address the preemption issue "in the first instance," to conclude that Section 4 of the Franchise is categorically or facially preempted by the Interstate Commerce Commission Termination Act of 1995 and is subject to the exclusive jurisdiction of this Board. The Ballard Terminal Motion was limited to the issue of categorical preemption, and did not ask the Court to resolve its as-applied preemption claims.

---

<sup>1</sup> King County Superior Court Docket No. 19-2-01794-5 SEA.

Seattle filed an opposition to the Ballard Terminal Motion, and the Superior Court heard oral argument on June 12, 2020.

On June 25, 2020, the Superior Court issued its Order Granting Ballard Terminal's Motion, holding, *inter alia*,

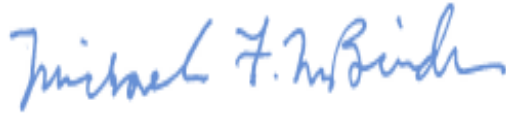
H. ...The City's attempted regulation through Section 4 of the Franchise goes beyond the traditional realm of municipal regulation outlined in the examples in Paragraph H, into direct regulation of rail reconfiguration and construction that is reserved to the STB.

J. The Court concludes that Congress intended categorical preemption of local government acts such as the forced relocation and reconstruction of one-half mile of track according to a municipal design which would operate directly, not incidentally, to regulate construction and operation of tracks and facilities. BTRC has met its burden to establish categorical preemption.

A copy of the Superior Court's June 25, 2020 Order is attached hereto.

The Superior Court has now resolved all of the City's state-law contract claims/causes of action against BTRC and the only remaining claims/causes of action are Ballard Terminal's claims against the City for damages and attorneys' fees, which can be resolved independent of the Board's jurisdiction and processes. It is Ballard Terminal's position that there is no reason for the Board to continue holding Ballard Terminal's Petition in abeyance and the Board can proceed on the Petition according to its processes and procedures. Because Seattle is considering its options, including, but not limited to, an appeal of the Superior Court's decisions, it is Seattle's position that Ballard Terminal's Petition should remain in abeyance pending final resolution of the City's state-law contract claims/causes of action against BTRC, including the outcome of any appeal. Counsel for the Parties will advise the Board of the posture of the state court proceedings during the next status report and will continue to apprise the Board of any additional decisions on the merits that occur prior to the status report.

Respectfully submitted,



Patrick Downs  
Assistant City Attorney  
Seattle City Attorney's Office  
701 Fifth Avenue, Suite 2050  
Seattle, Washington 98104-7097  
(206) 684-82000  
[patrick.downs@seattle.gov](mailto:patrick.downs@seattle.gov)

Michael F. McBride  
Van Ness Feldman, LLP  
1050 Thomas Jefferson Street, NW  
Suite 700  
Washington, DC 20007-3877  
(202) 298-1800  
[mfm@vnf.com](mailto:mfm@vnf.com)

Tadas A. Kisielius  
Dale Johnson  
Clara Park  
Van Ness Feldman, LLP  
719 Second Avenue, Suite 1150  
Seattle, WA 98104  
(206) 623-9372  
[tak@vnf.com](mailto:tak@vnf.com)  
[dnj@vnf.com](mailto:dnj@vnf.com)  
[cpark@vnf.com](mailto:cpark@vnf.com)

**Attorneys for the City of Seattle, Washington**

Joshua C. Allen Brower  
Brower Law PS  
1111 Third Avenue, Ste 3000  
Seattle, WA 98101-3292  
(206) 498-1804  
[josh@browerlawps.com](mailto:josh@browerlawps.com)

Patrick J. Schneider  
Foster Garvey PC  
1111 Third Avenue, Ste 3000  
Seattle, WA 98101-3292  
(206) 447-4400  
[pat.schneider@foster.com](mailto:pat.schneider@foster.com)

**Attorneys for Ballard Terminal Railroad Company, L.L.C.**

# ATTACHMENT A

Judge Averil Rothrock  
Friday, June 12, 2020 at 11:00 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 DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT: RE PREEMPTION

