

43216  
DO

SERVICE DATE – LATE RELEASE AUGUST 22, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35731

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.—ACQUISITION AND  
OPERATION EXEMPTION—WOODINVILLE SUBDIVISION

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

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN KING COUNTY,  
WASH. (WOODINVILLE SUBDIVISION)

Decided: August 22, 2013

This decision grants in part the motion of the City of Kirkland, Wash. (the City), asking the Board to compel Ballard Terminal Railroad Company, L.L.C. to produce documents responsive to the City's discovery requests, and to issue subpoenas to Eastside Community Rail, LLC, and Doug Engle,<sup>1</sup> to produce documents likewise responsive to the City's discovery requests.

BACKGROUND

On April 2, 2013, Ballard Terminal Railroad Company, L.L.C. (Ballard), a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10902 to acquire the residual common carrier rights and obligations, including the right to reinstitute rail service, and the physical trackage assets on a line of railroad (the Line) currently owned by the City and the Port of Seattle (Port) in King County, Wash., and currently subject to interim trail use/railbanking under the National Trails System Act, 16 U.S.C. § 1247(d).<sup>2</sup> The

---

<sup>1</sup> To ensure a complete record, the Board interprets the City's motion to include a request to issue subpoenas to Eastside Community Rail, LLC and Mr. Engle individually.

<sup>2</sup> In its request to withdraw as a party filed on August 14, 2013, the Port clarifies that it no longer owns any property interests in the Line, having conveyed (1) an easement over the majority of the Line in April 2012 to Central Puget Sound Regional Transit Authority, including fee title to approximately 1.1 miles of the Line, (2) its interest in a 5.75-mile portion of the Line to the City in April 2012, and (3) its remaining interests in the Line to King County in February 2013.

petition for exemption was filed concurrently with a Ballard petition to partially vacate the Notice of Interim Trail Use issued in Docket No. AB 6 (Sub-No. 465X) for the Woodinville Subdivision (which comprises the Line and an additional 1.35 miles), pursuant to which King County is the trail sponsor.

In a decision served and published in the Federal Register on April 19, 2013, the Board instituted an exemption proceeding pursuant to 49 U.S.C. § 10502(b) and sought comments from interested persons on Ballard's petitions. Pursuant to the schedule set there, comments were due by June 18, 2013, and replies by July 18, 2013.<sup>3</sup>

On June 12, 2013, the City filed an emergency motion requesting the Board to issue an order compelling Ballard to produce documents requested in discovery, and subpoenas directing third parties Eastside Community Rail, LLC (ECR) and its Managing Director, Mr. Engle,<sup>4</sup> to produce certain communications. Specifically, the City requests the Board to compel Ballard to produce the following: (1) all communications between Ballard and its agents and Mr. Engle; (2) all communications related to the Line and the Freight Segment (a 14-mile segment connecting with the Line at Woodinville) between Ballard and its agents and the Port; (3) all communications related to the Line and the Freight Segment between Ballard and its agents and Kathy Cox;<sup>5</sup> and (4) all of Ballard's financial statements, including tax returns and internally prepared statements, as well as statements prepared by an accounting firm. The City further requests the Board to issue subpoenas to ECR and Mr. Engle to produce all communications related to the Line and/or the Freight Segment between Mr. Engle and Ballard and its agents, the Port and its agents, and Ms. Cox. Finally, the City argues that, to the extent Ballard, ECR, or Mr. Engle claim that a communication is privileged, that party should produce a privilege log setting forth the specific facts for each document that establish each element of the privilege claimed.

---

<sup>3</sup> On May 8, 2013, Ballard filed a motion for preliminary injunction asking the Board to enjoin the City from removing the track assets on the portion of the Line owned by the City pending completion of the petition proceedings. The City, King County, and Central Puget Sound Regional Transit Authority replied in opposition. That motion was denied by a decision served on August 1, 2013.

