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SERVICE DATE – LATE RELEASE AUGUST 1, 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)

Digest:¹ In this decision, the Board denies Ballard Terminal Railroad Company, L.L.C.'s request for an injunction to prevent the City of Kirkland, Wash., from salvaging 5.75 miles of track over which Ballard is seeking authority to reinstitute freight rail service.

Decided: August 1, 2013

Ballard Terminal Railroad Company, L.L.C. (Ballard) requests that the Board enjoin the City of Kirkland, Wash., (the City) from removing the track assets along a 5.75-mile segment of railroad right-of-way in King County, Wash., pending completion of proceedings instituted by the Board in these two dockets. For the reasons discussed below, the motion for injunctive relief will be denied.

BACKGROUND

In 2008, BNSF sought and received an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 to abandon the Woodinville Subdivision, including an 11.2-mile segment of rail line at issue here (the Line). See BNSF Ry.—Aban. Exemption—In King Cnty., Wash., AB 6 (Sub-No. 465X) (STB served Nov. 28, 2008) (BNSF Woodinville Abandonment). To ensure that potential opportunities to preserve freight rail service on the Line could be

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

explored, the Board denied BNSF's request for an exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904. No OFA was submitted.

During the abandonment proceeding, King County filed a request for a Notice of Interim Trail Use (NITU) for interim trail use/rail banking on the subdivision pursuant to 16 U.S.C. § 1247(d) (Trails Act).² BNSF Woodinville Abandonment at 4-5. Subsequently, BNSF entered into an interim trail use arrangement with King County, which became the trail sponsor (i.e., the entity willing to assume managerial, tax, and legal responsibility for the right-of-way property and develop a trail, subject to possible future reactivation of the right-of-way for rail service by the abandoning railroad or by any other approved rail service provider). See 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a).

To protect the reactivation provision of the Trails Act, the Board has found that the railroad that initiates the abandonment proceeding retains a residual right and obligation to provide service. See Norfolk & W. Ry.—Aban. Between St Marys and Minster in Auglaize Cnty., Ohio, 9 I.C.C. 2d 1015 (1993). Here, in a separate proceeding, King County requested and received an exemption authorizing it to acquire BNSF's remaining common carrier rights and obligations with respect to the Line, including the right to reactivate rail service. King Cnty., Wash.—Acquis. Exemption—BNSF Ry., FD 35148 (STB served Sept. 18, 2009) (September 2009 Decision). In the September 2009 Decision, the Board explained that the right to reactivate rail service was not exclusive to BNSF, the abandoning railroad, and that another bona fide petitioner could seek to reactivate under appropriate circumstances.³ The Port of Seattle acquired from BNSF the underlying real estate and trackage along the Woodinville Subdivision, subject to an exclusive freight rail easement reserved for BNSF and its successors and assigns. See The Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served Oct. 27, 2008). The Port of Seattle subsequently sold the 5.75-mile section of the Line at issue here to the City.⁴

² An OFA to acquire the Line for continued rail service would have taken priority over interim trail use/rail banking, and, if the Line had been sold under the OFA procedures, the abandonment proceeding would have been dismissed and trail use precluded. See BNSF Woodinville Abandonment, slip op. at 5.

³ See, e.g., Georgia Great So. Division—Aband. & Discon. Of Service, 6 S.T.B. 902, 907 (2003); Iowa Power—Const. Exempt.—Council Bluffs, Iowa, 8 I.C.C.2d 858, 866-67 (1990).

⁴ In 2010, GNP Rly, Inc. (GNP) requested authority to reactivate rail service on the Line. See GNP RLY, Inc.—Acquis. and Operation Exemption—Redmond Spur and Woodinville Subdivision (GNP), FD 35407 (STB served June 15, 2011). In GNP, the Board found that GNP was not a bona fide petitioner, based on evidence of GNP's insolvency, which showed that GNP did not have the necessary financial resources to provide rail service on the rail-banked line. In addition, the Board noted that potential shippers identified by GNP did not have the facilities

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On April 2, 2013, 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 freight rail service and the physical trackage assets on the Line. As part of its petition for exemption, Ballard appended letters from area businesses CalPortland and Woford Trucking expressing general support for the reinstatement of rail service over the Line. Because the Line currently is subject to interim trail use/rail banking, along with its petition for exemption Ballard filed a petition to partially vacate the NITU issued in Docket No. AB 6 (Sub-No. 465X) for the Woodinville Subdivision (which comprises the Line and an additional 1.35 miles).

