

**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, L.L.C. – ACQUISITION AND
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

**THE CITY OF KIRKLAND'S MOTION FOR EXPEDITED RULING ON
BALLARD TERMINAL RAILROAD COMPANY, LLC'S
MOTION FOR PRELIMINARY INJUNCTION**

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Counsel for the City of Kirkland, Washington

Dated: July 10, 2013

Pursuant to 49 C.F.R. § 1117.1, the City of Kirkland, Washington (“Kirkland”) requests that the Board expedite its review of Ballard Terminal Railroad Company’s Motion for Preliminary Injunction (“Motion”). Kirkland asks that the Board rule by August 1, 2013, so that Kirkland can commence rail salvage and development of an interim trail on the railbanked Cross Kirkland Corridor during the 2013 construction season. The Motion has been fully briefed since early June, and Ballard has had ample opportunity to explain to the Board why a preliminary injunction is warranted. The Motion is ripe for the Board’s decision and Kirkland would be harmed if the decision is not issued by August 1.

On May 8, 2013 – more than a month after Ballard filed its petitions in these proceedings and after its collateral federal court action for a TRO was dismissed – Ballard filed its Motion. On June 4 Kirkland, King County, Washington, and the Central Puget Sound Transit Authority (together, the Regional Parties) filed their replies to Ballard’s Motion. On June 24 Ballard sought leave and filed a sur-reply to the Regional Parties’ replies (“Ballard’s Sur-Reply”).

Ballard bears the burden on every element of its request for a preliminary injunction. *BP Amoco Chem. Co. v. Norfolk So. Rly. Co.*, STB Docket No. 42093, slip op. at 4 (STB served June 3, 2005). Under 49 U.S.C. § 1121.3(a), Ballard was required to present its entire case-in-chief in its petition for exemption. In support of its Motion Ballard was required to present the evidence that warrants the extraordinary remedy of a preliminary injunction.

The Regional Parties base their opposition to Ballard’s Motion mainly on the flaws in Ballard’s case-in-chief, supplemented by discovery taken against Ballard’s principals and purported shippers. Kirkland, for instance, urged the Board to deny Ballard’s Motion because Ballard offered no credible evidence of rail freight demand and no property interest or other right to access the rail corridor. *See* Kirkland’s Preliminary Injunction Reply at 19-29.

Although the Board's rules do not authorize sur-replies to a reply to a request for injunctive relief, Ballard on June 24 filed a request for leave to file a reply that challenges the Regional Parties' characterization of the evidence. Ballard's Sur-Reply consists almost entirely of assertions about the statements of its own witnesses in deposition, plus several documents generated by its own witnesses.

No additional evidence is needed for the Board to rule on whether Ballard has met its burden of persuasion on each element of the *Holiday Tours* test.¹ Ballard's strategy, however, is to stall for time. Ballard knows that Kirkland will not salvage the rails until the Board rules on Ballard's motion.² For Ballard, no decision equals success. Ballard believes that the Board is incapable of ruling expeditiously and has relied on that assumption in crafting its strategy.³

¹ See *BP Amoco*, STB Docket No. 42093, slip op. at 4 (STB served June 3, 2005) (explaining that the party moving for a preliminary injunction bears the burden on every element of the *Holiday Tours* test); *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 4 (STB served Dec. 18, 2008) (denying request for injunctive relief and explaining that "some showing of each of the *Holiday Tours* factors is necessary"); *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Docket No. FD 35305, slip op. at 2 (STB served Nov. 5, 2010) ("A party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief." (citation omitted)).

² Kirkland so stated in its reply to Ballard's preliminary injunction request. Kirkland's Preliminary Injunction Reply at 31-32.

³ In federal court Ballard's counsel said the following about the Board's capacity to rule promptly:

And I'll be honest with you Your Honor. [The] STB has a lot of fine qualities. They do a lot of solid jurisdictional prudence. In the world of injunctive relief, they're not particularly expedient.

