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

**FOURTH 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**

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June 25, 2021

**FOURTH 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 herein on June 27, 2019, the City of Seattle, Washington (“Seattle”) and Ballard Terminal Railroad Company, L.L.C. (“Ballard Terminal”) provide this fourth joint status report of the litigation in the Superior Court of King County, Washington (“Superior Court litigation”) between Seattle and Ballard Terminal.¹

As explained in previous Joint Status Reports filed herein in December 2019, June 2020, and December 2020, the Superior Court ruled on the merits on a number of motions for summary judgment filed by the parties. As a result of those rulings, the Superior Court has now resolved all of Seattle’s state-law contract claims/causes of action against Ballard Terminal, which Seattle asserts were the basis for the Board’s decision to hold Ballard Terminal’s Petition in abeyance.²

On January 19, 2021, the King County Superior Court issued an “Order Granting the City’s Third Motion for Summary Judgment—To Dismiss Remaining Defendant’s Claims for Damages and Attorney Fees” (“Final Court Order”). This Final Court Order dismissed Ballard Terminal’s claims for damages and attorney fees pursuant to Washington State’s Anti-SLAPP statute, resolving the only remaining claims in the case. The Final Court Order included a “Final Order of Judgment” that encompassed all of the previously issued Orders on the parties’ motions for summary judgment including the Order Granting in Part and Denying in Part City of Seattle’s Motion for Partial Summary Judgment, and Granting in Part and Denying in Part Ballard Terminal Railroad Company’s Cross Motion for Summary Judgment (Nov. 13, 2019); the Order Granting City of Seattle’s Second Motion for Partial Summary Judgment (Feb. 11, 2020); the Order Denying Defendant’s Motion for Partial Summary Judgment—Specific Performance—and Granting City’s Cross Motion (Feb. 11, 2020); and the Order Granting Defendant’s Motion for Partial Summary Judgment: Re Preemption (June 25, 2020). A copy of the January 19, 2021 Final Court Order was attached to Seattle’s March 10, 2021 letter filed

¹ King County Superior Court Docket No. 19-2-01794-5 SEA.

² <https://dcms-external.s3.amazonaws.com/MPD/62491/EFB8285C8EEE4B8185258425006D2660/46990.pdf>.

herein.

Seattle and Ballard Terminal Railroad Company separately appealed and cross-appealed portions of the Final Court Order to Division I of the Washington State Court of Appeals. The case number for the appeal and cross-appeal is 82377-9-I. Seattle appealed those portions of the Final Court Order that decided, in the first instance, issues involving the Board's jurisdiction. Ballard Terminal cross-appealed the portion of the Final Court Order that exclusively involves issues of Washington State law (i.e., Anti-SLAPP damages and attorneys' fees) and do not involve issues of the Board's jurisdiction.

Following perfection of the cross-appeals, on March 30, 2021, Seattle filed a "Motion for Stay and Referral to the Surface Transportation Board" asking the Court of Appeals to stay the cross-appeals "and, under the primary jurisdiction doctrine, refer to the STB the question of whether the STB's exclusive jurisdiction preempts" Seattle from forcing Ballard Terminal to remove and relocate its rail tracks to accommodate the Missing Link. Ballard Terminal opposed Seattle's motion.

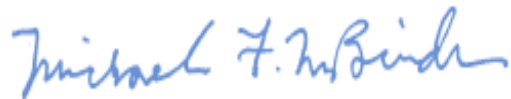
In a notation ruling dated April 16, 2021, a Commissioner of the Court of Appeals denied Seattle's motion. A copy of the Commissioner's notation ruling is attached. Since the Court of Appeals denied Seattle's Motion, the parties are now complying with the Court of Appeals' briefing schedule. The Court of Appeals has not set a date for oral argument.

In light of the Superior Court's Final Order and the Court of Appeals' April 16, 2021 decision, Ballard Terminal again asserts that there is no relief that the Board can provide to the parties that the Washington Courts have not already provided, and therefore again requests the Board dismiss its Petition without prejudice. Ballard Terminal further notes that doing so would be consistent with the Court of Appeals decision wherein it said "[t]he City admits that the STB and state courts have equal jurisdiction and authority to decide issues of preemption in the first instance and that it filed its lawsuit in superior court after the BTRC-initiated proceedings before the STB, thereby interrupting the STB's resolution of any part of their dispute," and therefore it is not "inappropriate or impossible for this Court to review the superior court's order without 'input' from the STB."

In contrast, it is Seattle's position that because it appealed those portions of the Superior Court's Final Order involving the Board's jurisdiction, that the Board should continue holding Ballard Terminal's Petition in abeyance pending the outcome of Seattle's appeal, which could take a year or more to complete. Seattle further notes that the Court of Appeals' April 16, 2021 decision denied referral "without prejudice to any party's ability to address the necessity for referral in their briefing on the merits to the panel."