This matter came on before the Court on Defendant Ballard Terminal Railroad Company, L.L.C.'s ("BTRC") Motion for Summary Judgment: Re Preemption, filed May 15, 2020. Plaintiff City of Seattle ("City") opposed the motion. This Court considered the pleadings, records, and files herein, including:

1. *Defendant's Motion for Summary Judgment: Re Preemption* (May 15, 2020);
2. *Declaration of Joshua C. Allen Brower in Support of Defendant's Motion for Summary Judgment: Re Preemption*, with exhibits attached thereto (May 15, 2020);
3. *City of Seattle's Opposition to Defendant's Motion for Summary Judgment: Re Preemption* (June 1, 2020);

1 4. *Declaration of Tadas Kisielius in Support of City of Seattle's Opposition to*  
2 *Defendant's Motion for Summary Judgment: Re Preemption*, with exhibits attached  
3 thereto (June 1, 2020); and

4 5. *Defendants' Reply in Support of Motion for Summary Judgment* (June 8, 2020).

5 The Court heard argument of counsel for the parties on June 12, 2020, and considered that  
6 argument in conjunction with the Motion, evidence, and pleadings referenced above. The motion seeks  
7 only partial summary judgment, as additional claims remain.

### 8 **DECISION**

9 A. Defendant BTRC seeks a ruling that enforcement of Section 4 of the Franchise as  
10 interpreted by the Court is expressly preempted by the Interstate Commerce Act, as amended by the  
11 Interstate Commerce Commission Termination Act of 1995 ("ICCTA") as a matter of law, i.e.  
12 categorical preemption. Plaintiff City argues that enforcement of Section 4 of the Franchise is not  
13 categorically preempted, and that the matter should proceed to trial to determine on an "as applied"  
14 basis whether enforcement of the Franchise is preempted because enforcement would result in  
15 substantial interference with railroad operations. Neither party asserts that the Court should decide  
16 the "as applied" issue on summary judgment.

17 B. The preemptive effect of the ICCTA is a question of law. *Franks Inv. Co. v. Union*  
18 *Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir.2010) (en banc). Because of the presumption against  
19 preemption, the party contending that preemption applies has the burden of persuasion. *Elam v.*  
20 *Kansas City So. Ry. Co.*, 635 F.3d 796, 802 (5th Cir.2011). Yet, that presumption "applies with less  
21 force when Congress legislates in a field with 'a history of significant federal presence' " such as  
22 railroads. *Id.* at 804 (quoting *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d  
23 69 (2000)).

24 C. BTRC in its reply requested that the Court remand the preemption issue to the STB.  
25 This request, coming in reply, is made too late. The City objected, and its objection is sustained.  
26 Moreover, BTRC provides no authority for the request to remand. Additionally, the STB had the

1 opportunity to reach the preemption issue in the first instance when this matter was before it, but, in  
2 its June 25, 2019 Decision, held its proceedings in abeyance and expressly contemplated that the  
3 State court might reach the preemption issue first. The Court has an obligation to resolve the issues  
4 before it, including preemption. No good cause or authority has been presented to persuade the  
5 Court to avoid resolving the preemption issue in these proceedings.

6 D. The ICCTA establishes exclusive jurisdiction in the STB for regulation of  
7 transportation by rail carrier, as follows:

8 The jurisdiction of the Surface Transportation Board over--

9 (1) transportation by rail carriers, and the remedies provided in this part with  
10 respect to rates, classifications, rules (including car service, interchange, and other  
operating rules), practices, routes, services, and facilities of such carriers; and

11 (2) the construction, acquisition, operation, abandonment, or discontinuance of  
12 spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are  
located, or intended to be located, entirely in one State,

13 is exclusive. Except as otherwise provided in this part, the remedies provided under this  
14 part with respect to regulation of rail transportation are exclusive and preempt the  
remedies provided under Federal or State law.

15 49 U.S.C. § 10501(b). BTRC puts at issue Subsection (2), arguing that the City's attempt to  
16 force relocation of the tracks at issue pursuant to the Franchise constitutes an exercise of  
17 jurisdiction over "construction" and "operation" of "tracks" or "facilities" that is categorically  
preempted. The Court agrees for the reasons stated below.