In a notice of exemption and request for comments served and published in the Federal Register on April 19, 2013, the Board instituted a proceeding pursuant to 49 U.S.C. § 10502(b) and sought comments from interested persons on Ballard's petitions.⁵ In addition to its petitions described above, Ballard filed a motion on May 8, 2013, for preliminary injunction under 49 U.S.C. § 721(b)(4) seeking to prevent the City from salvaging the rails on the 5.75-mile portion of the Line that runs through the City. In support, Ballard argues that, absent an injunction, it will face irreparable harm, because the City will salvage the tracks and Ballard will not be able to afford to install new tracks once it prevails on its underlying petitions.⁶ On June 4, 2013, the City filed a reply in opposition. On the same date, King County and Central Puget Sound Regional Transit Authority (Sound Transit), an entity involved in developing a comprehensive plan for use of the Line, filed a joint reply in opposition. Both replies cite to portions of deposition testimony and other discovery responses to support their argument that Ballard: (1) will not succeed on the merits of its underlying case; (2) faces no irreparable harm absent an injunction; (3) cannot afford to reinstitute rail service; and (4) has not shown that there is any shipper demand for that service.⁷ On June 26, 2013, Ballard filed a motion for leave to file a

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necessary to receive shipments by rail and that GNP had not shown how it would overcome the physical and financial obstacles to providing freight rail service to these businesses.

⁵ King County filed a motion to compel or issue a subpoena compelling the attendance of Michael Skrivan of CalPortland at a deposition, and after receiving replies in opposition from Ballard and CalPortland, the Board issued a decision on May 17, 2013, directing Mr. Skrivan to appear. The City later filed a motion to compel Ballard and Eastside Community Rail to produce documents requested in discovery. The City's motion will be addressed in a subsequent decision.

⁶ Ballard Motion 9-11.

⁷ City Reply 19-29; King County and Sound Transit Reply 19-24.

surreply to those replies, along with the surreply,⁸ arguing that the testimony and documents relied on by the City, King County, and Sound Transit are misrepresentative of the testimony and discovery responses as a whole.

On July 10, 2013, the City filed a motion requesting an expedited ruling on Ballard's motion for preliminary injunction, asking the Board to issue a decision by August 1, 2013, so that it would have the chance to complete salvage operations during the 2013 construction season. Ballard filed a letter in opposition on July 15, 2013, arguing that the Board should now wait to decide the motion for preliminary injunction until comments and replies to the underlying petitions are filed. Because Ballard has not adequately supported its request to delay ruling on its preliminary injunction request, we are issuing this decision now.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 721(b)(4), the Board may issue an appropriate order, such as an injunction, when necessary to prevent irreparable harm. To obtain an injunction, the requesting party must show: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined; (2) it will suffer irreparable harm in the absence of an injunction; (3) other interested parties will not be substantially harmed by an injunction; and (4) the public interest supports the granting of the injunction. See American Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours), 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking an injunction bears the burden of persuasion on all elements required for such extraordinary relief. See Middletown & New Jersey R.R.—Lease and Operation Exemption—Norfolk So. Ry., FD 35412 at 2 (STB served Oct. 6, 2010); 5 U.S.C. § 556(d).

Ballard's likelihood of success on the merits. A party other than the entity holding the right to reinstitute service over a rail-banked line may seek to reactivate rail service on that line. Where a challenge to a party's request to reactivate is raised, however, it is appropriate for us to look closely at whether the right-of-way proposed to be reactivated would likely support rail service. In GNP, a case involving some facts similar to the case at issue, the Board rejected a request by GNP, a third party that was seeking to reactivate rail service, for an order enjoining the City of Redmond, Wash., from removing any rail or infrastructure from the line. In a decision denying injunctive relief and ruling on the merits, the Board found that GNP was not a bona fide petitioner because it lacked the financial ability to reinstate rail service, and that GNP's potential shippers did not have the facilities necessary to receive shipments by rail.

⁸ While the Board's rules at 49 C.F.R. § 1104.13(c) prohibit a "reply to a reply," in the interest of compiling a more complete record, we will accept Ballard's surreply.

Based on the available evidence now before the Board, Ballard similarly does not appear to be in a financial position to reinstitute service. Rather, it appears that Ballard's existing operations near the Line are operating at a loss; that they are subsidized by revenues from Ballard's other two short lines; and that Ballard likely will not be able to proceed with the proposed project without additional revenue or funding, which at this point does not appear to be a realistic prospect.⁹ In addition, given Ballard's current financial position, 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.¹⁰ Thus, even if Ballard were ultimately to acquire permissive authority to reinstate rail service on the Line, it is doubtful, based on the current record, that Ballard would be able to do so.

