

BEFORE THE SURFACE TRANSPORTATION BOARD

234245
234246
ENTERED
Office of Proceedings
May 16, 2013
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 TERMINATL RAILROAD COMPANY, LLC – ACQUISITION AND OPERATION
EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION PURSUANT
TO 49 U.S.C. § 10502**

**RESPONSE OF CALPORTLAND TO EMERGENCY MOTION OF KING COUNTY, WASHINGTON TO
COMPEL THE ATTENDANCE OF MICHAEL SKRIVAN AT A DEPOSITION, OR, IN THE
ALTERNATIVE, TO ISSUE A SUBPOENA COMPELLING HIS ATTENDANCE.**

Non-party CalPortland Company (“CalPortland”) opposes the motion of King County seeking an order compelling the deposition of CalPortland employee Michael Skrivan or in the alternative requesting a subpoena compelling his attendance at a deposition at a mutually convenient time and place prior to May 20, 2013.

King County fails to establish that it is entitled to an order compelling Mr. Skrivan’s attendance for a number of reasons. Under the rules of the Surface Transportation Board (“Board”), discovery is not permitted in an informal proceeding. 49 C.F.R. § 1114.21(a). The rules also state that a rail exemption proceeding such as this one is an informal proceeding. 49 C.F.R. § 1121.4(a). Thus, no discovery is permitted here.

King County contends that it can compel a non-party witness to attend a deposition without any prior Board approval. According to King County, not even a subpoena is required. Clearly, that is not so. All adjudicative bodies require subpoenas in order to compel non-parties to participate in a legal proceeding. Indeed, here, King County believed a subpoena was required and issued one to Mr. Skrivan.

In addition, King County’s subpoena is unenforceable, and cannot justify a compulsion order from the Board, because King County did not follow Board rules in issuing it. Board rules

state that only the Director of Office Proceedings or a member of the Board can issue a subpoena. 49 C.F.R. § 1113.2(a). Here, the subpoena was not issued by the Director or a member of the Board. Instead, it was issued by King County and Board rules do not permit a subpoena to be issued by a party or its attorney.

King County's alternative request for a subpoena for the deposition of Mr. Skrivan is also lacking in merit. Before a subpoena can be issued, the Board must assess the burden it would put on the non-party witness. The more attenuated he or she is to the proceeding, and the more burdensome the subpoena, the greater the showing of relevance that must be made by the party seeking the subpoena. *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, Doc. No. FD 35557 at 4 (June 25, 2012). Here, Mr. Skrivan is not a party to this proceeding and responding to it – in terms of time and money spent – is burdensome, given that it requires a deposition and the production of six different categories of documents. At the same time, King County fails to make a satisfactory showing of relevance. Indeed, it provides no basis for why it needs Mr. Skrivan to produce six different categories of documents. It attempts to justify the deposition, but merely cites the fact that Mr. Skrivan's letter is one piece of information – among many – that the Board may (or may not) consider in deciding whether to reactivate the rail line. Under this rationale, any person who submits a letter in support of a petition could be hauled into a deposition against their will and be cross-examined under oath, forced to justify and defend their opinions under threat of perjury. This, of course, would have a chilling effect on the free speech rights of the public to state their opinions to government bodies on matters of public interest.¹ It would also impede the Board's process, which undoubtedly benefits immeasurably from the informal input by the public and, for that reason, invites the comments in the first place. Particularly in light of the compelling interests that are jeopardized by King County's subpoena, its weak relevance argument is clearly lacking.

¹ The chilling effect is particularly acute here where the subpoena was issued by a prosecuting lawyer and requires Mr. Skrivan to appear at a courthouse to testify.

CalPortland also opposes King County's request that this deposition proceed sometime before May 20, 2013. Contrary to King County's contention, there is no emergency here. As King County acknowledges, its response to Ballard's petition is not due until June 18, 2013. Particularly since King County has not articulated why the deposition is necessary, its argument that this deposition be conducted right away is lacking. Rather, if the deposition is going to proceed, it can be conducted at a time and place convenient for Mr. Skrivan in early June. King County's reference to the motion for a preliminary injunction pending before a federal judge in the United States District Court for the Western District of Washington is irrelevant since that litigation has no bearing to the issues before the Board and therefore cannot justify the issuance of a subpoena by the Board.

For the foregoing reasons, CalPortland respectfully requests that King County's motion be denied.

Respectfully Submitted,

VERIS LAW GROUP PLLC

By 
Benjamin J. Stone
Attorneys for CalPortland

CERTIFICATE OF SERVICE

I hereby certify that I am providing a copy of the foregoing *Response of CalPortland* to Emergency Motion of King County, Washington to Compel the Attendance of Michael Skrivan at a Deposition, or, in the Alternative, to Issue a Subpoena Compelling his Attendance upon all parties of record and other interested persons by email on May 15, 2013.

Myels L. Tobin
Fletcher & Sippel LLC
29 Wacker Drive, Ste 920
Chicago, IL 60606-2832
Attorneys for Ballard Terminal Railway LLC

Matthew Cohen
Hunter Ferguson
Stoel Rives LLP
Seattle, WA 98101
Attorneys for City of Kirkland

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

Jordan Wagner
Jennifer Belk
Central Puget Sound Regional Transit
Authority
401 S. Jackson St
Seattle, WA 98104

Craig Watson
Isabel Safora
Office of General Counsel
Port of Seattle
PO Box 1209
Seattle, WA 98111

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

DATED this 15th day of May, 2013.

VERIS LAW GROUP



Benjamin J. Stone, WSBA #33436
Attorneys for CalPortland