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April 18, 2013

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E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, D.C. 20423-0001

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ENTERED
Office of Proceedings
April 18, 2013
Part of
Public Record

Re: *BNSF Railway Company – Abandonment Exemption – In King County, Washington, Finance Docket No. AB-6 (Sub-No. 465X)*

Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision – Verified Petition for Exemption Pursuant to 49 U.S.C. § 10502

Dear Ms. Brown:

Enclosed please find for filing by King County, Washington, the City of Kirkland, Washington, and the Central Puget Sound Regional Transit Authority (collectively, the “Regional Parties”) the following: (1) the Regional Parties’ Motion for Leave to File a Reply to Ballard Terminal Railroad, L.L.C.’s Reply to the Regional Parties’ Motion to Extend Time to Respond; and (2) the Regional Parties’ accompanying Reply.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Hunter Ferguson

Enclosures

cc: Counsel for all parties of record

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision)**

STB Finance Docket No. 35731

**BALLARD TERMINAL RAILROAD COMPANY, LLC. – ACQUISITION AND
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

**MOTION OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND,
WASHINGTON, AND THE CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY FOR LEAVE TO FILE A REPLY TO A REPLY**

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Dated: April 18, 2013

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AUTHORITY FOR LEAVE TO FILE A REPLY TO A REPLY**

Pursuant to 49 C.F.R. § 1117.1, King County, the City of Kirkland (“Kirkland”), and the Central Puget Sound Regional Transit Authority (collectively, the “Regional Parties”) petition for leave to file a reply to a reply. On April 12, 2012, the Regional Parties moved for an extension of time to respond to the petitions of Ballard Terminal Railroad, L.L.C. (“Ballard”) filed in the above-captioned proceedings. On April 17, Ballard urged the Board to allow an extension only on the condition that Kirkland be required to suspend salvage activities that the Board previously authorized, pending the Board’s decision on Ballard’s petitions.

Although parties are not normally permitted to reply to replies (*see* 49 C.F.R. § 1104.13(c)), the Board may allow such replies when doing so would clarify the parties’ legal arguments without prejudicing other parties or unduly prolonging the proceedings. *See BNSF Railway Company — Discontinuance of Trackage Rights Exemption — In Peoria and Tazewell*

Counties, Ill., STB Docket No. AB 6 (Sub-No. 470X), slip op. at 1 (STB served June 4, 2010).

These criteria are met here. As explained in the reply attached hereto, Ballard does not directly respond to the substance of the Regional Parties' request for an extension. Instead, Ballard attempts to leverage the Regional Parties' request for an extension into the grounds for Ballard to seek an injunction against Kirkland without complying with the Board's normal procedures for considering requests for injunctive relief. Because Ballard's "reply" seeks affirmative legal relief, raises entirely new legal issues, and further seeks to interfere with authorized salvage plans, the Regional Parties should be permitted to respond to Ballard's arguments.

For these reasons, the Regional Parties seek leave to file the following reply memorandum.

Respectfully submitted,

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Dated: April 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing MOTION OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND, WASHINGTON, AND CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO EXEND TIME TO RESPOND, upon the following parties of record in the above-captioned proceedings by first class mail with postage prepaid and properly addressed:

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Hunter Ferguson

Dated this 18th day of April 2013

**BEFORE THE
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**REPLY OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND, WASHINGTON,
AND THE CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO
BALLARD TERMINAL RAILROAD, L.L.C.'S REPLY TO MOTION TO EXTEND
TIME TO RESPOND**

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**REPLY OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND, WASHINGTON,
AND THE CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO
BALLARD TERMINAL RAILROAD, L.L.C.’S OBJECTION TO MOTION TO
EXTEND TIME TO RESPOND**

On April 12, 2013, King County, the City of Kirkland (“Kirkland”), and the Central Puget Sound Regional Transit Authority (together, the “Regional Parties”) asked the Board to extend by 60 days the comment period on the petitions of Ballard Terminal Railroad, L.L.C. (“Ballard”) to vacate the NITU for, and reactivate rail service on, 12 miles of the Woodinville Subdivision (the “Line”). Ballard does not oppose this extension. Instead, Ballard seeks to leverage the Regional Parties’ request to extend the comment period into a vehicle for the Board to enjoin Kirkland from salvaging the track on the segment that Kirkland owns. In this reply, the Regional Parties ask the Board to consider the comment period extension request on its merits and invite Ballard to apply for a preliminary injunction if Ballard thinks it can satisfy the Board’s substantive criteria for staying its own orders.