Verbatim Report of Proceedings before the Hon. Marsha J. Pechman, U.S. District Judge (May 3, 2013), Tr. at 6 (Ex. 1 to this motion).

Consistent with this strategy, Ballard asserts that “Kirkland will not be harmed by delaying a decision on the injunction until August or September, as it has already represented that its contract for the removal of the rails is being held open through the month of September.”⁴ Ballard neglects to mention the statement by the salvage contractor, A&K Materials, that it likely would be able to complete salvage operations during the 2013 construction season, *if* Kirkland provides a notice to proceed by August 1, 2013.⁵ After that date, it would be difficult for Kirkland and its contractor to complete salvage before fall rains in the Pacific Northwest close the window for construction work.

Kirkland urges the Board not to reward Ballard’s delay strategy. Ballard has had more opportunity than the Board’s rules authorize to make its case for injunctive relief. The omissions in Ballard’s Motion reflect the holes in Ballard’s case, weaknesses that additional time cannot cure. Kirkland respectfully requests that the Board issue a ruling by August 1, so that Kirkland does not lose a year to procedural inertia.

Respectfully submitted,



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Counsel for the City of Kirkland, Washington

Dated: July 10, 2013

⁴ Ballard’s Motion For Leave To File Reply at 6.

⁵ Verified Statement of Kurt Triplett ¶ 21 (Ex. 2 to this motion).

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing motion upon the following parties of record in the above-captioned proceedings by first class mail with postage prepaid and properly addressed:

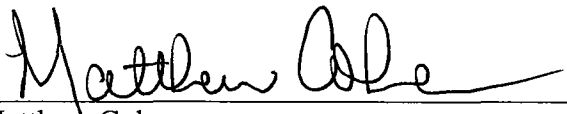
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Dated this 10th day of July 2013

74199420.1 0021620-00004

EXHIBIT 1

BALLARD TERMINAL RAILROAD
COMPANY, LLC, a Washington
limited liability company,

Plaintiff,

v.

CITY OF KIRKLAND, a Washington
municipal corporation,

Defendant.

)
)
) CASE NO. C13-00586MJP
)
) SEATTLE, WASHINGTON
) May 3, 2013
)
)
) MOTION TO DISMISS
)
)
)
)
)

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

For the Plaintiff: MYLES TOBIN
THOMAS MONTGOMERY

For the Defendant: HUNTER FERGUSON
MATTHEW COHEN
OSKAR REY
STEWART ESTES

Reported by: NANCY L. BAUER, CCR, RPR
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1 721, there's -- and I've read through this, and I've,
2 frankly, been practicing for a long time in railroad law --
3 there is no exclusivity on jurisdiction. Your Honor, you and
4 the STB have concurrent jurisdiction here, and either was an
5 appropriate choice.

6 And I suppose since Your Honor is asking, I'll jump right
7 into the first question, which Your Honor indicated, you
8 know, is that the STB, under 721, not the appropriate way for
9 plaintiff to seek enjoining salvaging of the track. And what
10 I would say to Your Honor is, it is an appropriate way, but
11 it is not the only appropriate way, and in this instance it's
12 not the appropriate way.

13 And I'll be quite honest and pragmatic with Your Honor.
14 STB has a lot of fine qualities. They do a lot of very solid
15 jurisdictional prudence. In the world of injunctive relief,
16 they're not particularly expedient.

17 Ballard has -- I'm sorry -- Kirkland has indicated to you
18 that they were poised to pull this track. This court is in a
19 much better position than the STB to -- in which to seek
20 expedited relief.

21 THE COURT: Well, you say that, but what's in the
22 record that would demonstrate that if you ask for accelerated
23 review, they have a specific portion of the statute that
24 deals with emergency issues.

