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SERVICE DATE – LATE RELEASE MAY 17, 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,  
WASHINGTON (Woodinville Subdivision)

Decided: May 17, 2013

This decision finds that CalPortland Company (CalPortland) and its employee Michael Skrivan are subject to discovery in this proceeding under the Board's subpoena power.

On April 2, 2013, Ballard Terminal Railroad Company, L.L.C. (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 rail service, and the physical trackage assets in a line of railroad (the Line) currently owned by the City of Kirkland (City) and the Port of Seattle (Port) in King County, Wash. (King County), and currently subject to railbanking/interim trail use under the National Trails System Act, 16 U.S.C. § 1247(d). The petition for exemption was filed concurrently with a Ballard petition to partially vacate the Notice of Interim Trail Use (NITU) issued in Docket No. AB 6 (Sub-No. 465X) for the Woodinville Subdivision (which comprises the Line and an additional 1.35 miles), pursuant to which King County is the trail sponsor.<sup>1</sup> As part of its filing, Ballard appended a letter from CalPortland, signed by Mr. Skrivan, expressing its support for the reinstatement of rail service over the Line.

In a notice of exemption and request for comments served and published in the Federal Register on April 19, 2013, the Board instituted an exemption proceeding pursuant to 49 U.S.C. § 10502(b) and sought comments from interested persons on Ballard's petitions. Pursuant to the schedule set there, comments are due by June 18, 2013, and replies by July 18, 2013.

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<sup>1</sup> King County also has the right to reinstitute rail service on the Line. See King County, Wash.—Acquis. Exemption—BNSF Ry., FD 35148 (STB served Sept. 18, 2009). King County has not, however, sought to do so.

On May 8, 2013, Ballard filed a motion for preliminary injunction under 49 U.S.C. § 721(b)(4) seeking to prevent the City from salvaging the rails on the portion of the Line that runs through the City. Responses to that motion are due by May 28, 2013.

On May 14, 2013, King County filed an emergency motion claiming that Mr. Skrivan has refused to comply with its discovery requests and asking the Board to compel his attendance at a deposition (originally scheduled for that day), or, in the alternative, to issue a subpoena compelling his attendance. King County also asked that Mr. Skrivan be compelled to produce certain documents at or before that time. According to King County, Mr. Skrivan's testimony on behalf of CalPortland, a shipper that filed a letter in support of Ballard's proposed reinstatement of rail service, is highly relevant to the issue of whether there is a genuine demand for Ballard's service. King County adds that the deposition must be taken promptly in view of its need to respond to Ballard's request for a preliminary injunction by May 28, 2013. Board staff held an informal teleconference with counsel for all interested parties on May 14, 2013, in an attempt to facilitate an agreement on the issues raised by King County, but no agreement was reached. The Board, by the Director of the Office of Proceedings, then served an order requiring that any replies to King County's motion be filed on May 15, 2013.

On May 15, 2013, and May 16, 2013,<sup>2</sup> Ballard and CalPortland, respectively, filed a reply to King County's emergency motion. They argue, among other things: that the subpoena that King County issued itself is invalid and unenforceable; that King County did not demonstrate a need for extensive questioning and nonparty document production; that subjecting Mr. Skrivan to discovery will have chilling effects on the participation of shippers in other Board proceedings; and that King County's alternative request for a Board subpoena does not pass the Board's test in Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions (Coal Dust), FD 35557, slip op. at 4 (STB served June 25, 2012), because it is overly burdensome and does not seek relevant information.

In Board proceedings, parties are entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding.<sup>3</sup> 49 C.F.R. § 1114.21(a)(1). Further, it is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 49 C.F.R. § 1114.21(a)(2). The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van

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<sup>2</sup> CalPortland's reply was received after business hours on May 15.

<sup>3</sup> Discovery is permitted in petition-for-exemption proceedings, and particularly here where the Board instituted a formal proceeding in this matter in its April 19, 2013 notice and request for comments. See 49 C.F.R. §§ 1114.21(a), 1121.2. The Board thus rejects CalPortland's argument that discovery is not permitted in this proceeding.

Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003).

