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May 7, 2013

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VIA FEDERAL EXPRESS

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

Re: **Finance Docket No. 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, WA



ENTERED
Office of Proceedings

MAY - 8 2013

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Public Record

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of a **Motion for Preliminary Injunction Pursuant to 49 U.S.C. § 721(b)(4)**, dated May 7, 2013. A check in the amount of \$250.00, representing the appropriate fee for this filing, is attached.

One extra copy of the Motion and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope. If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Myles L. Tobin'. The signature is fluid and cursive.

Myles L. Tobin
Attorney for Ballard Terminal
Railroad Company, L.L.C.

MLT/ekf
Enclosures
cc: Parties on Certificate of Service

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35730

BALLARD TERMINAL RAILROAD COMPANY,
-- LEASE EXEMPTION --
LINE OF EASTSIDE COMMUNITY RAIL, LLC



DOCKET NO. AB-6 (SUB-NO. 465X)

BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN KING COUNTY, WA

ENTERED
Office of Proceedings

MAY - 8 2013

Part of
Public Record

**MOTION FOR PRELIMINARY INJUNCTION
PURSUANT TO 49 U.S.C. § 721(b)(4)**

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**ATTORNEYS FOR BALLARD TERMINAL
RAILROAD COMPANY, L.L.C.**

Dated: May 7, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 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, WA



**MOTION FOR PRELIMINARY INJUNCTION
PURSUANT TO 49 U.S.C. § 721(b)(4)**

INTRODUCTION

Pursuant to 49 U.S.C. § 721(b)(4), Ballard Terminal Railroad Company, L.L.C. (“Ballard”) seeks from the Board a preliminary injunction enjoining the City of Kirkland (the “City”) from removing the track assets along a 5.75-mile segment of rail line located in King County, Washington pending completion of proceedings instituted by the Board in these two dockets.

On April 2, 2013, Ballard submitted a petition to the Board in Finance Docket No. 35731 in which Ballard seeks an exemption from the provisions of 49 U.S.C. § 10902 to acquire the residual common carrier rights and obligations relating to a railbanked line of railroad extending between Woodinville and Bellevue, Washington (the “Line”), including the right to reinstate rail service. On that same date, Ballard also filed a petition in Docket No. AB-6 (Sub-No. 465X) to partially vacate the Notice of Interim Trail Use (“NITU”) on the Line. By decision served April 19, 2013, the Board instituted a new proceeding on Ballard’s petitions to reinstate

rail service. As part of this proceeding, the Board will consider Ballard's request to order the transfer of the rail assets along the Line to Ballard at net liquidation value.

Ballard has learned that the City has imminent plans to remove the rail assets along the 5.75-mile segment of the Line that it owns. Such action would likely moot the pending proceeding that the Board has just initiated. The removal of the City's rail assets along the Line would dramatically impede any reasonable effort to reinstate rail service, because of the substantial cost Ballard would have to incur to reinstall the rail and crossing materials that were removed. If the City is not enjoined from removing the rail assets, Ballard will lose its opportunity to have the Board render a decision on its pending request, one that the Board invited a rail carrier such as Ballard to make. By losing this opportunity, Ballard will be irreparably harmed, and will have no other adequate remedy. As such, the Board should issue an injunction enjoining the City from removing the rail assets until it renders a decision on Ballard's petitions.

A federal district court in Washington State concluded on Friday, May 3rd that it did not have jurisdiction to enjoin the City from removing track materials on the Line, and directed Ballard to "promptly act on bringing your [case] to the STB." Ballard has immediately filed this motion as a result.

STATEMENT OF FACTS

Ballard is a common carrier providing rail transportation service within the State of Washington. Among several other operations, Ballard currently operates a 14-mile rail line between East Snohomish Junction and Woodinville, Washington (the "Snohomish-Woodinville line"). Ballard has been operating this line for several years as an agent for the owning rail carrier. After bankruptcy of the line's previous owner, Ballard continued the operating agency

relationship for the bankruptcy trustee. The Snohomish-Woodinville line was recently acquired by Eastside Community Rail, LLC (“ECRR”), with which Ballard has continued the operating agency relationship pursuant to an interim operating agreement. Ballard is in the process of taking over full common carrier obligations on the Snohomish-Woodinville line through a notice of exemption for lease and operation filed with the Board. See Ballard Terminal Railroad Company, L.L.C. -- Lease Exemption -- Line of Eastside Community Rail, LLC, STB Finance Docket No. 35730 (STB served April 18, 2013).

