

235455

235453

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
February 12, 2014
Part of
Public Record

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**

**EMERGENCY MOTION OF THE CITY OF KIRKLAND, WASHINGTON, KING
COUNTY, WASHINGTON, AND CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY FOR RESOLUTION OF DISCOVERY DISPUTE**

Communications with respect to this pleading should be addressed to:

Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Fax: (206) 386-7500
Email: mcohen@stoel.com
Email: hoferguson@stoel.com

Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
E-mail: epilsk@kaplankirsch.com
E-mail: afultz@kaplankirsch.com

Counsel for City of Kirkland, Washington

Counsel for King County, Washington and
Central Puget Sound Regional Transit Authority

Dated: February 12, 2014

**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**

**EMERGENCY MOTION OF THE CITY OF KIRKLAND, WASHINGTON, KING
COUNTY, WASHINGTON, AND CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY FOR RESOLUTION OF DISCOVERY DISPUTE**

Pursuant to 49 C.F.R. § 1114.31, the City of Kirkland, Washington, King County, Washington, and Central Puget Sound Regional Transit Authority (collectively, “the Regional Parties”), respectfully request the Surface Transportation Board (“Board”) to convene a telephone hearing this afternoon to address the issue described herein, and to issue an order directing Byron Cole to answer certain questions at a deposition, as detailed below.

In support of their Motion, the Regional Parties state as follows:

BACKGROUND

This proceeding involves the requests of Ballard Terminal Railroad Company, L.L.C. (“BTR”) to (1) obtain an exemption from 49 U.S.C § 10902 to acquire the residual common carrier rights and obligations relating to an 11.2-mile portion of a railbanked line of railroad between Woodinville, Washington and Bellevue Washington (the “Line”), and (2) to vacate the NITU on that portion of the Line. On December 6, 2013, BTR filed its Reply to Comments

submitted by the Regional Parties. In its Reply, BTR produced letters from so-called “shippers” that BTR argues demonstrate shipper demand for rail service on the Line. BTR also produced for the first time letters purporting to demonstrate that BTR has the financial resources to initiate and carry out service on the Line.

On January 15, 2014, the Board issued an Order acknowledging that BTR’s submission of new evidence in its Reply to Comments was “in contravention of 49 C.F.R. § 1121.3(a).” Order at 3. Rather than terminating the matter and allowing BTR to file new Petitions with its new evidence, the Board decided to reinstitute a procedural schedule to allow the Regional Parties the opportunity to take discovery on BTR’s new evidence. Accordingly, the Board ordered that discovery be completed by February 14, 2014.

On January 17, 2014, the Regional Parties filed a Motion seeking, *inter alia*, the issuance of subpoenas to several witnesses who had written letters BTR relied upon in its December 6 Reply or who otherwise possessed information relevant to the issues raised in BTR’s Reply. The Regional Parties also served Requests for Production of documents on BTR. On January 27, 2014, BTR replied to the Regional Parties’ Motion and further filed a Motion for Protective Order to limit the number of depositions and the scope of discovery. On January 31, 2014, the Board issued an Order granting both motions in part and denying them in part. The Board authorized the issuance of all but one of the requested subpoenas and limited the scope of depositions and requests for production “the extent they relate to evidence contained in the December 6 Reply, subject to privilege objections.” *Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731, slip op. at 2-3 (STB served Jan. 31, 2014May 17, 2013).

Pursuant to the January 31 Order, the Regional Parties served a subpoena on Byron Cole, and the parties agreed to hold the deposition on February 12, 2014. At the deposition, counsel asked Mr. Cole questions about documents filed earlier in the proceeding as part of a line of questions intended to explore the bases for his letter of support attached to the December 6 Reply. Specifically, counsel were attempting to secure information that would reconcile inconsistencies between the earlier documents and the materials filed on December 6th. Counsel for BTR objected to the question as barred by the protective order because the question was not sufficiently “related to” the support letter. Counsel for BTR refused to allow the witness to answer the question subject to the objection. Accordingly, the Regional Parties file this Emergency Motion seeking to compel Mr. Cole to answer the question, and similar questions regarding his support letter.

ARGUMENT

Board rules allow a party to seek an Order compelling discovery “[i]f a deponent fails to answer or gives an evasive answer to a question propounded under 49 C.F.R. 1114.24(a).” 49 C.F.R. § 1114.24(a) requires a deponent to answer questions subject to objections:

Examination and cross-examination of witnesses should proceed as permitted at a hearing and should be limited to the subject matter specified in the order granting discovery. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, should be noted by the officer upon the deposition. Evidence objected to should be taken subject to the objections.

