

**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**

**REPLY OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD
COMPANY, L.L.C.'S PETITION FOR RECONSIDERATION**

Communications with respect to this pleading should be addressed to:

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: csputulnik@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: September 11, 2013

234795
234796
ENTERED
Office of Proceedings
September 11, 2013
Part of
Public Record

**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**

**REPLY OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD
COMPANY, L.L.C.’S PETITION FOR RECONSIDERATION**

Pursuant to 49 C.F.R. § 1115.3 and 49 C.F.R. § 1104.12, King County, Washington, a political subdivision of the State of Washington (the “County”) and Central Puget Sound Regional Transit Authority (“Sound Transit”), file this Reply to the Petition for Reconsideration filed by Ballard Terminal Railroad Company, L.L.C. (“BTR”) on August 22, 2013 in the above-captioned dockets (“Petition”)¹. BTR’s Petition seeks reconsideration of the Board’s August 1, 2013 decision denying BTR’s request to enjoin the City of Kirkland from salvaging railroad tracks and ties on a 5.75 mile portion of the railbanked line located in, and owned by, the City of Kirkland (the “Line”). *Ballard Terminal R.R. Co., L.L.C. —Acquisition and Operation Exemption—Woodinville Subdivision, FD 35731, et al.* slip op. at 5 (STB served Aug. 1, 2013) (“August 1 Decision”).

¹ Pursuant to 49 C.F.R. § 1115.3(e), BTR’s Petition was due on August 21, 2013. BTR submitted its Petition after 5:00 p.m. Eastern Daylight Time on August 21, 2013 and the Board deemed it filed on August 22, 2013. Pursuant to 49 C.F.R. § 1104.6, BTR’s Petition was not filed within the time required by 49 C.F.R § 1115.3(e).

INTRODUCTION

BTR's Petition for Reconsideration asserts that the Board's August 1 denial of BTR's Motion for Preliminary Injunction rests on "material error" — specifically, that when the Board issued its June 14 Order² suspending the procedural schedule in these dockets, the Board somehow prevented unnamed "interested parties" from presenting comments in support of BTR's petitions in these dockets. In fact, however, the June 14 Order did not bar additional comments; rather, it eliminated a deadline for such comments, effectively extending the time for "interested parties" to comment.

Ultimately, the timing of third-party comments is irrelevant to the question whether the June 14 Order led to "material error" in the Board's August 1 decision denying BTR's requested injunction. As the party seeking injunctive relief, BTR had the burden to produce evidence demonstrating a likelihood of success on the merits of its Motion. In fact, BTR submitted two substantive Replies and over 60 pages of evidence in support of its Motion for Preliminary Injunction – all *after* the Board suspended the procedural schedule. Plainly, the June 14 Order did not prevent BTR from presenting any evidence to support its Motion for Preliminary Injunction, much less prevent "interested parties" from filing comments on the merits if they so wished. Accordingly, the June 14 Order did not lead to any "material error" in the Board's August 1 Decision.

In any event, none of the information BTR now presents justifies reconsideration. BTR asserts that its financial condition is stronger than the Board found. To support this, however, BTR offers only unsubstantiated assertions that it had a good year last year, has access to capital, and can afford to initiate service. But BTR offers no sworn testimony or financial statements to

² *Ballard Terminal R.R. Co., L.L.C.—Acquisition and Operation Exemption—Woodinville Subdivision*, FD 35731, *et al.* (STB served June 14, 2013) ("June 14 Order").

counter the sworn deposition testimony of BTR's own principals upon which the Board relied. More significant than what BTR now asserts, however, is what it *fails* to assert. BTR again fails to explain how it intends to acquire the property rights it would need to use the Line and how it intends to pay for the "substantial" cost of acquisition. BTR's Petition for Reconsideration simply provides no evidence that could "materially affect" the Board's August 1 conclusion that BTR lacks the financial capacity to execute its proposal.

Similarly, BTR asserts that there is new evidence of shipper demand. But most of that so-called evidence is a repackaged version of the earlier evidence the Board found insufficient – expressions of interest regarding conceptual future construction contracts in Bellevue that may never materialize. Mr. Engle, who is not an officer, director, or even employee of BTR, asserts that he expects General Mills to request BTR to provide service to a Safeway bakery located on the Line but presents no evidence to support that assertion other than hearsay and hope. BTR also produces letters from RJB Wholesale indicating an interest in service, but that information pre-dates the Board's August 1 Decision (and BTR's June 25 Reply in further support of its Motion for Preliminary Injunction) and thus is not new evidence. In any event, it does not materially affect the Board's decision because RJB Wholesale does not have access to the Line and its potential demand of 2-3 cars a month is simply insufficient to overcome the Board's conclusion that BTR does not have the financial ability to implement the proposed service.