In issuing the NITU for the Line, the Board authorized the salvage of the existing rail infrastructure, subject to certain conditions. *See BNSF Railway Company – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 6 (STB served Nov. 28, 2008) (the “NITU Order”). Kirkland now seeks to salvage the tracks and ties along the 5.75 mile-long segment of the Line that Kirkland owns, consistent with the NITU Order. Kirkland’s plans to salvage the rails in preparation for developing a trail have been more than a year in the making. Only at the eleventh hour, *after* Kirkland expended substantial resources in formulating its plans, did Ballard attempt to assert an interest in the Line.

The stay requested by Ballard would disrupt Kirkland’s well-laid plans to salvage the rails as authorized by the NITU Order. Kirkland recently identified and accepted a bid from a salvage contractor. Kirkland was poised to sign the contract for rail removal when Ballard instituted these proceedings. If Ballard’s request is granted, Kirkland would risk losing these favorable contract terms.

Contrary to Ballard’s assertions, Kirkland’s planned salvage would not interfere with future rail reactivation. The issue of salvage during a pending acquisition petition arose when Ballard’s former business partner, GNP Railway, Inc., sought to enjoin salvage on another right-of-way connected to the Line. *See GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Docket No. FD 35407, slip op. at 4-5 (STB served June 15, 2011) (“GNP”). The Board concluded that the National Trails System Act, 49 U.S.C. § 1247(d), does not prohibit salvage, “so long as the property remains available for reactivation of rail service.” *Id.* at 5. Here, the authorized salvage will not compromise the

integrity of the Line. The Line remains subject to future reactivation in appropriate circumstances by a carrier with a *bona fide* proposal to provide freight rail service.

The Board has a well established procedure for parties seeking to stay a Board order or otherwise to enjoin activity during the pendency of a Board proceeding. If Ballard genuinely believes that there is a basis to enjoin Kirkland from carrying out authorized salvage, Ballard may seek a preliminary injunction under 49 U.S.C. § 721(b)(4). In reviewing such requests, the Board requires parties to satisfy the traditional four-part test for preliminary injunctive relief by demonstrating (1) a likelihood of success on the merits; (2) irreparable harm if an injunction is not granted; (3) that an injunction will not substantially harm other interested parties; and (4) that an injunction is in the public interest. *See American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, And PPG Industries, Inc. v. Alabama Gulf Coast Railway And RailAmerica, Inc.*, STB Docket No. NOR 42129, slip op. at 4 (STB served May 4, 2012) (“*American Chemistry Council*”); *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Docket No. FD 35305, slip op. at 2 (STB served Nov. 5, 2010); *Edwin Kessler – Petition for Injunctive Relief*, STB Finance Docket No. 35206, slip op. at 4 (STB served June 12, 2009). Further, the Board has made clear that a preliminary injunction – which is what Ballard seeks here – “will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction.” *American Chemistry Council*, slip op. at 4.

This reply does not reach the question of whether Ballard meets the requirements for a preliminary injunction, because Ballard has not requested one. And that is the critical point. There is a procedure for Ballard to seek injunctive relief. *See* 49 U.S.C. 721(b)(4); 49 C.F.R. 1117.1. Ballard’s response to the Regional Parties’ comment period extension request attempts

an end-run around this procedure and the evidentiary burdens it would impose on Ballard. In *GNP*, the Board required GNP to show that the planned salvage “would be inconsistent with rail banking and potential reactivation of rail service” in order to obtain its requested injunction, and GNP failed. *GNP*, slip op. at 5. Ballard should be held to the same standard when seeking the same kind of relief.

As Ballard noted in its reply (page 2), it has sought a temporary restraining order against Kirkland in a civil action filed in the Western District of Washington. Kirkland agreed not to proceed with salvage while this TRO request is pending. Kirkland is similarly willing to agree to defer all salvage activities for up to 20 days to give Ballard an opportunity to request a preliminary injunction pursuant to the Board’s procedures. Further, if Ballard files such a request, Kirkland will defer salvage until the Board decides that request.

For these reasons, and all of the reasons stated in their earlier pleading, the Regional Parties’ Motion for an Extension of Time should be granted, without the condition urged by Ballard.

Respectfully submitted,

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Dated this 18th day of April 2013