18 E. First, the Court agrees with BTRC that the City cannot avoid categorical preemption  
19 based on its argument that the Franchise is a voluntary agreement and citation to the line of federal  
20 case law and STB decisions holding that preemption does not ordinarily apply to enforcement of  
21 voluntary agreements. *See Township of Woodbridge, NJ v. Consolidated Rail Corporation, Inc.*, 256  
22 F.3d 718, 2000 WL 1771044, 2001 WL 283507 (STB clarified 2001). The Supreme Court of the  
23 State of Washington has held that franchises, though subject to interpretation like a contract, are  
laws and rejected the argument that franchises be treated as voluntary agreements in an ICCTA

1 preemption analysis. *City of Seattle v. Burlington Northern*, 145 Wn.2d 661 (2002). See also *City of*  
2 *Tacoma v. Bonney Lake*, 173 Wn.2d 584, 589-90 (2012) (municipalities enter franchise agreements  
3 in their propriety capacity, so courts should interpret franchises like contracts; municipalities grant  
4 franchise agreements in their governmental capacity). Our Supreme Court has observed that  
5 franchises are a form of regulation, stating, “The agreement is nonetheless an ordinance—that is, a  
6 law. Like any state law, a local ordinance is subject to Congressional preemption.” *Id.* at 673. In  
7 *Burlington Northern* the terms of the franchise at issue held to be categorically preempted regulated  
8 switching, not construction and reconfiguration of existing rail. Thus, the result in *Burlington*  
9 *Northern* does not necessarily control the outcome here.

10 F. The Court focuses on application of the express language of the federal statute to the  
11 undisputed facts. The language of Congress is the best indication of its intent. *Demarest v.*  
12 *Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991)(“When we find the terms of  
13 a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.”);  
14 *United States v. Gonzales*, 520 U.S. 1, 6, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997)(“Given the  
15 straightforward statutory command, there is no reason to resort to legislative history.”). Here,  
16 “construction” and “operation” of tracks and facilities is expressly stated to be within the exclusive  
17 jurisdiction of the Board “even if the tracks are located, or intended to be located, entirely in one  
18 State.” 49 U.S.C. § 10501(b). This plainly includes within the acts subject to categorical  
19 preemption regulation of the physical construction of tracks or other rail facilities, including their  
20 design and configuration. The City’s enforcement of Section 4 of the Franchise to control and dictate  
21 the relocation and construction of tracks and facilities must yield to the STB’s exclusive jurisdiction.  
22

23 G. The City argues that the reference to construction in 49 U.S.C. § 10501(b)(2) should  
be limited to the type of construction subject to the licensing requirement of 49 U.S.C. § 10901. The  
Opposition 7-8. Court does not find the available authorities support the City’ interpretation.  
Moreover, that is not what the statute says.

1           H.       The Court recognizes that the ICCTA does not categorically preempt all exercise of  
2 local police power that incidentally touches tracks. “Congress narrowly tailored the ICCTA pre-  
3 emption (sic) provision to displace only ‘regulation,’ i.e., those state laws that may reasonably be  
4 said to have the effect of ‘managing’ or ‘governing’ rail transportation, Black’s Law Dictionary 1286  
5 (6th ed.1990), while permitting the continued application of laws having a more remote or incidental  
6 effect on rail transportation.” *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d  
7 1324, 1331 (11th Cir.2001). For example, “[c]rossing disputes, despite the fact that they touch the  
8 tracks in some literal sense, thus do not fall into the category of ‘categorically preempted’... state  
9 actions.” *New Orleans & Gulf Coast Ry. Co. v. Varrois*, 533 F.3d 321, 333 (5<sup>th</sup> Cir. 321).  
10 “[R]outine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire  
11 crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations  
12 or pose undue safety risks.” *Id.* See also *CSX Transp., Inc.*, 2005 WL 1024490, at \*6 (approving the  
13 proposition that “a state’s traditional authority over the safety of roads and bridges at grade-separated  
14 rail/highway crossings pursuant to other statutory schemes is not preempted by section 10501(b) so  
15 long as no unreasonable burden is imposed on a railroad”); *City of Lincoln v. Surface Transp. Bd.*,  
16 414 F.3d 858, 863 (8th Cir.2005) (STB adopting the position that “it is well established that  
17 nonconflicting, nonexclusive easements across railroad property are not preempted if they do not  
18 hinder rail operations or pose safety risks.”); *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550  
19 F.3d 533, 541-42 (6<sup>th</sup> Cir. 2008) (installation of pedestrian crossings and adjacent pedestrian  
20 sidewalks is subject to as-applied-preemption analysis). Thus, if the terms of the Franchise at issue  
21 acted more remotely upon the tracks such that they could be considered to only incidentally regulate  
22 the construction and configuration of the tracks, the Court likely would reach a different conclusion.