In seeking injunctive relief, BTR bore the burden of proof that it would succeed on the merits of its petitions. Nothing in the Board's June 14 Order prevented BTR from submitting evidence to meet that burden, including but not limited to comments or other statements from "interested parties." Because there was no material error, and because BTR's "new" evidence

does not justify reconsideration of the Board’s August 1, 2013 decision denying the requested injunction, the Petition should be denied.

ARGUMENT

Pursuant to 49 C.F.R. § 1115.3(b), a petition for reconsideration will only be granted upon a showing that the “prior action will be affected materially because of new evidence or changed circumstances” or that “the prior action involves material error.” As Petitioner, BTR bears the burden of demonstrating that the Petition meets those standards. *See Allegheny Valley R.R. Co.—Petition for Declaratory Order*, FD 35239, slip op. at 3 (STB served July 16, 2013) (denying petition because petitioner failed to meet burden of proof). This is a heavy burden. As the Board has explained in construing similar language regarding “materiality” in 49 C.F.R. § 1115.4: “The alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its prior decision in this case.” *Canadian Nat’l Ry. Co. and Grand Trunk Corp. —Control—EJ&E West Co. [Barrington Petition for Mitigation]*, FD 35087 (Sub-No. 8), slip op. at 8-9 (STB served Nov. 8, 2012). Thus, “the issue before us here is whether [Petitioner’s] claims of new evidence and material error warrant a different result” *Id.* at 9. BTR does not meet that standard.

A. The Board’s August 1 Decision Does Not Rest On Material Error

BTR argues that the Board committed material error when it suspended the procedural schedule on June 14, 2013 pending resolution of a Motion to Compel Production of Documents filed by the City of Kirkland. Petition at 1. BTR claims that by suspending the deadline for filing Comments in these dockets, the Board somehow prevented unnamed “interested parties” from submitting comments and thus deprived BTR of the ability to present all the evidence it needed to support its request for injunction. *Id.*

This argument is utterly without merit, and fails for the simple reason that the June 14 Order did not impair BTR’s ability to present evidence to support its Motion for Preliminary Injunction. The Board’s June 14 Order suspending the procedural schedule on the merits did not suspend the briefing on the Motion for Preliminary Injunction, did not prevent BTR from introducing evidence to support its injunction motion, did not prevent “interested parties” from filing comments on the merits, or did not prevent BTR from presenting evidence in support of its Motion for Preliminary Injunction.³ Indeed, the Board’s June 14 Order did not address the pending Motion for Preliminary Injunction or purport to affect the parties’ ability to submit evidence regarding that Motion.

In fact, BTR subsequently sought and received leave to file a reply to a reply in further support of its Motion for Preliminary Injunction.⁴ *Ballard Terminal R.R. Co., L.L.C.—Acquisition and Operation Exemption—Woodinville Subdivision, FD 35731, et al., Motion for Leave to File Reply to King County, Washington, City of Kirkland, Washington, and Puget Sound Regional Transit Authority’s Replies to Motion for Preliminary Injunction* (Filed June 25, 2013). In its Reply, BTR presented additional evidence to the Board, attaching approximately 65 pages of exhibits in support of its Motion. BTR apparently chose not to attach the letters from RJB Wholesale and Mr. Nerdrum, dated June 17 and 15, respectively.⁵ BTR, not any action by

³ BTR fails to explain what “material error” the Board allegedly committed in suspending the procedural schedule while it considered Kirkland’s motion to compel. On its face, it is eminently reasonable to suspend the deadline for submitting comments on the merits pending resolution of a discovery dispute. Contrary to BTR’s assertion, Kirkland’s motion was not “spurious,” as the Board made clear when it *granted* the motion. *Ballard Terminal R.R. Co., L.L.C.—Acquisition and Operation Exemption—Woodinville Subdivision, FD 35731, et al.* (STB served Aug. 22, 2013). In any event, if BTR felt that the June 14 decision improperly limited its ability to argue its Motion for Preliminary Injunction, BTR should have sought reconsideration of that decision, rather than wait for the Board to rule on the Motion for Preliminary Injunction and then claim that the prior June 14 decision somehow undercut that later decision on the injunction.

