

**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, LLC – ACQUISITION AND
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

**KING COUNTY, SOUND TRANSIT, AND KIRKLAND’S MOTION FOR LEAVE TO
REPLY TO BALLARD TERMINAL RAILROAD’S REPLY TO COMMENTS**

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Dated: December 16, 2013

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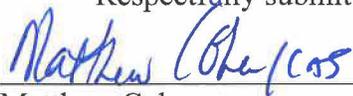
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Pursuant to 49 C.F.R. § 1117.1, King County, Sound Transit, and Kirkland (collectively, the “Regional Parties”) move for leave to reply to Ballard Terminal Railroad’s (“BTR”) Reply to the Regional Parties’ Comments filed by BTR on December 6, 2013 (“BTR’s Reply”). The Regional Parties’ proposed Reply is submitted herewith.

Although parties are not normally permitted to reply to replies (*see* 49 C.F.R. §1104.13(c)), the Board will accept a sur-reply when doing so would clarify the parties’ arguments or provide a more complete record without prejudicing any party or unduly prolonging the proceeding. *See BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, Ill.*, STB Docket No. AB 6 (Sub-No. 470X), slip op. at 1 (STB served June 4, 2010); *BNSF Railway Company – Abandonment Exemption – In Kootenai County, Id*, STB Docket No. AB-6 (Sub-No. 468X), slip op. at 1 (served Nov. 27, 2009).

These criteria are met here. For the first time in its Reply, BTR presents allegations about shipper demand and financial capacity that should have been presented in its initial petitions as required by the Board's rules (*see* 49 C.F.R. § 1121.3(a)). By waiting until the last possible moment to float its "new" allegations of freight rail demand and access to credit, BTR hopes to deny the other parties any chance to rebut BTR's contentions. The Regional Parties seek leave to file a short sur-reply so that they may briefly point out why BTR's contentions are no more credible than those BTR presented in its initial petitions, and which the Board found to be inadequate in its decision denying BTR's motion for preliminary injunction issued in these proceedings on August 1, 2013 ("August 1 Decision," slip op. at 5). The Regional Parties' Reply will not broaden the issues raised in these proceedings and therefore will not prolong this proceeding or prejudice any party to it. Accordingly, leave to file a reply to BTR's Reply should be granted.

Respectfully submitted,



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I. INTRODUCTION

During the course of the last eight months, Ballard Terminal Railroad (“BTR”) has had numerous opportunities to present credible evidence of shipper demand and demonstrate its financial capacity to provide rail service on the Line, including:

- (1) its petitions filed April 2, 2013, in which BTR was required to present its case-in-chief;
- (2) BTR’s motion for preliminary injunction filed May 8, in which BTR was required to demonstrate its likelihood of success on the merits;
- (3) its responses to Kirkland’s discovery requests served by BTR on May 8, in which Kirkland asked BTR to identify all of its prospective shippers and lenders;
- (4) its June 25 reply to the Regional Parties’ briefing in opposition to BTR’s motion for preliminary injunction;
- (5) its July 15 opposition to an expedited ruling on its preliminary injunction request;
- (6) its August 22 motion for reconsideration of the Board’s August 1 Decision denying its preliminary injunction request; or
- (7) its comments on its own petitions that BTR filed on October 24.

In all of these pleadings, BTR was obliged to present its best evidence on the key issues in these proceedings.

After building its case on evidence that the Board found deficient in its August 1 Decision, BTR now presents, in its Reply to Comments, new assertions about supposed shipper demand and its financial capacity. For example, BTR now asserts that Aggregates West, General Mills, and CT Sales have stepped forward requesting service. *See* BTR’s Reply at 6. In addition, it argues that another shortline railroad, Watco Companies, LLC (“Watco”) and two banks are “ready, willing, and able” to provide BTR with financial support. *See Id.* at 5.

BTR’s attempt to salvage its petitions by presenting these allegations and related arguments in its Reply is improper and should be rejected. The Board should not entertain, at this late date, evidence that should have been raised in BTR’s petitions. If the Board accepts these new allegations, it should nonetheless deny BTR’s petitions because none of this new information provides credible evidence of either adequate financial capacity or freight demand.

