



BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

EXPEDITED CONSIDERATION REQUESTED

September 23, 2004

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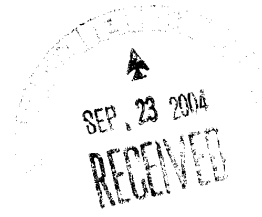
Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St., N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

SEP 23 2004

Part of
Public Record



RE: STB Finance Docket No. 34555, City of Tacoma, Department of Public Utilities,
Beltline Division, d/b/a Tacoma Rail, Tacoma Municipal Beltline or TMBL—
Acquisition And Operation Exemption—Lakeview Subdivision, Quadlok-St. Clair,
And Belmore-Olympia Rail Lines In Pierce And Thurston Counties, Washington

Dear Secretary Williams:

Enclosed please find the original and ten (10) copies of the Opposition to Petition for Stay and Request for Partial Waiver of 49 C.F.R. § 1150.42(e) of the City of Tacoma, Department of Public Utilities, Beltline Division, d/b/a Tacoma Rail, Tacoma Municipal Beltline or TMBL ("TMBL") for filing in the above referenced docket.

As a courtesy, electronic copies of this filing in Microsoft Word and Adobe Acrobat are contained on the enclosed diskette.

One additional copy of this filing is enclosed for stamping and return to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Michael H. Higgins

Jeffrey O. Moreno
Michael H. Higgins
Counsel for the Applicant

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34555

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, BELTLINE
DIVISION, DBA TACOMA RAIL OR TACOMA MUNICIPAL BELTLINE OR
TMBL—ACQUISITION AND OPERATION EXEMPTION—LAKEVIEW SUBDIVISION,
QUADLOK-ST. CLAIR, AND BELMORE-OLYMPIA RAIL LINES IN PIERCE AND
THURSTON COUNTIES, WASHINGTON**

**OPPOSITION TO PETITION FOR STAY
AND
REQUEST FOR PARTIAL WAIVER OF 49 C.F.R. § 1150.42(e)**

CITY OF TACOMA, DEPARTMENT OF
PUBLIC UTILITIES, BELTLINE DIVISION,
DBA TACOMA RAIL OR TACOMA
MUNICIPAL BELTLINE OR TMBL
2601 SR 509 North Frontage Road
Tacoma, WA 98421

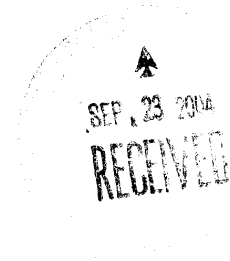
Applicant

Jeffrey O. Moreno
Michael H. Higgins
THOMPSON HINE LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

Anne L. Spangler
Chief Assistant City Attorney
CITY OF TACOMA
3628 South 35th Street
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(253) 502-8218

Attorneys for Applicant

DATE FILED: September 23, 2004



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34555

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, BELTLINE
DIVISION, DBA TACOMA RAIL OR TACOMA MUNICIPAL BELTLINE OR
TMBL—ACQUISITION AND OPERATION EXEMPTION—LAKEVIEW SUBDIVISION,
QUADLOK-ST. CLAIR, AND BELMORE-OLYMPIA RAIL LINES IN PIERCE AND
THURSTON COUNTIES, WASHINGTON**

**OPPOSITION TO PETITION FOR STAY
AND
REQUEST FOR PARTIAL WAIVER OF 49 C.F.R. § 1150.42(e)**

The CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, BELTLINE DIVISION, DBA TACOMA RAIL, TACOMA MUNICIPAL BELTLINE OR TMBL ("TMBL"), a Class III carrier, hereby opposes the Petition for Stay submitted in this proceeding by John D. Fitzgerald ("Fitzgerald") and, simultaneously, respectfully requests a partial waiver of the 60-Day Certification Requirement, codified at 49 C.F.R. § 1150.42(e). As explained herein, the facts of this matter—most significantly, TMBL's timely actual notice to affected BNSF employees and their national labor unions on July 30th, 2004—and Surface Transportation Board precedent strongly support TMBL's opposition and its reasonable request for a partial waiver. Accordingly, Fitzgerald's Petition should be denied and TMBL's Request for Partial Waiver should be granted without delay.¹

¹ TMBL supports Fitzgerald's request for expedited handling of his Petition for Stay, and TMBL similarly requests expedited consideration of this Request for Partial Waiver of 49 C.F.R. § 1150.42(e).