BTR’s instructions not to answer the questions described above were improper for two reasons.

First, the proper procedure was for BTR to note its objections, but allow the testimony to be taken. Section 1114.24(a) explicitly directs that “Evidence objected to should be taken subject to the objections.” After the deposition, BTR would be able to move to strike the

testimony or seek other relief to limit its use in the proceeding. But BTR is not permitted to instruct the witness not to answer a question.

Second, the question is well within the scope of discovery. The Board made clear in its January 15 Order, and confirmed in its January 31 Order, that discovery, including deposition testimony of Mr. Cole was necessary and appropriate given BTR's reliance on his letter of support. The only limitation the Board placed on the scope of discovery is that it "relate to evidence contained in the December 6 Reply." Generally, the phrase "relate to" is understood to have a relatively broad meaning. *See Morales v. Trans World Airlines Inc.*, 504 U.S. 374 (1992) (construing preemptive scope of statute containing the phrase "related to"). The Supreme Court has explained that the phrase "related to" means that there is "'a connection with, or reference to'" the subject at issue. *Id.* at 384-85 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983)) (rejecting narrow construction of statute in light of "related to" phrase).

The Regional Parties' questions clearly fit within that understanding of "related to." Mr. Cole's earlier letters discussed some of the same shippers that are referred to in the December 6th filing. BTR represented to the Board that that letter indicated that that there was sufficient shipper demand/BTR had the financial resources to carry out its proposed service. The questions at issue were intended to probe the basis for that assertion by attempting to reconcile discrepancies. Such questions have a "connection" with the letter and a "reference to" the letter. Accordingly, the question clearly "relates to" the December 6th filing.

BTR appears to be taking the position that the Regional Parties cannot ask questions that probe the bases for the evidence offered in its December 6 Reply; that discovery is somehow limited to the conclusory statements in the letters themselves. That is an unsupportable position, however. First, the phrase "relate to" is clearly different, and broader, than that. The phrase

“relate to” mean that discovery simply must have some connection to the evidence presented I the December 6 Reply. It does not mean, as BTR suggests, that discovery is limited to the evidence itself.

Second, BTR made that exact argument in support of its Motion for Protective Order in which it sought to prevent the issuance of all of the subpoenas and to cut off any further discovery, and specifically argued that discovery was not necessary because the support letters “speak for themselves.” *Motion for Protective Order of Ballard Terminal Railroad Company LLC and Eastside Community Rail, LLC, Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731, at 8-9 (Jan. 27, 2014). The Board clearly rejected that argument by issuing the subpoenas and allowing discovery to proceed, subject only to the general limitation that discovery “relate to” the evidence offered in the December 6 Reply. January 31 Order at 2-3.

The Board’s Order recognizes the fundamental point that discovery provides a valuable tool to uncover the bases for statements made by witnesses and parties. Accordingly, the Board ordered that the discovery proceed. BTR’s objections are an impermissible attempt to undo the Board’s Order and should be overruled out of hand so the parties can complete discovery in the time the Board has provided.

CONCLUSION

For the foregoing reasons, the Regional Parties respectfully request Board relief, and that the Board convene a telephone hearing this afternoon to permit the deposition of Mr. Cole to conclude in a timely way.

Respectfully submitted,



Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Fax: (206) 386-7500
Email: mcohen@stoel.com
Email: hoferguson@stoel.com

Counsel for City of Kirkland, Washington



Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, D.C. 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
E-mail: epilsk@kaplankirsch.com
E-mail: afultz@kaplankirsch.com

Counsel for King County, Washington and
Central Puget Sound Regional Transit Authority

Dated: February 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that I am providing a copy of the of the foregoing Motion of the City of Kirkland, Washington, King County, Washington, and Central Puget Sound Regional Transit Authority upon the following parties of record and other interested persons by email on February 12, 2014, or as otherwise indicated below:

Jordan Wagner Jennifer Belk Central Puget Sound Regional Transit Authority 401 S. Jackson Street Seattle, WA 98104 <i>Attorneys for Central Puget Sound Regional Transit Authority</i>	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile
Myles L. Tobin, Esq. Thomas J. Litwiler Thomas C. Paschalis Fletcher & Sippel LLC 29 North Wacker Drive Suite 920 Chicago, IL 60606-2832 <i>Attorneys for Ballard Terminal Railway LLC</i>	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile
Tom Montgomery Montgomery Scarp PLLC 1218 3rd Ave # 2700 Seattle, WA 98101 <i>Attorneys for Ballard Terminal Railway LLC</i>	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile
Pete Ramels Andrew Marcuse Office of the Prosecuting Attorney—Civil Division W400 King County Courthouse 516 Third Avenue Seattle, WA 98104 <i>Attorneys for King County</i>	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile

