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SERVICE DATE – JANUARY 15, 2014

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: January 15, 2014

Digest:¹ This decision finds Ballard Terminal Railroad Company, L.L.C.'s December 6, 2013 reply to be a supplement to its petitions filed on April 2, 2013, and grants a motion by the City of Kirkland, Wash., King County, Wash., and Central Puget Sound Regional Transit Authority for leave to file a surreply to Ballard's supplement. This decision also vacates the protective order issued on November 22, 2013, and reinstates a procedural schedule to allow for additional discovery and comment, given the new information provided in Ballard's supplement.

BACKGROUND

On April 2, 2013, Ballard Terminal Railroad Company, L.L.C. (Ballard), a Class III rail carrier, filed a petition in Docket No. FD 35731 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 a line of railroad (the Line)² owned by the City of Kirkland, Wash. (the City), and the Port of Seattle

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).

² The Line consists of a portion of the former BNSF Railway Company Woodinville Subdivision extending between milepost 23.8 at Woodinville, Wash., and milepost 12.6 at Bellevue, Wash.

(Port) in King County,³ Wash. (King County). The Line is currently subject to interim trail use/railbanking under the National Trails System Act, 16 U.S.C. § 1247(d). The petition for exemption was filed concurrently with Ballard's 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). In a notice of exemption and request for comments served and published in the Federal Register on April 19, 2013 (April 19 Notice),⁴ the Board instituted an exemption proceeding pursuant to 49 U.S.C. § 10502(b) and sought comments from interested persons on Ballard's petitions.⁵

In a number of subsequent decisions, the Board modified the procedural schedule or granted extensions of time for the filing of pleadings—most recently on November 22, 2013, when the Board extended Ballard's deadline to reply to the City's, King County's, and Sound Transit's (collectively, Respondents) opposition comments from November 6, 2013, to December 6, 2013. In that decision, the Board also granted Respondents' motion for a protective order bringing to an end further document production to Ballard.

On December 6, 2013, Ballard filed its reply, which included new evidence to demonstrate financial and shipper support for its petitions that it had not previously submitted. Ballard states that the City's desire to remove expeditiously the track on its portion of the Line had required Ballard to file its initial petitions prior to gathering all of the reactivation support, and that the support now before the Board merits approval of its petitions.

On December 16, 2013, Respondents filed a motion for leave to file a surreply to Ballard's reply, arguing that Ballard was essentially presenting its case-in-chief for the first time therein, which should have been presented with Ballard's initial petitions. Respondents allege that by presenting this material in its reply, Ballard has effectively denied them the opportunity to take discovery and comment in contravention of the purpose of 49 C.F.R. § 1121.3(a). Respondents argue that for these reasons, the Board should not entertain Ballard's new evidence; alternatively, they argue that the new evidence still fails to establish adequate financial capacity and credible freight demand to support its petitions. Finally, Respondents request an opportunity

³ In a request to withdraw as a party filed on August 14, 2013, the Port clarified 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 (Sound Transit), 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.

⁴ On May 8, 2013, Ballard filed a motion for an injunction to prevent the City from salvaging 5.75 miles of track over which Ballard is seeking authority to institute rail service, pending Board resolution of Ballard's petitions. The Board denied the motion in a decision served August 1, 2013. The City has subsequently removed the track.

⁵ The April 19 Notice started the 9-month statutory period for completion of the exemption proceeding, which ends on January 17, 2014.

to take discovery if the Board finds that Ballard's new evidence might support a different conclusion.

On January 3, 2014, Ballard filed a response to Respondents' motion for leave to file a surreply, stating that it does not object to the filing of the surreply and again arguing that it is a bona fide petitioner and that the Board should grant its petitions.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 C.F.R. § 1121.3(a), "[a] party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition." Ballard acknowledges that it did not gather all of its support for its petitions at the time of its initial filings. Ballard's new evidence substantially constitutes its case-in-chief, in contravention of 49 C.F.R. § 1121.3(a), and has the effect of denying Respondents the opportunity to take discovery and comment on significant portions of Ballard's case.

Nonetheless, we will consider the evidence contained in Ballard's reply. While the Board has the option to terminate this matter and have Ballard refile under a new sub-number, doing so would start a new 9-month statutory period in the exemption proceeding and would likely unduly delay a decision on the merits of the petitions. Instead, we will accept Ballard's reply and treat it as a supplement to its initial petitions filed on April 2, 2013. We will also grant Respondents' unopposed motion for leave to file a surreply to Ballard's supplement. Finally, because circumstances have changed with the filing of this supplement, it is appropriate to vacate the November 22, 2013 protective order and reinstitute a procedural schedule to allow a brief period for the parties to conduct any supplemental discovery necessary to fully address Ballard's supplement. The procedural schedule is as follows: the parties must conclude discovery by February 14, 2014; the Respondents' comments are due March 6, 2014; and Ballard's reply is due March 21, 2014.⁶

Following the submission of the comments and reply, the Board will issue a decision on the merits of this matter as soon as practicable.

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

⁶ As noted above, the 9-month statutory period for completion of the exemption proceeding ends on January 17, 2014, and reinstating a procedural schedule for discovery and comment will necessarily extend the proceeding past this deadline.

It is ordered:

1. The Respondents' motion for leave to file a surreply to Ballard's supplement is granted, and the surreply is accepted.
2. The protective order issued on November 22, 2013, is vacated.
3. The parties must conclude discovery by February 14, 2014.
4. The Respondents' comments are due March 6, 2014.
5. Ballard's reply is due March 21, 2014.
6. This decision is effective on its date of service.

By the Board, Chairman Elliott and Vice Chairman Begeman.