I. Background

As set forth in its Verified Notice of Exemption ("Verified Notice"), filed September 20, 2004, TMBL intends to acquire by purchase and lease approximately 28 miles of rail line from the Burlington Northern and Santa Fe Railway Company ("BNSF") in Pierce and Thurston counties, Washington. Pursuant to the foregoing transaction, TMBL also intends to obtain incidental trackage rights over approximately 22 route miles, including incidental trackage rights assigned by BNSF over an approximately nine mile segment of Union Pacific Railroad Company ("UPRR") line, all in Pierce and Thurston counties, Washington. Under the parties' agreement, TMBL is required to have all necessary government approvals, including STB exemption authority, in place by October 1, 2004, the effective date of the transaction. See Verified Statement of Anne L. Spangler ("Spangler V.S."), ¶4, attached hereto as Exhibit A.

Because TMBL projected that it would generate gross revenues in excess of \$5 million, annually, it concluded that the notice requirements of 49 C.F.R. § 1150.42(e) applied to the contemplated transaction. Accordingly, on July 29th, 2004, TMBL sent a "Notice to Employees of the Burlington Northern & Santa Fe Railroad" (attached at Exhibit C to its Verified Notice) to both BNSF and the national offices of all labor unions with employees on the affected lines, namely the Brotherhood of Locomotive Engineers & Trainmen ("BLET"), the Brotherhood of Maintenance of Way Employees ("BMWE"), the Brotherhood of Railroad Signalmen ("BRS"), and the United Transportation Union ("UTU"). TMBL sent its notice to BNSF at BNSF's Tacoma Washington Terminal. A Federal Express Tracking Summary (attached at Exhibit C to the Verified Notice) establishes that all of the foregoing notices were delivered before noon on July 30th,

2004. The Terminal Manager of BNSF's Tacoma Washington Terminal personally posted the notices in employee workplaces that same day. Spangler V.S., ¶3. Due to an oversight, TMBL did not certify the foregoing to the Board until September 16, 2004, two weeks before the effective date of the transaction.

II. Argument

Because TMBL provided notice to BNSF employees and their respective national labor unions 60 days before the purchase and lease transaction is to become effective—achieving substantial compliance with the notice requirements set forth at 49 C.F.R. § 1150.42(e)—the Board should not disrupt the normal exemption process, by granting the stay requested by Fitzgerald. Contrary to Fitzgerald's speculation, the Affidavit of Anne L. Spangler establishes that BNSF employees on the affected lines did receive actual notice of the transaction on July 30th, 2004, the day after TMBL sent its notice to BNSF by overnight mail. Spangler V.S., ¶3.

Moreover, because BNSF's assignment of incidental trackage rights over approximately 9 miles of UPRR line to TMBL affects only BNSF's own employees working on that line—and not UPRR employees—Fitzgerald wrongly contends that TMBL neglected to notify UPRR employees. In fact, no such notice was required, since this was an assignment by BNSF of existing BNSF trackage rights over which BNSF operates using its own employees. Even so, the hypothetical "interest" that BNSF employees have in "fair treatment for UP employees," as alleged by Fitzgerald, was abundantly protected by TMBL's uncontested, timely notice to the BLET, the BMW, the BRS and the UTU.

Accordingly, TMBL's delay in making certification to the Board does not warrant action by the Board that could frustrate the transaction planned by TMBL and BNSF, which requires TMBL to have all required government approvals in place by October 1, 2004. Spangler V.S., ¶4. Indeed, granting a stay could jeopardize the agreements that TMBL and BNSF have reached to the detriment of TMBL. Spangler V.S., ¶4.

Abundant Board precedent supports waiver of the 60-day certification requirement, which the Board has generously granted under similar circumstances. For example, in Finance Docket No. 34423, M & B Railroad, L.L.C.—Acquisition and Operation Exemption—CSX Transportation, Inc., 2003 STB Lexis 691 at *4-5 (Served Nov. 3, 2003), the Board granted a partial waiver where the applicant demonstrated that it provided notice to affected CSXT employees and the relevant national labor unions more than 60 days prior to the intended consummation date, but certified compliance to the Board only 24 days before the closing date for the transaction. Similarly, in Finance Docket No. 34286, Fort Worth and Western Railroad Company, Inc.—Acquisition and Operation Exemption—Union Pacific Railroad Company, 2002 STB Lexis 773 at *3-5 (Served Dec. 20, 2002), the Board partially waived the requirement where the applicant demonstrated that it provided notice to UPRR employees and the relevant national unions 60 days prior to the planned closing date, but certified compliance to the Board only 9 days before the closing date. See Finance Docket No. 34213, Puget Sound & Pacific Railroad—Lease and Operation Exemption—Union Pacific Railroad, 2002 STB Lexis 732 (Served Dec. 6, 2002). Given the foregoing precedent, it is reasonable for the Board to waive the remainder of the 60 day period set forth at 49 C.F.R § 1150.42(e) because of TMBL's timely actual notice to affected BNSF employees and

their relevant national labor unions, which waiver will allow the transaction to go forward. Such a waiver does not prejudice affected BNSF employees, who received timely notice despite the lack of certification to the Board.