The issues in this proceeding center around an 11-mile connecting rail line previously owned by BNSF Railway Company (“BNSF”) that extends from the Woodinville end of ECRR’s Snohomish-Woodinville line south to Bellevue, Washington (the “Woodinville-Bellevue line” or the “Line”). In 2008, BNSF sought and received an exemption from the abandonment provisions of 49 U.S.C. § 10903 to abandon the Woodinville-Bellevue line. Pursuant to the Board’s grant of exemption, BNSF discontinued rail service along the Line. See BNSF Railway Company -- Abandonment Exemption -- In King County, WA, STB Docket No. AB-6 (Sub-No. 465X) (STB served November 28, 2008) (“BNSF Woodinville Abandonment”).

During the course of the abandonment proceeding, BNSF and King County sought an NITU pursuant to the National Trails System Act, 16 U.S.C. § 1247(d). See BNSF Woodinville Abandonment at 4-5. The Board’s issuance of the NITU forestalled the abandonment of the line, and gave King County an interest in the right-of-way for trail purposes, subject to restoration of the line for railroad purposes. Id. In a separate proceeding, King County then sought 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 County, WA -- Acquisition Exemption -- BNSF Railway Company, STB

Finance Docket No. 35148 (STB served September 18, 2009) (King County). The Board there noted the unusual issue before it -- “whether it is permissible under the Trails Act for a trail sponsor to acquire from a railroad the right to reactivate rail service over a railbanked line even if there is no evidence that the trail sponsor intends to exercise that right.” King County at 3. Acknowledging that King County, the trail sponsor, had no incentive to reinstate rail service, the Board reluctantly granted the exemption, but in doing so, made it clear that other bona fide parties could petition the Board at a future date to reinstate rail service. Thus, the Board stated:

[T]he right to reactivate a railbanked line is not an exclusive right. While the parties’ agreement would transfer to King County BNSF’s opportunity to provide rail service, *it would not preclude any other service provider from seeking Board authorization to restore active rail service on all or parts of the railbanked segments in the future* if King County does not exercise its right to reinstate rail service. Accordingly, regardless of the parties’ intentions, *a bona fide petitioner, under appropriate circumstances, may request the NITU to be vacated to permit reactivation of the line for continued rail service.*

King County at 3-4 (emphasis added; internal citations omitted).

King County thereafter conveyed the underlying real estate and trackage along the Woodinville-Bellevue line to the Port of Seattle (the “Port”). See The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company, STB Finance Docket No. 35128 (STB served October 27, 2008) at 1, n.2 (outlining planned acquisition transactions between the Port and BNSF). The Port, in turn, sold a 5.75-mile section of the Line to the City. The rail and other track materials on the Line remain in place.

Ballard’s recent filings reflect an interest in rail service that has developed on the Line. Two customers, CalPortland and Wolford Demolition Company, have come forward and asked Ballard to provide them rail services. These customers would potentially be served by the Line, then via the ECRR-owned Snohomish-Woodinville line to ultimate interchange with

BNSF. Ballard Verified Petition for Exemption, filed April 2, 2013, Exhibit B, Verified Statement of Byron Cole, at 2-3. Representatives of CalPortland and Wolford Demolition Company have submitted letters to the Board in support of the restoration of the line, in which they assert that they are ready, willing, and able to utilize the line once rail service is reinstated. See Ballard Petition, Exhibits C and D. Representatives from the Cities of Woodinville and Snohomish and the County of Snohomish, various State of Washington legislators, and the President and CEO of the Snohomish County Economic Alliance have also written letters in support of the restoration of rail service along the Line. See Ballard Petition, Exhibits E, F, and G; Ballard Letter filed April 17, 2013; Exhibit A attached hereto.