25 MR. TOBIN: The best I can tell, Your Honor, is it's

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 8th day of May 2013.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
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FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

**VERIFIED STATEMENT OF KURT TRIPLETT
IN SUPPORT OF THE CITY OF KIRKLAND'S REPLY TO
BALLARD TERMINAL RAILROAD COMPANY, L.L.C.'S
MOTION FOR PRELIMINARY INJUNCTION**

I, Kurt Triplett, declare under penalty of perjury as follows:

1. I have personal knowledge of, and am competent to testify to, the following facts.
2. I hold the office of City Manager for the City of Kirkland ("Kirkland") and have served in this capacity since June 28, 2010. Before assuming this position, I served as Chief of Staff to King County Executive Ron Sims from July 2003 to April 2009 and then as Interim King County Executive from May 2009 to November 2009.
3. On January 5, 2012, Kirkland and the Port of Seattle (the "Port") entered into a purchase and sale agreement for the Cross Kirkland Corridor ("CKC"), which is a 5.75 mile segment of the 12.55 mile railroad right-of-way running between the cities of Woodinville and Bellevue (the "Line"). Under the terms of the purchase and sale agreement, the Port conveyed to Kirkland its interests in the land comprising the CKC, along with its interests in the rail infrastructure and other personal property and fixtures in the CKC.

4. On April 13, 2012, Kirkland closed on its purchase of the CKC for \$5 million.

5. The CKC connects eight of Kirkland's 13 neighborhoods and offers a unique opportunity to provide a regional transit corridor and a green pathway through a heavily urbanized area. With this potential in mind, Kirkland acquired the CKC with the plan of developing a multi-modal trail and transit corridor. The first phase of this plan is the development of an interim trail.

6. Kirkland officials and managers recognize that under the terms of the railbanking statute, every railbanked right-of-way remains subject to reactivation of freight service if a demand arises. Kirkland officials and managers further recognize that the Central Puget Sound Regional Transit Authority holds a transit easement over the entire length of the Line and might provide future commuter rail on the Line, alongside a trail.

7. Kirkland believes that there is no realistic demand for freight rail service in Kirkland or Bellevue today, or in the foreseeable future. I am not aware of any business located between Woodinville and Bellevue that has requested or displayed an interest in receiving freight rail service since 2008. During the past several years, the land use adjacent to the Line between Bellevue and Woodinville has steadily moved toward high-end commercial, mixed-use residential/retail, and retail. In 2008, for instance, Kirkland rezoned the Parmac light industrial zone to become Class A office space for the purpose of attracting high-end financial and tech companies. In addition, Google plans to build new campus next to the Line where more than a thousand employees will work.

8. Beginning in the spring of 2012, Kirkland staff evaluated various approaches to developing an interim trail, including both removal of the existing rail infrastructure and leaving the tracks and ties in place. Kirkland staff concluded that removing the rails and leaving the rail bed and ballast in place was the best approach, in part, because: (a) no rail operator had come forward with a plan to provide freight service on the Line, since BNSF Railway sold the Line to the Port in 2009; (b) rail removal would make development of interim trail easier and less expensive; (c) Sound Transit does not have a plan in the near term for providing commuter rail

service within the CKC; (d) removal would make vegetation and stormwater maintenance within the CKC easier and less expensive than with the rails in place; and (e) grant funding secured for the removal of the rails and development of an interim trail is available only through 2014.

9. On August 7, 2012, the Kirkland City Council voted unanimously to approve salvage of the rail infrastructure within the CKC beginning in spring 2013, thus allowing Kirkland residents to begin developing and using the CKC as an interim trail by summer 2013.