III. Conclusion

For the reasons stated above, TMBL respectfully asks the Board (i) to deny the Petition for Stay submitted by Fitzgerald, (ii) to grant TMBL's Request for Partial Waiver of the 60-day certification requirement in 49 C.F.R. § 1150.42(e), and (iii) to make TMBL's Verified Notice of Exemption effective on September 28th, 2004, which is 60 days from the date that TMBL provided actual notice of the transaction to affected employees and their relevant national labor unions.

Respectfully submitted,

Michael H. Higgins

Jeffrey O. Moreno
Michael H. Higgins
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Certificate of Service

I hereby certify that I have served on this 23rd day of September, 2004, a copy of the above Opposition to Petition for Stay and Request for Partial Waiver of 49 C.F.R. § 1150.42(e) by hand delivery upon the following:

Gordon P. MacDougall, Esq.
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

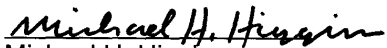

Michael H. Higgins

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34555

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, BELTLINE
DIVISION, DBA TACOMA RAIL OR TACOMA MUNICIPAL BELTLINE OR
TMBL—ACQUISITION AND OPERATION EXEMPTION—LAKEVIEW SUBDIVISION,
QUADLOK-ST. CLAIR, AND BELMORE-OLYMPIA RAIL LINES IN PIERCE AND
THURSTON COUNTIES, WASHINGTON**

VERIFIED STATEMENT OF ANNE L. SPANGLER

1. My name is Anne L. Spangler, I am the Chief Assistant City Attorney for the City of Tacoma. I am over the age of 18 and competent to provide this Verified Statement.

2. I have acted as lead in-house counsel to the City of Tacoma, Department of Public Utilities, Beltline Division d/b/a Tacoma Rail, Tacoma Municipal Beltline, or TMBL ("TMBL") in the purchase and sale transaction that is the subject of STB Finance Docket No. 34555. I have personal knowledge of the facts and circumstances of the transaction. I have reviewed the Petition for Stay, filed John D. Fitzgerald, and I am submitting this Verified Statement in Support of TMBL's Opposition to Petition for Stay and Request for Partial Waiver of 49 C.F.R. § 1150.42(e).

3. First, I wish to inform the Board that on September 22nd, 2004, I spoke by telephone with Mr. Dan Burns, Terminal Manager of the Burlington Northern and Santa Fe Railway Company's ("BNSF") Tacoma Washington Terminal. Mr. Burns informed me that on July 30th, 2004 he personally posted TMBL's "Notice to Employees

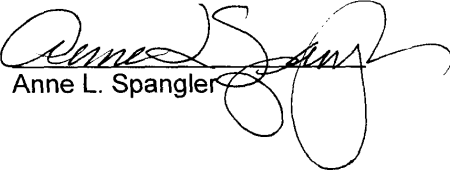
of the Burlington Northern & Santa Fe Railroad" in the on-duty location for the crews affected by transaction, making approximately 6 postings in total. (A copy of that notice is attached hereto at Tab 1 with a copy of my cover letter to Mr. Burns and his assistant, Ms. Barbara Seeburger, dated July 29th 2004.) Mr. Burns also informed me that in one particular on-duty location he posted a second copy of TMBL's notice, on August 2nd, 2004, in order to replace a copy that had been removed. Accordingly, TMBL properly certified to the Board, on September 16th, 2004, that notice to affected BNSF employees, as required by 49 C.F.R. § 1150.42(e), was provided on July 30th, 2004.

4. Additionally, I wish to inform the Board that the agreements implementing the transaction that is the subject of this proceeding require that TMBL have obtained all necessary governmental approvals, including STB exemption authority, before the required closing date of October 1st, 2004. Any delay in the effective date of the exemption, such as the stay requested by John D. Fitzgerald, will have an adverse effect on the underlying transaction.