The current record also does not support a conclusion that there is a demand to reactivate rail service over the Line. The evidence demonstrates that neither of the two prospective shippers that filed letters in support of Ballard's petitions, CalPortland and Wolford Trucking, is located on the Line. In addition, neither shipper has a contract to participate in the local construction projects cited by Ballard as purported evidence of the need for freight rail service.¹¹ To the contrary, at deposition, Mr. Skrivan of CalPortland specifically testified that the letter he signed on behalf of the company was "not a request to provide service."¹² Additionally, the record shows that on March 15, 2013, Wolford Trucking submitted a bid proposal to the City for the City's Cross Kirkland Rail Removal Project, requesting to be chosen to remove the very track it purportedly supports using to transport freight.¹³ Moreover, while Ballard has asserted that the two companies would use the Line to ship approximately 50,000 carloads of freight, Ballard has failed to provide any probative support for that estimate. Thus, based on the record to date, no current demand for freight service on the Line has been demonstrated. Given Ballard's financial situation and the lack of demand, Ballard has not shown that it is likely to prevail on the merits.

Harm to Ballard in the absence of an injunction. Ballard makes two claims of irreparable harm: (1) that it will lose a business opportunity to serve "ready, willing, and able" rail

⁹ King County and Sound Transit Reply 15-17, 21.

¹⁰ Given the relatively high property values in the area, the costs likely would be substantial. See City Reply 20.

¹¹ King County and Sound Transit Reply, Ex. 5, Skrivan Dep. Tr. at 27; Ex. 6, Wolford Dep. Tr. at 32. Ballard has suggested that the parties opposing injunctive relief have taken the deposition testimony out of context. We disagree with that assertion.

¹² King County and Sound Transit Reply, Ex. 5, Skrivan Dep. Tr. at 27.

¹³ City Reply. Ex. 29.

customers; and (2) that it will have to expend \$10,000,000 to replace track removed on Kirkland's 5.75-mile segment of the Line.

Ballard has not supported its first claim. As discussed above, the current record fails to show that there actually are any rail customers on the Line, let alone customers "ready, willing and able" to use freight rail service. Thus, any potential harm related to the alleged loss of future freight rail business opportunities here is "remote, speculative, and uncertain."¹⁴

As for the second argument, Ballard alleges that it could not afford the \$10,000,000 it says it would cost to replace the removed track in Kirkland, and thus denial of injunctive relief would effectively moot its proposal to restore rail service. The evidence of Ballard's financial position discussed above, however, shows that, even if the existing rail were to remain in place, Ballard could not likely reinstitute rail service and maintain the Line without additional revenue or funding.¹⁵ Yet, Ballard fails to identify any additional likely sources of revenue or funding. Moreover, Ballard fails to show that the existing track on the Line, which has not carried traffic since 2006, would even be adequate for freight rail service in its current state. Because Ballard does not appear to be a bona fide petitioner that could successfully undertake the project even if the rail were to remain in place, it will not be irreparably harmed if its injunction request is denied.

Harm to other interested parties from an injunction. Ballard's assertion that the City will not be harmed by retaining the track on the Line until the Board rules on the underlying petition lacks merit. In fact, the record shows that the City, as well as King County, Sound Transit, and other interested parties, would be harmed by an injunction. In this case, parties have invested years and millions of dollars of public funding toward their interim trail use and other public projects in the area the Line traverses.¹⁶ The City asserts that a one-year delay in proceeding with these plans will result in costs to the City's taxpayers and deprive the City of the 2013 construction season.¹⁷ If the injunction is granted, these projects would need to be put on hold, and the City could lose its contract to remove the track.

¹⁴ King County and Sound Transit Reply 24.

¹⁵ See King County and Sound Transit Reply, Ex. 4, Cole Dep. Tr. at 83-85.

¹⁶ The Trails Act does not prohibit removal of track or changes to the right-of-way, so long as the property remains available for reactivation of rail service. See 49 C.F.R. § 152.29(a)(3); 1152.29(d)(1). Thus, a party seeking to restore service on a rail-banked line cannot necessarily expect the tracks to be in place on the right-of-way.

¹⁷ City Reply 17.

Public interest considerations. The Board takes seriously its statutory duty to preserve and protect freight rail service, and, under the Trails Act, the Line remains subject to future reactivation. Here, however, the current record does not reflect a concrete, realistic proposal to provide freight rail service on the Line. Under these circumstances, and given the City's significant investment and the additional expense it would face if its plans are delayed,¹⁸ the public interest supports denial of the injunction.

CONCLUSION

Ballard's request for an injunction will be denied. Ballard has failed to demonstrate, based on the current record, that it will likely succeed on the merits because it appears to have insufficient financial resources and there is insufficient evidence of current shipper need. Given this weak showing, any harm to Ballard resulting from its inability to pay for or recover the cost of installing track is insufficient to warrant an injunction. In addition, the potential harm to the City, King County, and Sound Transit, and the public interest in permitting the local plans for development of a trail on the right-of-way at issue to move forward, weigh against injunctive relief. Accordingly, we will not enjoin the removal of track pending a final decision on Ballard's underlying petitions.

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

It is ordered:

1. Ballard's motion for a preliminary injunction is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

¹⁸ City Reply 30.