23           I.       Here, however, enforcement of Section 4 cannot be characterized as having a remote  
or incidental effect on rail transportation. By enforcing Section 4, the City would directly control  
and enforce the precise location and configuration of the tracks. The City seeks to enforce Section 4  
to direct the construction of BTRC’s rail line for over one-half mile. The reconfiguration is a

1 significant change. The City is attempting to manage an area reserved to the STB, i.e., the  
2 configuration and construction of tracks and rail facilities. Multiple authorities convince the Court  
3 that this type of regulation is categorically prohibited. See *Franks Inv. Co. LLC v. Union Pacific R.*  
4 *Co.*, 593 F.3d 404, 406 (5<sup>TH</sup> Cir 2010) (Noting the Eleventh Circuit’s holding that “Congress  
5 narrowly tailored the ICCTA pre-emption provision to displace only ‘regulation,’ i.e., those state  
6 laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail  
7 transportation, ... while permitting the continued application of laws having a more remote or  
8 incidental effect on rail transportation.”); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d  
9 1324, 1331 (11th Cir.2001) (“We find this interpretation of the ICCTA to be persuasive.... For a  
10 state court action to be expressly preempted under the ICCTA, it must seek to regulate the operations  
11 of rail transportation.”); *Davis v. Davis*, 170 F.3d 475, 481 (5th Cir.1999) (en banc) (The  
12 presumption against preemption is applicable to “areas of law traditionally reserved to the states, like  
13 police powers and property law ....”); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d  
14 525, 533 (5<sup>th</sup> Cir. 2012) (“If the Board directly regulates the activity, as it does the construction of  
15 rail lines, state and local regulation is prohibited. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533  
16 F.3d 321, 332 (5th Cir.2008). Thus, the ordinances that would apply to the slope or other features of  
17 the embankments for the railroad tracks themselves are expressly preempted ....”); *Friberg v.*  
18 *Kansas City Southern Railway Co.*, 267 F.3d 439, 443 (5<sup>th</sup> Cir. 2001) (“The language of the statute  
19 could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as  
20 well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of  
21 the STB unless some other provision in the ICCTA provides otherwise.”). The City’s attempted  
22 regulation through Section 4 of the Franchise goes beyond the traditional realm of municipal  
23 regulation outlined in the examples in Paragraph H, into direct regulation of rail reconfiguration and  
construction that is reserved to the STB.

J. The Court concludes that Congress intended categorical preemption of local  
government acts such as the forced relocation and reconstruction of one-half mile of track according

1 to a municipal design, which would operate directly, not incidentally, to regulate construction and  
2 operation of tracks and facilities. BTRC has met its burden to establish categorical preemption.

3 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that  
4 Defendant's Motion for Summary Judgment: Re Preemption is GRANTED. Additional claims remain  
5 for adjudication.

6 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

7 Signed electronically/see attached  
8 Judge Averil Rothrock  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

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 RE GRANTING PMSJ RE PREEMPTION

Signed by: Averil Rothrock  
Date: 6/25/2020 11:22:18 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.

Certificate Hash: 9F855AA0761CA7624EF2BC1ECCD5D60CB03F8EB5  
Certificate effective date: 11/5/2018 5:31:37 PM  
Certificate expiry date: 11/5/2023 5:31:37 PM  
Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA,  
O=KCDJA, CN="Averil Rothrock:  
njR2SwvS5hGglSP3AFk6yQ=="