Ballard and ECRR have been engaged in discussions with King County representatives about the restoration of rail service on the Line. King County and the City have made it clear that they do not want to have rail service restored along the line. Indeed, the City recently executed a contract with A&K Railroad Materials to salvage the rail assets along the City's 5.75-mile segment of the Line for a net salvage value of \$106,560. See excerpts of Declaration of Kurt Triplett, attached hereto as Exhibit B, at ¶¶ 19, 20b.¹

The City's removal of rail assets will make it extremely difficult, if not impossible, for Ballard to reinstate rail service on the Line. If the City removes the rail assets along its portion of the Line, the cost to reinstall them would run in the millions of dollars. Cole Statement at 3. On the other hand, the net value of the rail materials to the City has now been confirmed to be just over \$100,000. As such, on April 1, 2013, Ballard filed a complaint in the U.S. District Court for the Western District of Washington seeking declaratory and injunctive

¹ Mr. Triplett's Declaration was filed on April 29, 2013 as part of the City's Response to Ballard's Motion for Temporary Restraining Order in Ballard Terminal Railroad Company, LLC v. City of Kirkland, No. 2:13-cv-00586MJP (W.D. Wash.) (the "Federal Court Proceeding").

relief, and moved for a temporary restraining order (“TRO”) enjoining the City from removing the rail assets during the pendency of the Board’s proceedings on Ballard’s petitions. On May 3, 2013, the court denied Ballard’s Motion for TRO, finding that the court lacked jurisdiction to consider the issue, and noting from the bench that the matter was one more appropriately handled by the Board. See Federal Court Proceeding, Verbatim Report of Proceedings, May 3, 2013, attached hereto as Exhibit C (“You should take this oral ruling and promptly act on bringing your class [sic] to the STB. If they somehow are waiting for me, you can tell them Judge Pechman is now out.”).

The City itself takes the position that the Board is the proper authority to consider Ballard’s motion for preliminary injunction. See Reply of King County, Washington, City of Kirkland, Washington and the Central Puget Sound Regional Transit Authority to Ballard’s Reply to Motion to Extend Time to Respond, dated April 18, 2013 (the “Kirkland Reply”), at 2, 4 (the parties “invite Ballard to apply for a preliminary injunction” at the STB and note that “[t]here is a procedure for Ballard to seek injunctive relief” at the agency (citing 49 U.S.C. § 721(b)(4)). The City has specifically represented to the Board that if Ballard sought a preliminary injunction from the Board by May 8, 2013, the City would suspend the removal of rail assets until the Board renders its decision on such a motion. See Kirkland Reply at 5.²

Ballard understands that the City has an interest in placing a trail along the Line. Ballard has no objection to the corresponding “rail with trail” uses of the Line. Indeed, two of Ballard’s other railroad operations have paved bike/pedestrian trails beside them, and in both

² “Kirkland is similarly willing to agree to defer all salvage activities for up to 20 days [from the April 18, 2013 date of Kirkland’s pleading] to give Ballard an opportunity to request a preliminary injunction pursuant to the Board’s procedures. Further, if Ballard files such a request, Kirkland will defer salvage until the Board decides that request.” Ballard has not sought emergency relief in this motion in express reliance on the City’s representations.

cases, Ballard has been involved extensively in the design, construction, and maintenance of the trails. Just as with Ballard's other two rail lines, the concurrent presence of a trail and rail service along the Woodinville-Bellevue line is viable. Despite this, however, the City and King County have made it clear that they only want a trail on the right-of-way. Cole Statement at 4.

Unless enjoined by the Board, the City will take action to remove the rail assets. This will deal a severe blow to the restoration of rail service along the Line, and will deny Ballard the right to have the Board rule on the issue. Because the City's efforts in removing the rail assets along the Line are imminent and will cause irreparable harm to Ballard, Ballard now seeks a preliminary injunction from the Board.