⁴ BTR needed the Board’s permission to file that reply because the STB normally does not allow a reply to a reply. 49 C.F.R. § 1104.13(c). But it was the Board’s rules—not the June 14 Order—that imposed that stricture on BTR.

⁵ Mr. Nerdrum and RJB Wholesale claim that they submitted their June 15th and June 17th letters to the Board and that the Board failed to consider them. Counsel has reviewed the Docket in these matters and finds no record that

the Board, was responsible for that choice. Further, on July 15, BTR filed its Reply to Kirkland's Motion for Expedited Ruling on BTR's Motion for Preliminary Injunction, but once again BTR chose not to present any further evidence it may have possessed.

In seeking injunctive relief, BTR had the burden to submit evidence showing (among other things) a likelihood that BTR would succeed on the merits of its underlying petitions. *See American Chemistry Council v. Alabama Gulf Coast Ry.*, slip op. at 4, NOR 42129 (STB served May 4, 2012) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). While any "interested party" could have filed comments on the merits at any time, it was BTR's obligation to independently produce evidence in support of its motion. BTR had multiple opportunities to present the evidence now attached to its Petition for Reconsideration, but apparently chose not to do so. The Board's order suspending the overall procedural schedule, made necessary by BTR's own failure to follow the Board's discovery rules, simply did not impair in any way BTR's ability to present evidence in support of its injunction request. There was no material error.

B. BTR Has Not Presented Any Evidence That Could Materially Affect the August 1 Decision

BTR also bears the burden of showing that there is new information that would lead the Board to reach a different conclusion than it did in its August 1 Decision. In considering new evidence in the context of the Section 1115.3 Petition, the Board has indicated that reliance on hearsay and unsupported assertions will not undercut conclusions based on sworn, first-hand

the letters were filed. Further, counsel was never served with a copy. This is difficult to understand, particularly with respect to Mr. Nerdrum, who is a principal of BTR and therefore represented by counsel who certainly know how to file and serve documents. In addition, nothing prevented BTR from attaching those letters to its June 25, 2013 Reply in support of its Motion for Preliminary Injunction or its July 15 Reply to Kirkland's Motion for Expedited Consideration, or from referring to them if they had been previously filed.

testimony. *See Middletown & New Jersey RR, LLC—Lease and Operation Exemption—Norfolk Southern Ry. Co.*, FD 35412, slip op. at 4 (STB served May 2, 2012) (unverified statements and hearsay statements were insufficient to indicate material error in relying on objectively credible statements based on first-hand knowledge). None of the so-called evidence now offered by BTR meets this burden.

1. BTR Has Failed to Present New Evidence That Could Materially Affect The Board’s Decision that BTR Is Not in a Financial Position to Reinstate Service

In its August 1 Decision, the Board, relying primarily on the sworn testimony of BTR’s principals, found that BTR “does not appear to be in a financial position to reinstitute service.” Slip op. at 5. The Board found further that BTR’s precarious finances made it unlikely that BTR could carry out the proposed project or afford the “substantial” cost of acquiring the necessary right-of-way. *Id.* None of the information proffered by BTR materially affects those conclusions.

First, the three main documents relating to BTR’s financial condition, Petition, Tabs 1, 2 and 5, are unsworn opinions from Mr. Engle, BTR’s principal Mr. Nerdrum, and a financial consultant working for BTR, Mr. Behr. Although Mr. Engle and Mr. Nerdrum claim that BTR is no longer operating at a loss and that it has access to capital, they provide no evidence that BTR is generating sufficient revenue, or has access to sufficient capital, to initiate or carry out the proposed service. BTR presents no new financial statements, no evidence of cash or available credit, no budget for the proposed new service, and no concrete evidence to overcome the sworn testimony of BTR’s principals upon which the Board relied. Most of the documents are little more than optimistic assumptions about future market demand with virtually no evidence of current financial capability. Indeed, most of the financial and market information summarized in, and attached to, Mr. Engle’s letter is repeated or rehashed speculation that BTR previously

offered and that the Board previously found insufficient.

Second, even taking as true BTR's assertions that it can afford to initiate and operate the rail service itself, BTR continues to offer no explanation as to how it would acquire the right-of-way or pay the "substantial" cost of acquiring those rights. As the August 1 Decision makes clear, acquiring access to the right-of-way is a necessary element of establishing that BTR is a bona fide carrier. *August 1 Decision*, slip op. at 5. Without the property rights to use the Line, BTR cannot initiate or carry out its plan; even if BTR could afford to operate trains on the Line, there is no evidence that it can afford the "substantial" costs of acquiring the property rights necessary to use the Line. Accordingly, the Petition fails to present evidence that would materially affect the Board's August 1 Decision.