Charles A. Spitulnik W. Eric Pilsk Allison Fultz Kaplan Kirsch & Rockwell LLP 1001 Connecticut Avenue, NW, Suite 800 Washington, DC 20036 <i>Attorneys for King County</i>	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile
AmericanWest Bank c/o Corporation Service Company, Registered Agent 300 Deschutes Way SW, Suite 304 Tumwater, WA 98501	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
AmericanWest Bank c/o Nathan Engman 2237 NW 57th Street Seattle, WA 98107 Phone: (206) 784-2200 Fax: (206) 784-6650	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☒ facsimile
Coastal Community Bank c/o Greg Starup Colby Branch 2817 Colby Avenue Everett, WA 98201 Phone: (425) 258-5299 Fax: (425) 257-0521	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☒ facsimile
Coastal Community Bank/Administrative Office c/o Director or Greg Starup 10520 19th Ave SE Everett, WA 98208	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
Aggregates West, Inc. c/o BS&G Inc., Registered Agent 1191 2nd Ave, Suite 1800 Seattle, WA 98101	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile

Aggregates West, Inc. c/o Scott Day 9151 Van Buren Road Everson, WA 98247 Phone: (360) 966-3641 Fax: (360) 966-3841	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☒ facsimile
C. T. Sales, Inc. c/o James A. House, Registered Agent 7227 W. Bostian Road Woodinville, WA 98072-6008 Phone: (425) 483-0101 Fax: (425) 485-9131	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☒ facsimile
EB5 Capital Partners.us, LLC c/o The Company Corporation, Registered Agent 2711 Centerville Road, Suite 400 Wilmington, DE 19808	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
Daniel T. Behr EB5 Capital Partners.us, LLC 3145 Cherry Lane Northbrook, IL 60062 Phone: (847) 951-7245 dtb@eb5captialpartner.us	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile
Douglas Engle c/o Tom Montgomery Montgomery Scarp PLLC 1218 Third Avenue, Suite 2700 Seattle, WA 98101 Phone: (206) 625-1801 Fax: (206) 625-1807 tom@montgomeryscarp.com	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile
Douglas Engle c/o Myles L. Tobin, Esq. Thomas J. Litwiler Thomas C. Paschalis Fletcher & Sippel LLC 29 North Wacker Drive Suite 920 Chicago, IL 60606-2832	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile

Paul Nerdrum 1040 NW 178th Street Seattle, WA 98177 Phone: (206) 542-9694	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
Paul Nerdrum 5228 Shilshole Ave NW Seattle, WA 98107 Phone: (206) 784-1234 Fax: (206) 781-0984	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☒ facsimile
RJB Wholesale, Inc. c/o Nick Beck, Registered Agent 12418 NE 124th Street Kirkland, WA 98034 Phone: (425) 823-1414 Fax: (425) 821-7353	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☒ facsimile
WATCO Companies, L.L.C. c/o Corporation Service Company, Registered Agent 2900 SW Wanamaker Drive, Suite 204 Topeka, KS 66614	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
WATCO Companies, L.L.C. c/o Mark Blazer 1900 N. Main, Suite 13 Helena, MT 59601 Phone: 406-495-1096 Fax: 406-495-1098 mblazer@watcocompanies.com	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☒ facsimile
WATCO Companies, L.L.C. c/o Corporation Service Company, Registered Agent 300 Deschutes Way SW, Suite 304 Tumwater, WA 98501	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile

WATCO Companies, L.L.C. c/o Corporation Service Company, Registered Agent 2711 Centerville Road, Suite 400 Wilmington, DE 19808	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
Kathy Cox 1204 Kirkland Avenue Kirkland, WA 98033-6323 Phone: (425) 827-3311 Phone: (425) 822-3925	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☐ copy via email ☐ facsimile
Kathy Cox Marketing Philharmonic 218 Main Street Kirkland, WA 98033 Phone: (425) 822-3925 kathy@marketingphilharmonic.com kathy.com@escrail.org	Service by: ☐ hand delivery via messenger ☒ mailing with postage prepaid ☒ copy via email ☐ facsimile

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
Counsel for King County, Washington and
Central Puget Sound Regional Transit Authority

Dated this 12th day of February, 2014