DISCUSSION

Pursuant to 49 U.S.C. § 721(b)(4), “[t]he Board may . . . when necessary to prevent irreparable harm, issue an appropriate order . . .” An “appropriate order” under Section 721(b)(4) includes a preliminary injunction, and the Board has recognized that the statutory provision was designed “‘to grant administrative injunctive relief to address threats of irreparable harm * * * in the exemption context,’ as well as ‘in other areas of the Board’s jurisdiction.’” Public Views on Major Rail Consolidations, 4 S.T.B. 586, 595 (2000) (quoting H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 168-169, 170, 233 (1995)). It is undisputed by the City that “salvage of the tracks and ties [on the Kirkland-owned segment of the Line] remains subject to the STB’s exclusive jurisdiction” Federal Court Proceeding, City’s Response to Ballard’s Motion for TRO, April 29, 2013, at 19 (excerpt attached as Exhibit D). It is thus clear that the Board may take appropriate action to enjoin the City from salvaging rail materials on the Line to prevent irreparable harm while the Board completes the proceedings it has initiated on Ballard’s petitions.

Irreparable harm is the primary but not necessarily the only relevant consideration in addressing a request for injunctive relief. DeBruce Grain, Inc. v. Union Pacific R. Co., 2 S.T.B. 773, 776 (1997). The Board applies the familiar Holiday Tours criteria that require a party seeking a preliminary injunction to demonstrate that:

(1) there is a likelihood that it will prevail on the merits of its claim; (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.

Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); see, e.g., American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc., STB Docket No. 42129 (STB served May 4, 2012) at 4. In each case, however, “our action to grant, or not to grant, relief under section 721(b)(4) [is] based on our weighing of harms and our determination of the public interest.” Public Views on Major Rail Consolidations, 4 S.T.B. at 595, n.16. As the Board has noted in language directly applicable to these proceedings:

The balancing of the harms undertaken in connection with requests for injunctive relief normally relates to whether the court or an agency should stop a party from changing the status quo while issues are being litigated or adjudicated.

Id. at 596. Here, the City’s removal of the track from a rail line while a petition to allow reactivation of rail service on that very line is pending and under active consideration by the Board would be a dramatic change in the status quo and would irreparably harm Ballard and its legitimate efforts -- under a process explicitly outlined by the Board four years ago in the King County proceeding and manifestly consistent with the purposes of the Trails Act -- to restore rail service on a railbanked line.

Thus, the irreparable harm that Ballard will suffer if the City removes the rail assets before the Board renders a decision on Ballard's petitions is substantial. The other factors, including Ballard's likelihood of success on the merits, also weigh heavily in favor of the issuance of a preliminary injunction.

I. BALLARD WILL SUFFER IRREPARABLE INJURY IF THE BOARD DOES NOT ISSUE A PRELIMINARY INJUNCTION.

If the City is not enjoined from removing the rail assets before the Board has decided the issues raised in Ballard's petitions, the Board's proceeding on such petitions will be rendered essentially meaningless, causing irreparable harm to Ballard. As the Sixth Circuit has stated, a party sustains irreparable harm that necessitates the issuance of a preliminary injunction if the proceedings on the merits "will be a meaningless or hollow formality unless the status quo is preserved" pending its decision. Performance Unlimited v. Questar Publishers, Inc., 52 F.3d 1373, 1382 (6th Cir. 1995) (reversing district court's denial of preliminary injunction because the parties' arbitration on the merits of the case would be rendered meaningless absent injunctive relief). That is precisely the case here. If the City removes the rail assets prior to the Board deciding Ballard's petitions, Ballard will have lost its opportunity to have the Board render a meaningful decision on its request to acquire those assets and the common carrier right to reinstitute rail service -- a result inconsistent with the Board's April 19, 2013 decision instituting a new proceeding on Ballard's petitions. The removal of the rails will effectively moot the new proceeding, causing irreparable harm to Ballard for which it has no adequate damage remedy.

The removal of the City's rail assets along the Line will also make it extremely difficult, if not impossible, for Ballard to reinstate rail service. While the City will only recoup approximately \$100,000 from the removal of the rail assets, the reinstallation of the rail and crossing materials along the City's segment of the track alone could cost Ballard approximately

\$10,000,000, a sum so significant that it could ultimately preclude the restoration of rail service altogether.