2. BTR Has Failed to Present New Evidence That Could Materially Affect The Board's Decision that There is Insufficient Shipper Demand to Reinstate Service

BTR also argues that it has new evidence of shipper demand that materially affects the Board's August 1 Decision. As detailed below, none of the so-called evidence of shipper demand is insufficient to materially affect the Board's August 1 finding that "there is [no] demand to reactivate rail service over the Line." *August 1 Decision*, slip op. at 5.

General Mills/Safeway. Mr. Engle claims that General Mills is about to request service to a Safeway bakery located on the Line. Petition, Tab 1 at 3. But Mr. Engle provides no documentary evidence of this impending request and implicitly concedes that no request has yet been made. Given that Safeway voluntarily stopped receiving shipments by rail in Bellevue prior to BNSF's abandonment, *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, AB-6 (Sub-No. 465X), slip op. at 3 (STB served Nov. 28, 2008) ("NITU Order"), Mr. Engle's assertion is difficult to accept at face value. In any event, his assertion rests on hearsay and speculation and cannot itself establish the existence of shipper demand.

RJB Wholesale. RJB Wholesale expresses an interest in receiving shipments of pipe and other material to its facility in Kirkland. Petition, Tab 3. First, this does not appear to be new information because RJB Wholesale claims that it expressed interest no later than June 17. BTR cannot base its Petition on information it did not timely provide. Moreover, it is curious that RJB Wholesale had never before requested service, despite having been located on the Line for a number of years.

Second, the existence of possible request for service amounting to 2-3 cars per month hardly demonstrates evidence of adequate demand to justify reactivation. *See Norfolk and Western Ry. Co.—Abandonment Exemption—In Cincinnati, Hamilton County, OH, AB-290* (Sub-No. 184X), slip op. at 8-10 (STB served May 13, 1998) (rejecting exemption petition when “there exist overriding public purposes sufficient to justify our withdrawing our jurisdiction” and the claim of freight demand was “neither persuasive nor meritorious”); *Denver & Rio Grande Railway Historical Found.—Adverse Abandonment—In Mineral County, CO, AB-1014*, slip op. at 7-12 (STB served May 23, 2008) (after “closely” examining “alleged prospects for [freight] service” and finding such claims “to be unsubstantiated,” Board denied request in favor of other public projects).

Third, there is no spur onto RJB Wholesale’s property. Based on the map attached to the Petition at Tab 3, p. 4, RJB Wholesale appears to have only a small frontage on the Line, raising the question of whether a spur could be constructed, whether RJB Wholesale or BTR would have to acquire more property, or whether the costs of construction would make economic sense. The Board has previously noted that a purported shipper’s access to a line is a material consideration in evaluating alleged shipper demand in the reactivation context. *See GNP Ry., Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision, FD 35407*,

slip op. at 6, n.6 (STB served June 15, 2011) (lack of existing industrial track and switches to putative shippers supported a finding that the railroad was not a bona fide petitioner for reactivation purposes). Finally, even if RJB Wholesale is a genuine potential shipper, it would not make BTR a bona fide Petitioner because the small volume RJB Wholesale suggests it might ship would not generate enough revenue to undermine the Board's well-founded conclusions that (1) BTR cannot afford the "substantial" cost of acquiring the necessary interest in the right-of-way and (2) BTR lacks the financial means to initiate and carry out its proposed service.

CT Sales. BTR claims that CT Sales would like to use rail to ship building supplies to possible future customers in Bellevue. Petition, Tab 1 at 3. CT Sales is not located on the Line; it is located on the Freight Segment of the Woodinville Subdivision, well north of the Line.⁶ There does not appear to be a spur or siding giving CT Sales access to the Line. More fundamentally, CT Sales' anticipated use appears to depend entirely on it obtaining future contracts to sell construction materials for use in unidentified future projects. There is no current demand or need for service. CT Sales is no different than any other putative shipper on the Freight Segment, like Wolford Trucking, which the Board already found to be insufficient.