II. ARGUMENT

A. BTR’s New Evidence Is Late, Effectively Denying The Regional Parties A Meaningful Opportunity To Comment.

The Board’s rules regarding the content of petitions for exemption are clear: “A party filing for exemption shall provide its case-in-chief along with its supporting evidence, workpapers, and related documents *at the time it files its petition.*” 49 C.F.R. § 1121.3(a) (emphasis added). Under this rule, BTR was required to put forth evidence of credible freight service demand and sufficient financial capacity in its petitions filed on April 2. BTR sought to meet this burden by presenting letters from CalPortland and Wolford Trucking and asserting that it was financially stable. In discovery, however, the claims of these purported shippers and

Ballard's assertions about its financial capacity proved to be illusory. *See* August 1 Decision, slip op. at 5.

In its final pleading, BTR now offers a new packet of vague shipper support letters and nonspecific statements from supposed financial backers. BTR offers no explanation for why these shippers or supposed financial supporters were not disclosed in its initial petitions, or its responses to discovery, or its motion for injunctive relief.

The Board's rule (49 C.F.R. § 1121.3(a)) requiring a petitioner to present its case-in-chief in its petition ensures that interested parties will have the opportunity to test the merits of a petition. By presenting this material so late in the process, BTR has effectively denied the Regional Parties the opportunity to comment and take discovery in contravention of the purpose of Section 1121.3(a). At this stage in the proceedings, the Board should not entertain BTR's new evidence.

B. BTR's New Evidence And Related Arguments Fail To Establish Adequate Financial Capacity And Credible Freight Demand.

Even without the benefit of any discovery, BTR's new contentions about shippers and financial support simply are not credible. With respect to alleged shippers, BTR's new evidence suffers from the same flaws that undermined BTR's assertions about CalPortland and Wolford Trucking. BTR points to a letter of Aggregates West dated October 8 in support of its claim that there is shipper demand on the Line. *See* BTR's Reply at 6, 38. But Aggregates West is not located on the Line, does not indicate that it has any customers on the Line, and the plain text of its letter discloses no present demand for rail service on the Line. BTR's claim that there is a shipping demand from General Mills is unsupported. The letter from General Mills suggests only that a current General Mills customer, apparently Safeway, currently receives shipments by truck and that there could be advantages to shipping by rail. But the letter is not a request for

service by General Mills or Safeway, and indeed Safeway did not join in the letter. *See Id.* at 31. CT Sales' letter of October 1 reveals that CT Sales *is not* located on the Line but, rather, on the Freight Segment. *See Id.* at 32. CT Sales does not receive, and apparently has not requested, rail service from BTR on the Freight Segment, and the letter provides no evidence that CT Sales has any business on the Line itself.

BTR's claim that it would transport several thousand rail cars on the Line is not supported by any concrete evidence. *See Id.* at 7, 16. None of BTR's shipper letters presents a current demand for freight service from a shipper located on the Line, and none of the letters provides a well-supported estimate of shipping volumes. BTR's table estimating shipper volume is nothing but conjecture.

Turning to BTR's claims about financing, BTR previously told the Board that removal of the rail infrastructure on the Kirkland-owned segment of the Line would preclude the financial viability of rail reactivation. BTR Motion for Preliminary Injunction at 5, 9-10 (filed May 8, 2013). Now that the rails are gone, paradoxically, BTR contends that lenders are lining up to underwrite its venture. BTR points to letters from Paul Nerdrum, a silent partner in BTR, two commercial banks, and Watco, but none of these materials demonstrates that BTR has or would be able to obtain adequate financing to acquire property rights necessary to access the Line. Mr. Nerdrum's letter (*see id.* at 22-24) does not include any commitment of financing. Likewise, the letters from Coastal Community Bank and AmericanWest Bank (*id.* at 20-21) do not contain any commitments to provide financing, even if BTR's petitions were granted. Similarly, Watco's letter (*id.* at 18-19) is nothing more than a general expression of interest in possibly conducting future business with BTR, and does not contain any commitment to provide funding to BTR.

