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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 31, 2014

In a decision served on January 15, 2014, the Board accepted Ballard Terminal Railroad Company, L.L.C.'s (Ballard) December 6, 2013 filing (December 6 Reply) as a supplement to its initial petitions filed on April 2, 2013, granted a motion by the City of Kirkland, Wash., King County, Wash., and Central Puget Sound Regional Transit Authority (together, Movants) for leave to file a surreply to the December 6 Reply, vacated the protective order issued on November 22, 2013, and reinstated a procedural schedule to allow for additional discovery and comment given the new information provided in the December 6 Reply.

On January 17, 2014, Movants filed a motion requesting that the Board: (1) issue subpoenas to specified third parties; (2) enter a modified procedural schedule; and (3) give the motion expedited consideration. In a decision served on January 22, 2014, the Board ordered that any replies to the motion be filed by January 27, 2014.

On January 23, 2014, Movants filed a motion (together with the January 17, 2014 motion, the Discovery Motions) asking the Board to: (1) issue deposition subpoenas on AmericanWest Bank (AmericanWest) and Coastal Community Bank (Coastal Community); (2) enter a modified procedural schedule; and (3) give the motion expedited consideration. Movants simultaneously filed a supplemental brief in support of their motion, stating that both AmericanWest and Coastal Community had confirmed that they would not oppose Movants' motions for issuance of subpoenas.

On January 27, 2014, Ballard and Eastside Community Rail, LLC (Eastside) filed a joint reply to the Discovery Motions, together with a motion for protective order. First, Ballard and Eastside state that they are agreeable to the depositions of Ballard General Manager Byron Cole and Eastside Managing Director Douglas Engle, but only under a protective order that limits the depositions to a total of three hours per deponent and that limits the subject matter to the evidence contained in the December 6 Reply. Second, Ballard states that it is agreeable to

responding to Movants' additional document production requests, but again only to the extent that the requests relate to matters contained in the December 6 Reply. Ballard specifically objects to request for production number 23, claiming attorney work-product privilege, and 25 and 26, claiming the requests relate to matters that Movants could have sought in prior discovery. Third, Ballard and Eastside object to the deposition of Paul Nerdrum, a principal of Ballard, stating that Movants should not be allowed to depose multiple Ballard representatives, as they already have the deposition of Ballard's general manager Byron Cole. Fourth, Ballard and Eastside object to the deposition of Kathy Cox, a proponent of excursion service over the line in question, alleging that she was known to Movants and thus potentially available for deposition prior to the filing of the December 6 Reply. Fifth, Ballard and Eastside object to Movants deposing and requesting the production of documents from AmericaWest and Coastal Community, stating that to the extent the banks have supplied documents to Ballard or Eastside, or exchanged documents between those two parties, Ballard and Eastside will produce those documents. Sixth, Ballard and Eastside object to Movants deposing and requesting the production of documents from Aggregates West, Inc., C.T. Sales, Inc., Daniel Behr of EB5 Capital Partners.us, LLC, RJB Wholesale, Inc., and Watco Companies, L.L.C., alleging that their letters speak for themselves. Ballard and Eastside state that to the extent that there have been additional documents exchanged between these entities and Ballard or Eastside, Ballard and Eastside will produce those documents.

On January 28, 2014, Movants filed a reply to Ballard's and Eastside's motion for protective order, together with a request for a subpoena to Kathy Cox. In support of their reply, Movants object to the shortened deposition time limits, but state that they have sought to schedule the nonparty witnesses for short depositions, with as many as three witnesses in one day.¹ Movants further argue that the Board should allow the requested discovery because Movants are seeking discovery of nonparties that were not included in Ballard's initial petitions, and that their earlier discovery efforts were driven by the content of the original petitions. With respect to the discovery requests to Ballard, Movants argue that they either seek information about the new allegations in the December 6 Reply, or are follow-up requests for materials that the Board previously ordered Ballard to produce in the discovery order of August 22, 2013, which Ballard continues to withhold. Finally, with respect to their request for a subpoena to Kathy Cox, Movants allege that the request was inadvertently omitted from their Discovery Motions, and that Kathy Cox is believed to have information relevant to Ballard's rail service plan, as evidenced by Douglas Engle's earlier deposition testimony and emails produced by Eastside.

Consistent with the Board's January 15, 2014 order, the Board will grant in part the Discovery Motions and will permit the discovery requested by Movants, subject to the following limitations. The Board will grant Ballard and Eastside's motion for protective order with respect to the subject matter limitation—the parties will be directed to comply with requests for

¹ Thus, as long as all parties act cooperatively, it does not appear that specific action on the request for a three-hour time limit is necessary.

depositions and requests for production of documents to the extent they relate to evidence contained in the December 6 Reply, subject to privilege objections. Further, the Board will deny Movants' request to depose and seek document production from Kathy Cox because, as Movants themselves acknowledge, Kathy Cox's name and her potential involvement in this matter were raised in discovery conducted in response to Ballard's initial petitions. Thus, discovery requests related to Kathy Cox fall outside the scope of this phase of the proceeding. In contrast, Paul Nerdrum was not described as integral to the financing of the project until the December 6 Reply, nor could Movants have sought to depose officials of the banks whose financial backing is alleged, and of the entities that, for the first time, have been introduced in support of Ballard's project. The parties are directed to work together to set dates for the production of documents and for the taking of depositions. The parties are further directed to comply with the protective order as set forth above.

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

It is ordered:

1. The Discovery Motions are granted to the extent discussed above.
2. Ballard and Eastside's motion for protective order is granted to the extent discussed above, and the parties are directed to comply with the protective order as set forth above.
3. Movants' January 28, 2014 request for a subpoena to Kathy Cox is denied.
4. The parties are directed to work together to set dates for the production of documents and for the taking of depositions.
5. This decision is effective on its date of service.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.