10. In the fall of 2012, Douglas Engle, a representative of Eastside Community Rail, LLC ("ECR"), contacted me to discuss the possibility of allowing his company to operate an "excursion" train within the CKC and urged me to delay Kirkland's salvage plans. On November 15, Mr. Engle and I met in person to discuss this proposed use for the CKC. During this meeting, Mr. Engle stated that ECR had acquired the rights and assets of his former company, GNP Railway, which was in bankruptcy, and would operate freight rail service with Ballard Terminal Railroad Company ("Ballard") on the 14 mile freight segment between the cities of Woodinville and Snohomish. In this meeting and in a subsequent email, Mr. Engle stated that ECR and its business partners would forgo reactivation of freight service through Kirkland, if Kirkland would allow ECR and its business partners to operate an excursion train on the Line between the cities of Snohomish and Bellevue. Mr. Engle did not articulate a specific plan for the freight service that ECR and its business partners would forgo. Mr. Engle represented that ECR could run an excursion train alongside a pedestrian-cycling trail and that an individual named "Byron" was investigating the cost and logistics of improving the rail infrastructure on the Line to support an excursion train. Mr. Engle further requested that Kirkland delay salvage by 90 days. I explained that Kirkland did not plan to commence salvage until late February, which was more than 90 days in the future, and therefore we would continue to pursue Kirkland's current plans. A true and correct copies of my email correspondence with Mr. Engle regarding these issues and our meeting is filed with Kirkland's reply as **Exhibit 9**.

11. On December 17, I met again with Mr. Engle regarding his proposal for ECR and its business partners to run an excursion train on the Line. He reiterated that ECR and its

business partners would not attempt to operate freight service if Kirkland agreed to allow an excursion train to run with the CKC. Mr. Engle did not, however, identify any specific plan for freight service that ECR and its business partners would not pursue.

12. In a letter dated February 19, 2013, Mr. Engle outlined a proposal, whereby ECR and Wolford Trucking and Demolition and would construct a "maintenance of way" road for ECR's excursion train alongside the existing tracks within the CKC for a cost of \$2.87 million. ECR proposed that the maintenance of way road could function as a trail when not in use by ECR and that Kirkland would cover the cost of maintaining the road. A true and correct copy of Mr. Engle's February 19 letter is filed with Kirkland's reply as **Exhibit 18**.

13. In a letter dated February 22, 2013, Mr. Engle renewed ECR's proposal to run an excursion train on the CKC and his proposal for ECR and Wolford Trucking and Demolition to construct a trail alongside the existing rails. In particular, Mr. Engle proposed that ECR and Wolford Demolition and Trucking be allowed to use grant funding secured by Kirkland to develop a trail within the CKC alongside the existing rails. A copy of Mr. Engle's February 22 letter is filed with Kirkland's reply as **Exhibit 19**.

14. Kirkland staff, its engineering consultants, and I considered ECR's proposals to run an excursion train within the CKC and construct a maintenance of way road alongside the existing rails and concluded they were not financially or economically viable for Kirkland. Among other things, the proposals (a) did not include plans for bridge construction and street modifications, (b) contemplated filling in wetlands, (c) called for the trail to be placed at levels uneven with railroad grade in several places, (d) lacked a specific time line for construction, and (e) did not include adequate financing. Kirkland's engineering consultants estimated that ECR's proposed construction would cost more than \$17 million, well above ECR's estimate of \$2.87 million. A true and correct copy of this evaluation is filed with Kirkland's reply as **Exhibit 21**. In light of these flaws, I concluded that ECR's excursion train was incompatible with Kirkland's plan to develop an interim trail and with the possibility that Sound Transit might provide commuter rail service in the future.

15. On February 26, 2013, Kirkland solicited bids for the removal of the rail infrastructure within the CKC.

16. On March 11, 2013, I received a copy of ECR's public business plan from Mr. Engle, along with requests for information about Kirkland's plan to develop an interim trail. A true and correct copy of Mr. Engle's March 11 correspondence and ECR's business plan is filed with Kirkland's reply as **Exhibit 20**. With respect to the prospect of freight service on the Line, ECR's business plan stated: "There are no written plans, agreements or otherwise to move spoils from Bellevue to Snohomish County, although there have been many conversations and some analysis. No other freight has been identified in Bellevue." ECR Business Plan at 7. In addition, ECR's business plan revealed that it did not have the capacity to run an excursion train because of the need to upgrade the existing rail infrastructure to accommodate passenger service. See ECR's Business Plan at 2. In light of these statements, I further concluded that it was appropriate to continue with plans for rail salvage and development of an interim trail.