VERIFICATION

I, Anne L. Spangler, Chief Assistant City Attorney for the City of Tacoma, verify under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on this 2nd day of September, 2004.


Anne L. Spangler

TAB 1



2601 SR 509 North Frontage Road
Tacoma, Washington 98421

TACOMA PUBLIC UTILITIES

Via Federal Express

July 29, 2004

Mr. Dan Burns, Terminal Manager
Ms. Barbara Seeburger, Assistant
BNSF Terminal Tacoma Washington-
605 Puyallup Ave.
Tacoma WA 98421

Dear Mr. Burns and Ms. Seeburger:

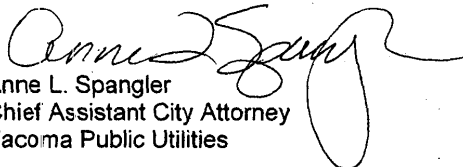
Attached to this letter please find a copy of a Notice to Employees that has been prepared by the City of Tacoma's Tacoma Municipal Belt Line (TMBL), relating to the TMBL's proposed acquisition of freight service on several of The Burlington Northern & Santa Fe's lines.

This notice was prepared to comply with 49 C.F.R. §1150.42, and must be posted at the workplace of the employees on the affected lines at least 60 days before the date the transfer is expected to be effective. It is my understanding that BNSF wishes to have the transaction completed by September 30, 2004. Therefore, we are required to have this notice posted no later than Friday, July 30, 2004.

I appreciate your assistance in having this notice posted for employees of the Brotherhood of Locomotive Engineers and Trainmen, the Brotherhood of Maintenance of Way Employees, the Brotherhood of Railroad Signalmen, and the United Transportation Union. We are separately service copies of this notice on the national headquarters of these unions.

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

Sincerely,


Anne L. Spangler
Chief Assistant City Attorney
Tacoma Public Utilities

cc: Dennis Dean
Mark Crisson

July 29, 2004

City of Tacoma, Department of Public Utilities, Belt Line Division, also known as the Tacoma Municipal Belt Line, TMBL (dba Tacoma Rail)

NOTICE TO EMPLOYEES OF THE BURLINGTON NORTHERN & SANTA FE RAILROAD

Pursuant to Surface Transportation Board regulations at 49 C.F.R. § 1150.42(e), the City of Tacoma, Department of Public Utilities, Belt Line Division, also known as the Tacoma Municipal Belt Line, TMBL (dba Tacoma Rail), hereby provides notice to the employees of The Burlington Northern & Santa Fe Railroad (BNSF), that it intends to acquire by lease and easement and operate freight service on approximately 27 miles of BNSF's line of railroad as follows, effective September 30, 2004:

1. Tacoma Rail will acquire BNSF's freight rail easement on the Lakeview Subdivision between South Tacoma (MP 2.7) and Lakeview Junction (MP 7.9) and between West Lakeview Junction (MP 0.0) and Nisqually (MP 11.5), Washington State, BNSF to retain overhead trackage rights.
2. Tacoma Rail will lease BNSF's Quadlok (MP 3.27) to St. Claire (MP 0.0), and Belmore (MP 16.0) to East Olympia (MP 0.0), Washington, lines, including BNSF trackage rights over six miles of Union Pacific track, and trackage rights over the BNSF main line between Nisqually, St. Claire and East Olympia.

Tacoma Rail will assume the BNSF's rights and obligations under all existing rail freight transportation contract on the same terms as provided in these contract to the extent the contracts relate to rail service which is or could be provided over all or a portion of the rail line that has been acquired by Tacoma Rail.

As a result of its agreements, Tacoma Rail expects to hire approximately 5 employees, including 1 locomotive engineer, 1 conductor/switch supervisor, 1 switch operator, 1 track inspector/trackman, and 1 other operating employee. This estimate is preliminary and is subject to modification prior to commencing operations.

Employees will be provided wages and benefits in accordance with the City of Tacoma's ordinances and policies. Tacoma Rail will select employees in accordance with its regular civil service hiring procedures, and in accordance with all federal, state and local equal opportunity laws. Employees will be selected on the basis of skills and aptitudes required for each position. Successful candidates must have a stable work record and demonstrate a commitment to safety and customer service. Successful applicants will be required to pass a pre-employment drug and alcohol screen, and may be required to take a physical examination.

BNSF employees interested in seeking employment with Tacoma Rail should contact Mr. Dennis Dean at (253) 502-8891.