<sup>4</sup> The City explains that ECR holds a long-term freight easement on the contiguous rail line between Woodinville and Snohomish, Wash., which it leases to Ballard. The City further asserts that Mr. Engle is a de facto partner with Ballard in efforts to secure financing and customers for rail service on the Line.

<sup>5</sup> According to the City, Ms. Cox is the proponent of an excursion train that would be operated by Ballard on the Line and the Freight Segment, and she worked to encourage Ballard to pursue a federal injunction against the City. (Motion to Compel 9.)

In its motion, the City requested that the Board issue an order and subpoenas no later than June 14, 2013, directing Ballard, ECR, and Mr. Engle to produce the responsive documents by 9:00 am PDT on June 17, 2013, in light of the then-current June 18, 2013 comment deadline in the exemption proceeding. In a decision served on June 14, 2013, the Board directed that any replies to the City's motion were due no later than June 19, 2013, as opposed to the 20-day response time provided in 49 C.F.R. § 1104.13(a). The Board also held the procedural schedule in the exemption proceeding in abeyance pending further order.

On June 19, 2013, Ballard and ECR filed a joint reply to the City's motion, characterizing the City's depositions and discovery requests as overly broad and burdensome.<sup>6</sup> Ballard and ECR argue that they have already provided extensive testimony and documents pertaining to all issues relevant to this proceeding, and that any further production of documents would only add to the excessive discovery burdens they have endured thus far.<sup>7</sup> Specifically, they provide the following objections to the discovery requests: (1) the relevant time period should not extend back to January 1, 2008, as requested by the City, because ECR did not obtain an easement on the Freight Segment until September 2012, and only then did Ballard and ECR pursue plans to reinstitute freight service on the Line; (2) documents and communications pertaining to the Freight Segment are irrelevant to the proceeding because Ballard's operations on the Freight Segment are not at issue in this proceeding and thus need not be produced; (3) there are no unique circumstances here that warrant production of a privilege log; (4) Ballard should not bear the burden of producing copies of its communications with the Port because the City can obtain those copies from the Port directly, and because ECR's and the Port's performance of their obligations under their Operation & Maintenance (O&M) Agreement is not relevant to this proceeding; and (5) the City's demand for tax returns is intrusive, hostile, and harassing, and Ballard has already produced a revenue summary for 2012.

## DISCUSSION AND CONCLUSIONS

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aban.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al.

---

<sup>6</sup> Concurrently, Ballard and ECR filed a motion to adopt a protective order agreed upon by all parties to ensure that confidential or proprietary material produced in response to discovery requests will be used only in connection with this proceeding. That motion was granted in a decision served on August 21, 2013.

<sup>7</sup> Ballard asserts that on the date the City filed its motion to compel, Ballard produced 111 documents in addition to the 46 it had already provided, and as such, that it has now produced all relevant communications with Mr. Engle, ECR, and Ms. Cox. (Reply 2-3.)

(STB served Nov. 14, 2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2). While some elements of the City’s discovery requests meet this standard, others do not.

With respect to the relevant time period, the Board will not direct Ballard, ECR, and Mr. Engle to produce responsive communications dating back to January 1, 2008. The City has not shown how communications dating back that far are relevant to this proceeding, and further, Ballard and ECR have asserted that they only began to pursue plans to reinstitute freight rail service on the Line in September 2012. Therefore, in order to allow the City to assess the veracity of that assertion, yet limit the scope of the request to relevant documents, the Board will direct Ballard, ECR, and Mr. Engle to produce responsive communications dating back to September 1, 2011.

The Board will further direct Ballard, ECR, and Mr. Engle to produce responsive communications related to the Freight Segment. Ballard has stated that it operated the Freight Segment for years as an agent first for GNP RLY, Inc. and later for ECR prior to seeking and obtaining the Board’s authorization to lease the Freight Segment from ECR in April 2013.<sup>8</sup> Ballard’s claim that its operations on the Freight Segment are not “germane” to the issues involved in this proceeding conflicts with its own statement that potential shippers on the Line would be served by the Line, then via the Freight Segment to ultimate interchange with BNSF.<sup>9</sup> Under these circumstances, the Board finds communications related to the Freight Segment relevant to the instant proceeding.