If the Board does not dismiss Ballard Terminal's Petition without prejudice and continues holding it in abeyance, 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,



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LEA ENNIS,
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April 16, 2021

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CASE #: 82377-9-I

City of Seattle, App/Cross-Resp v. Ballard Terminal Railroad Co. L.L.C., Resp/Cross-App

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on April 15, 2021:

The City of Seattle requests a stay of its appeal and referral of a question of preemption to the federal Surface Transportation Board (STB). Respondent/Cross-Appellant Ballard Terminal Railroad Co., L.L.C. (BTRC), has filed an answer. The City filed a reply. For the reasons discussed below, the motion is denied.

In December 2018, filed a petition with the STB seeking a declaratory order that federal law prohibits the City from taking certain actions regarding BTRC's rail tracks. In January 2019, the City filed suit against BTRC in superior court seeking declaratory and injunctive relief based on two contracts entered in September 1997 to require BTRC to remove and relocate its tracks to accommodate a project on the Burke-Gilman Trail known as the Missing Link. The City then asked the STB to stay proceedings or dismiss BTRC's petition

pending the superior court matter. On June 25, 2019, the STB granted the request and held the docket in abeyance pending resolution of the City's contract action, recognizing that the court may address "[i]ssues of federal preemption ... after it resolves the contract dispute," as such issues "can be decided either by the Board or the courts in the first instance." The STB also ordered the parties to submit status reports every six months. Thereafter, the trial court entered a series of partial summary judgment motions on November 13, 2019, February 11, 2020, and June 25, 2020 with the ultimate conclusion that BTRC had met its burden to establish categorical preemption of a local government project requiring removal and relocation of one-half mile of track. The City filed a notice of appeal on February 12, 2021; BTRC filed a notice of cross review on February 18, 2021. The parties have filed status reports with the STB describing the trial court orders and the appellate proceedings before this Court.

Relying generally on the primary jurisdiction doctrine, the City argues that this Court should enter a stay and refer a question as to the scope of preemption to the STB. The City contends that (1) STB routinely accepts referrals of preemption issues from courts "[a]lthough the courts and STB have concurrent jurisdiction over preemption issues"; (2) STB has special competence over preemption issues; (3) STB's expertise would also be beneficial in determining the "as-applied" preemption claim that the trial court did not address and that "BTRC will likely seek to litigate"; and (4) the STB is better able to resolve both preemption issues on its existing docket of BTRC's petition, contributing to uniform and expert administration of the regulatory scheme. The City acknowledges that the issues raised in the appeal and cross appeal "are independent of the preemption question" and should be addressed by this Court, but contends that "the STB's analysis of the preemption question may inform the issues before this Court." The City requests a stay of the appeal "while the STB addresses the preemption issues," after which this Court "can lift the stay and consider all of the issues before it."

BTRC points out that the City does not identify authority to support its request or grounds for relief under RAP 8.3. BTRC also contends that the City is merely seeking a different result, that the STB's resolution of disputed factual issues as to as-applied preemption is not necessary to decide the issues on appeal, and that any decision of the STB would not be final in any event, but appealable to federal court.

In reply, the City criticizes BTRC's arguments and contends that its motion is clear as to the relief it was seeking, that is, referral of the trial court's conclusion that the City is categorically preempted from making BTRC move the tracks for the missing link project. The City also contends its motion is directed to this Court's inherent authority, rather than RAP 8.3, that a stay and referral "will not only ensure uniformity and due deference to the STB's special competence, but will also enhance judicial efficiency without undue prejudice," and that BTRC did

not identify any prejudice that would result from a stay. The City contends that “the STB’s input is critical to ensuring regulatory uniformity.”

RAP 7.3 states that this Court has authority “to secure fair and orderly review of a case.” Under RAP 8.3, this Court has authority to issue orders “to insure effective and equitable review.” RAP 8.3. Such relief generally requires a showing (1) that the appeal raises a debatable issue and (2) that the harm without a stay outweighs the harm that would result from it. In balancing the parties’ relative harm, this Court considers whether the requested relief is necessary to maintain the status quo and preserve the fruits of a successful appeal in light of the equities of the situation. See *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985).

Although I agree with the City that this Court has authority to refer questions to the STB, I am not persuaded that such a referral is necessary in this case. The City admits that the STB and state courts have equal jurisdiction and authority to decide issues of preemption in the first instance and that it filed its lawsuit in superior court after BTRC initiated proceedings before the STB, thereby interrupting the STB’s resolution of any part of their dispute. Simply emphasizing the importance of regulatory uniformity does not explain why it is inappropriate or impossible for this Court to review the superior court’s order without “input” from the STB.

Accordingly, the City’s motion for a stay and referral to the STB is denied, without prejudice to any party’s ability to address the necessity for referral in their briefing on the merits to the panel.

Please be advised a ruling by a Commissioner “is not subject to review by the Supreme Court.” RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a “motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed.”

Sincerely,

A handwritten signature in black ink, appearing to read "Lea Ennis", written in a cursive style.

Lea Ennis
Court Administrator/Clerk

LAW