Moreover, Watco's letter suggests that Watco, not BTR, would actually carry out rail service, raising more questions than it answers about BTR's ability to provide service on the Line.

Furthermore, the notion, expressed in the letters from the banks and in BTR's letter (*id.* at 21-24), that no entity can commit to any financing unless and until the Board grants BTR's Petitions should not be taken seriously. Lenders and investors should be able to make a conditional commitment to BTR based on BTR's current financial position and demonstrated shipper demand. The financial strength of BTR and the existence of shipper demand do not depend on Board action; they depend on market conditions that do not, at present, justify the investment BTR requires. Moreover, as the Board made clear in the August 1 Decision, BTR must *prove* there is genuine shipper demand *and* that BTR has the financial strength to initiate and operate its proposed service *before* the Board can approve the Petitions. BTR's last-ditch attempt to evade its clear burden of proof in this case should be rejected.

Finally, BTR seeks to reduce its financial capacity burdens by implying that it should obtain access to the Line at no expense.¹ BTR misconstrues a critical aspect of *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. – Abandonment & Discontinuance Exemption – Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga.*, 6 STB 902 (2003). In that matter, *the railroad already owned the right of way* (*id.* at 903), and the only issue was whether the railroad had to compensate the trail sponsor for improvements to the right-of-way built by the trail sponsor. The Board held that that issue of compensation was a contractual matter between the parties that was not a prerequisite to reactivation. *Id.* at 906-908. The issue of what the Board would do if the petitioning railroad did not own the line was not presented.

¹ BTR first advanced this argument in its motion for preliminary injunction. The Board rejected it, observing that "it is unlikely that Ballard would be able to pay appropriate compensation for use of the right-of-way in the event we grant the authority requested." August 1 Decision at 5.

In contrast, as the Board recognized in its August 1 Decision in these proceedings (slip op. at 5), when a petitioning carrier does not hold property rights to a line it seeks to reactivate, as is the case with BTR here, it must demonstrate that it has, or can obtain, the property necessary to carry out service before it can obtain reactivation authority. *See also, BG & CM R.R., Inc. – Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket 34398, slip op. at 3 (Service Date Oct. 17, 2003) (new operator approved under Section 10502 after acquisition of property from abandoning railroad). Here, because BTR has *no* property rights in the Line, the Board made clear in the August 1 Decision that BTR *must* demonstrate not only how it will obtain those rights *but also* that it can afford to acquire them. *Georgia Great Southern* does not excuse BTR from any part of its burden of proof, and the factual assertions in the BTR Reply and BTR's other submittals are patently insufficient to satisfy that burden.

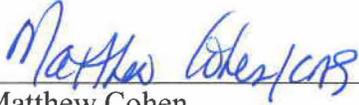
III. CONCLUSION

For all the foregoing reasons, and for the reasons presented in the Regional Parties' previous filings, BTR's petitions should be denied.

If the Board finds that BTR's new evidence might support a different conclusion, the Regional Parties respectfully request an opportunity to take discovery concerning this new evidence. By availing themselves of the Board's discovery procedures earlier in these proceedings the Regional Parties were able to point out the shortcomings in BTR's petitions and

claims. Ballard should not be permitted to escape similar scrutiny of its new evidence just because it waited to disclose it until the last possible moment.

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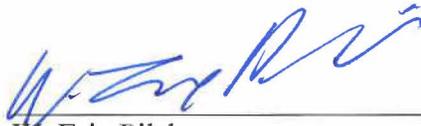
CERTIFICATE OF SERVICE

I hereby certify that I am providing a copy of (1) KING COUNTY, SOUND TRANSIT, AND KIRKLAND'S MOTION FOR LEAVE TO REPLY TO BALLARD TERMINAL RAILROAD'S REPLY TO COMMENTS; and (2) KING COUNTY, SOUND TRANSIT, AND KIRKLAND'S REPLY TO BALLARD TERMINAL RAILROAD'S REPLY TO COMMENTS upon the following parties of record by email and by first class U.S. mail, postage prepaid and properly addressed:

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Dated this 16th day of December 2013