The Board will also direct Ballard and its agents, ECR, and Mr. Engle to produce responsive communications between themselves, and the Port and its agents. The City argues that the Port-owned Freight Segment is “critical to operation on the Line because it provides the only means for in- and out-bound movement on the Line.”<sup>10</sup> The City further asserts that the Port notified ECR that ECR is in material breach of the parties’ O&M Agreement. The Port’s relationship with Ballard, ECR, and the Line involving use of the Freight Segment demonstrates the relevance of the requested communications to this proceeding.

The Board is not persuaded by Ballard’s objection that it should not be required to produce responsive communications with the Port based on the claim that those documents are available from the Port itself. The City has requested relevant communications in the possession of Ballard, ECR, and Mr. Engle, which the City itself does not possess and which are not

---

<sup>8</sup> Pet. for Exemption 2; Motion for Preliminary Injunction 3-4.

<sup>9</sup> Pet. for Exemption, Verified Statement of Byron Cole 2.

<sup>10</sup> Emergency Motion to Compel 7.

necessarily in the possession of the Port. Moreover, the case cited by Ballard and ECR in support of their objection to producing such communications is distinguishable on its facts. In Amstar Corp. v. The Alabama Great Southern Railroad, No. 38239S (ICC served July 14, 1989), the Interstate Commerce Commission declined to force defendants to answer unnecessary and burdensome interrogatories when the information was already in the plaintiff's possession or independently available from an identified source. Accordingly, the Board will direct Ballard, ECR, and Mr. Engle to produce the requested communications in accordance with this decision.

To the extent that Ballard, ECR, or Mr. Engle claims a communication is privileged, the Board will direct Ballard, ECR, or Mr. Engle to produce a privilege log setting forth the specific facts for each document that establish the privilege claimed. While the Board does not routinely require the production of a privilege log, the responses from Ballard and ECR suggest that privilege may have been waived in some communications. Thus, production of privilege logs is appropriate.<sup>11</sup>

Finally, the Board will not direct Ballard to produce its tax returns or financial statements dating back to 2008, as the City has not demonstrated the relevance of all such documents for the requested time period. The Board will, however, direct Ballard to produce summaries of its revenue, expenses, and costs for 2011 and 2013 to date, as it did for 2012, to correspond with the time period applied to the production of communications. Ballard's financial status is relevant to this proceeding in determining whether Ballard is a bona fide petitioner.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's motion to compel Ballard to produce certain documents is granted to the extent discussed above.
2. The City's motion to issue subpoenas to ECR and Mr. Engle to produce certain documents is granted to the extent discussed above.
3. Ballard is directed to produce all responsive communications between itself and its agents and the Port and its agents, Ms. Cox, and Mr. Engle, including those related to the Freight Segment, dating back to September 1, 2011.
4. ECR is directed to produce all responsive communications between Mr. Engle and Ballard and its agents, the Port and its agents, and Ms. Cox, including those related to the Freight Segment, dating back to September 1, 2011.

---

<sup>11</sup> See Joint Reply 9.

5. Mr. Engle is directed to produce all responsive communications between himself and Ballard and its agents, the Port and its agents, and Ms. Cox, including those related to the Freight Segment, dating back to September 1, 2011.

6. Ballard, ECR, and Mr. Engle are directed to produce privilege logs in the event responsive communications are withheld on the basis of privilege.

7. Ballard is directed to produce financial statements in the form of summaries of its revenue, expenses, and costs for 2011 and 2013 to date.

8. The procedural schedule will be restarted and revised to allow for the filing of comments and replies.

9. Ballard, ECR, and Mr. Engle will have 20 days from the service date of this decision to produce the above-described documents.

10. Comments on Ballard's petitions are due October 1, 2013.

11. Replies to comments are due October 21, 2013.

12. This decision is effective on the date of service.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.