Although neither Mr. Skrivan nor CalPortland is a party in this proceeding, they are subject to discovery and a Board subpoena herein. In Coal Dust, the Board affirmed the Director’s application of a test in which “[a]ll discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information.” Coal Dust at 4. The balance between the relevance of the information sought and the burden of producing it hinges on the nonparty’s relationship to the proceeding; if the nonparty is a stranger to the litigation (i.e., has no clear interest in the proceeding and will not be directly affected by its outcome) and responding to a subpoena to compel would be expensive, oppressive or burdensome, then a strong foundation regarding the relevance of the information sought is required. Id. (citing Asphalt Supply & Serv., Inc. v. Union Pac. R.R., NOR 40121 (ICC served Mar. 27, 1987)).<sup>4</sup> If, on the other hand, a party seeks a subpoena compelling a nonparty that has a clear interest in the proceeding and will be directly affected by its outcome, then a very strong foundation as to relevance is not a prerequisite to the issuance of the subpoena. Id.

Here, Mr. Skrivan’s letter, which was submitted by Ballard as an exhibit to its petition, expresses that CalPortland has a clear interest in this proceeding and that it would be directly affected by its outcome. In addition, Mr. Skrivan’s testimony is relevant to a central issue raised by King County in this case – whether there is a demand for rail service.<sup>5</sup> Likewise, the documents requested appear to be reasonably calculated to lead to the discovery of admissible

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<sup>4</sup> Ballard and CalPortland are correct in their arguments that the Board, and not King County, has the authority to issue a subpoena. See 49 U.S.C. § 721(d)(2); East West Resort Transp., LLC, et al.—Petition for Declaratory Order—Motor Carrier Transp. of Passengers in Co. (East West), MCF 21008, slip op. at 2 (STB served June 1, 2005). While King County correctly states that a party to a proceeding may take the testimony of a witness by deposition pursuant to 49 U.S.C. § 721(d)(1), that party cannot compel such testimony or issue a subpoena. East West at 2.

<sup>5</sup> Both Ballard and CalPortland have protested that issuing a Board subpoena compelling Mr. Skrivan to attend a deposition and produce documents would ultimately have a chilling effect on shippers’ willingness to participate in Board proceedings. The Board addressed this concern in Coal Dust and concluded that the valuable role of such nonparties in Board proceedings cannot shield them from reasonably tailored discovery of relevant information in appropriate cases. Coal Dust at 6. Here, Mr. Skrivan’s letter in support of Ballard stated a desire for rail service and was attached as an exhibit to Ballard’s petition in order to affect the outcome of these proceedings, and is therefore subject to reasonably tailored discovery of relevant information. Thus, Ballard has not supported its claim that King County did not demonstrate a need for discovery.

evidence, as the requests are tailored to matters raised in Mr. Skrivan's letter.<sup>6</sup> Given CalPortland's interest and the relevance of the information sought, neither CalPortland nor Ballard has shown that Mr. Skrivan's appearance at the deposition at a mutually agreed-upon location, or his production of any responsive documents he may have, would be so expensive, oppressive, or burdensome to warrant denial of the requested discovery.

Based on this finding, Mr. Skrivan will be directed to appear at a deposition at a mutually agreed upon time and place. Because Mr. Skrivan and CalPortland have had ample notice of King County's intent to take this deposition, and because the deadline for replies to the preliminary injunction is currently May 28, 2013, and the deadline for comments on Ballard's petitions is June 18, 2013, the parties will be directed to hold the deposition no later than May 24, 2013 (unless the parties mutually agree to a later date). The parties will be directed to notify the Board of the date the deposition is taken. Additionally, Mr. Skrivan will be directed to comply with the subpoena duces tecum attached as Exhibit 2 to King County's emergency motion and to produce the responsive documents sought by King County at or before the deposition. Finally, any replies to Ballard's motion for preliminary injunction will be due 7 days after Mr. Skrivan's deposition.

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

It is ordered:

1. King County's request for a Board subpoena is granted.
2. Mr. Skrivan is directed to attend a deposition at a time and place mutually agreed upon by the parties, but not later than May 24, 2013, (unless the parties mutually agree to a later date) and to produce at or before the deposition all responsive documents.
3. The parties are directed to notify the Board of the date the deposition is taken.
4. Any replies to Ballard's motion for preliminary injunction are due 7 days after the deposition of Mr. Skrivan.
5. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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<sup>6</sup> The requested documents are listed in Exhibit 2 to King County's emergency motion, as Attachment A to King County's proposed subpoena duces tecum.