Snohomish County. BTR proffers a letter from Snohomish County Public Works generally describing a need for fill material for a project in Snohomish County, many miles from the Line. Petition, Tab 1, Attachment E. The letter speculates that such fill could come from construction projects in Bellevue and could be hauled by rail. But the letter makes clear that (1) fill from Bellevue may not meet Snohomish County's technical standards for fill material and (2) that any decision to ship any potential fill would be made solely by an as-yet unknown entity who may win an as-yet unannounced potential future public bidding process. By its own terms,

⁶ CT Sales' postal address is 7227 West Bostian Road, Woodinville, WA 98072, which is on the Freight Segment, in the Maltby area of unincorporated Snohomish County, Washington, near Wolford Trucking and Demolition.

the letter is not a request for service and the letter makes clear the speculative nature of any future deliveries of fill to Snohomish County from any area near the Line. As with Wolford and CalPortland, Snohomish County is not a shipper requesting service on the Line.

CalPortland. BTR attaches another letter from CalPortland, Petition, Tab 4, that simply summarizes the purported benefits of shipping by rail. It is not a request for service and does not materially change the Board's August 1 conclusion that CalPortland has not requested service.

At bottom, BTR's "new evidence" of shipper demand consists of little more than rehashing its theory that demand will materialize driven by unidentified, potential future construction projects in Bellevue and hopeful speculation about the return of a long-absent shipper. At most, BTR offers evidence that one shipper is interested in the possibility of service. But the possible level of service appears to be far below a level of economic viability and it is not clear that RJB Wholesale has sufficient property on which to construct a spur and accept service, much less any agreement or plan to construct a spur. None of that is sufficient to justify reconsideration of the Board's August 1 Decision.

C. None of BTR's Additional Arguments Offered Justify Reconsideration of the August 1 Decision

In addition to the arguments set forth in the Petition itself, BTR presents a lengthy unsworn letter from Mr. Engle, Petition, Tab 1, that purports to show that BTR is a bona fide railroad. First, Mr. Engle is not a principal, officer, or employee of BTR, making it unclear whether he is providing firsthand knowledge or mere hearsay. Second, as demonstrated above, none of the information presented by BTR in general, or by Mr. Engle in particular, undermines the Board's conclusions that BTR lacks the financial capacity and shipper demand to be considered a bona fide railroad for purposes of reactivation. Beyond the hearsay assertions of financial capacity and shipper demand, Mr. Engle's letter is little more than a restatement of the

general reasons why Mr. Engle believes that reactivation is good idea, which the Board has already found to be insufficient. For example, Mr. Engle repeats the argument that shipping by rail is “greener” than shipping by truck, and that rails and trails is a viable concept. Similarly, Mr. Engle outlines Eastside Community Rail’s separate plans for the Line beyond freight service, including an excursion train and possible commuter service.⁷ BTR previously raised those points, and the Board rejected them in the August 1 Decision. They are necessarily insufficient to merit reconsideration of that Decision.

CONCLUSION

Because BTR has failed to demonstrate that the Board’s August 1, 2013 Decision rested on material error or that new evidence exists that would materially change the Board’s Decision, BTR’s Petition should be denied.

Respectfully submitted,



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

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

Dated: September 11, 2013

⁷ Mr. Engle also repeats BTR’s argument that King County is the “fox guarding the henhouse” and that one King County official allegedly expressed the notion that freight is a “non-starter.” This argument is not material to the Petition for Reconsideration because the alleged opinions of individual King County officials are irrelevant to the key question of whether BTR is a bona fide railroad. King County notes, however, that Mr. Engle’s assertions are absolutely false, as Mr. Engle should know based on King County’s responses to Interrogatories and Requests for Admission served on BTR on July 19, 2013, in which King County Councilmember Jane Hague denied making such statements. The County will further address Mr. Engle’s assertions in the County’s Comments on the merits.

CERTIFICATE OF SERVICE

I hereby certify that I am providing a copy of REPLY OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD COMPANY, L.L.C.'S PETITION FOR RECONSIDERATION upon the following parties of record by email and by first class U.S. mail, postage prepaid and properly addressed:

Myles L. Tobin, Esq.
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
Attorney for Ballard Terminal Railway LLC

Matthew Cohen
Hunter Ferguson
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
Attorneys for City of Kirkland

Tom Montgomery
Montgomery Scarp PLLC
1218 3rd Ave # 2700
Seattle, WA 98101
Attorney for Ballard Terminal Railway LLC

Oskar Rey
Kirkland City Attorney's Office
123 5th Ave
Kirkland, WA 98033
Attorney for City of Kirkland



W. Eric Pilsk
Kaplan Kirsch & Rockwell, LLC
Counsel for King County, Washington and Central
Puget Sound Regional Transit Authority

Dated this 11th day of September, 2013