17. Bids received for the Cross Kirkland Corridor Rail Removal Project were opened by Kirkland staff on March 15, 2013.

18. Among the bids received was one from "Bobby Wolford Trucking & Demolition, Inc." Wolford Trucking's bid was not selected. A true and correct copy of Wolford Trucking's bid, along with a notice dated March 22, 2013 returning Wolford Trucking's deposit is filed with Kirkland's reply as **Exhibit 29**.

19. After reviewing the bids, Kirkland awarded the salvage contract to A&K Railroad Materials, Inc. ("A&K"). Under the terms of A&K's bid, Kirkland stands to receive an estimated net benefit of \$106,560 for the salvage value of the rails. This estimated benefit takes into account the contract price (\$473,419) and the estimated salvage value of the rails.

20. Kirkland entered into the salvage contract with A&K on April 26, 2013, and immediately suspended performance. A true and correct copy of Kirkland's contract with A&K for rail salvage is filed with Kirkland's reply as **Exhibit 22**.

21. A&K has represented that it likely would be able to complete salvage operations during the 2013 construction season, if Kirkland provides a notice to proceed by August 1, 2013.

22. If Kirkland is unable to proceed with its plan to salvage the rails during the summer of 2013, it will both lose substantial expected benefits and incur several costs, including:

a. *Lost Investment in the CKC.* If Kirkland is unable to salvage the rails during 2013 construction season, its next opportunity to do so will be during the 2014 construction season. Trail development cannot start until salvage is complete. As a result, Kirkland's intended use of the CKC and the public benefits of a trail will be delayed by at least a year. Kirkland paid \$5 million for the CKC. It recently borrowed \$35 million with a simple annual interest rate of approximately 3.5 percent. Applying this interest rate to the purchase price, Kirkland will lose at least \$175,000 over the next year on its investment in the CKC.

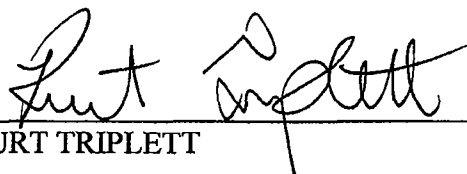
b. *Risk of Lost Contract Value.* If A&K is unable to perform work under the contract within the next six months, Kirkland risks losing its expected payment of \$106,560 for the net salvage value of the rails. The possible future benefit from salvage, if any, is unknown and cannot be known until Kirkland solicits new bids in the spring of 2014 because salvage contractors prepare bids at points in time when they can reasonably predict the salvage value of steel.

c. *The Cost to Re-Bid the Salvage Contract.* If A&K is unable to salvage the rails within the next six months, Kirkland will have to solicit new salvage bids in the spring of 2014 at an estimated cost of \$1,522.10.

d. *Increased Maintenance Costs within the CKC.* As the owner of the CKC, Kirkland is responsible for maintaining the right-of-way. In the absence of any rail traffic for several years, much of the vegetation within the CKC is now overgrown and must be removed. In addition, Kirkland must undertake excavation work in drainage ditches, where sediment and vegetation have accumulated, blocking the flow of stormwater. Kirkland had planned to begin this maintenance work by driving

maintenance vehicles and equipment on the gravel rail bed in the right-of-way as A&K completed salvage work. If the rail infrastructure is not salvaged, Kirkland instead will have to use rail-compatible vehicles and equipment to perform maintenance work and forgo the use of other equipment and tools. Based on price quotes provided by auto mechanics and maintenance equipment rental companies, these requirements will increase Kirkland's maintenances by an estimated \$211,013.35:

WORK/EQUIPMENT	COST-RAILS REMOVED	COST-RAILS IN PLACE	INCREASED COST
Vegetation Maintenance Labor	\$12,445	\$71,120	\$58,675
Rail-Compatible Vehicle Retrofit	N/A	\$14,860	\$14,860
Ditch Excavation Labor & Equipment	\$90,910.40	\$228,388.75	\$137,478.35
TOTAL			\$211,013.35


KURT TRIPLETT

Dated: 6/4/13

Place: Kirkland