If Ballard is unable to reinstate rail service along the Line due to the substantial cost of reinstalling rail materials that were unnecessarily and prematurely removed, it will suffer a significant loss of a business opportunity. Ballard has already received notification from two potential rail customers that they are ready, willing, and able to utilize Ballard's services along the Line once rail service is reinstated. Ballard also anticipates that if rail service is reinstated, it will service additional existing and future customers who do not otherwise have access to rail service. If rail service is not reinstated, however, these customers will be required to either ship their commodities over the road at a significantly higher expense, or give their business to other rail carriers in the region. This will result in a substantial loss of a business opportunity to Ballard, which is a clear form of irreparable injury. Indeed, as the Second Circuit stated: "If preliminary relief is not available, [the plaintiff] will lose an opportunity to become a major publisher of children's books -- that is to say, it will lose an opportunity to become a sufficiently well-known publisher of children's books to attract additional authors and owners of characters." Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 38 (2d Cir. 1995); see also Sambo's of Ohio, Inc. v. City Council of Toledo, 466 F.Supp. 177, 181 (N.D. Ohio 1979) ("The loss the plaintiff suffered here is an irreparable and incalculable one, for it is the loss of the right to open a new business and strive to make it successful."); Garth v. Steck Tech Corp., 876 S.W.2d 545, 549 (Tex. App. 1994) ("[L]ost opportunity to create or gain control of a new market may result in unquantifiable losses for which there is no adequate remedy at law.").

Many courts have held that, in cases such as this, where a disruption to the status quo during the proceeding would so damage that party that it would not be able to recover even

if prevails in the end, the party has suffered irreparable harm. See, e.g., Performance Unlimited, 52 F.3d at 1382-83 (the status quo should be maintained to the extent sufficient to ensure that the party seeking relief is not driven out of business during the pendency of the adjudication on the merits); Gateway E. Ry. Co. v. Terminal R. Ass'n of St. Louis, 35 F.3d 1134, 1139-40 (7th Cir. 1994) (upholding issuance of preliminary injunction because otherwise plaintiff would be forced to pay a significantly higher rate to operate over a segment of track than the rate it negotiated pursuant to the agreement at issue in the case); Roland Machinery Co. v. Dresser, Ind., 749 F.2d 380, 386 (7th Cir. 1984) (a party suffers irreparable harm by the denial of an injunction while waiting for an adjudication on the merits where the damage award comes too late). Here, if the status quo is not preserved during the pendency of the proceedings before the Board -- i.e., if the rail assets are removed -- then even if Ballard is successful in its attempt to have the Board authorize the reinstatement of rail service, such an order would be ineffectual because the cost of reinstallation is so substantial and would likely preclude service reinstatement, despite Ballard's clear right to do so. Thus, if the Board does not issue a preliminary injunction, the pending proceedings on Ballard's petitions are likely to be mooted, resulting in irreparable harm to Ballard for which Ballard has no adequate remedy.

II. BALLARD HAS A STRONG LIKELIHOOD OF PREVAILING ON THE MERITS.

Pursuant to the Trails Act, a rail line is not abandoned when it is rail-banked (i.e. when an NITU is issued), and the Board continues to retain jurisdiction over the line during the interim period of trail use. 16 U.S.C. § 1247(d); see also Caldwell v. United States, 391 F.3d 1226, 1230 (Fed. Cir. 2004) (when an NITU is issued, the "STB retains jurisdiction for possible future railroad use"). The proper method for a rail carrier to seek to reinstate rail service along a rail-banked line is to file a petition to vacate the NITU, which Ballard has done here. *See* 49

C.F.R. § 1152.29(d)(2); Norfolk & Western Ry. Co. -- Aban. -- St. Marys & Minster in Auglaize County, OH, 9 I.C.C.2d 1015, 1016-1017 & n.3 (1993). And while Ballard does not currently hold the right to reactivate rail service on the Line, it is following exactly the course of action invited by the Board when the agency reluctantly agreed to permit King County to acquire the right to reinstate rail service along the Line, despite the fact that King County was also the trail sponsor on the Line and had no intention to resume rail service itself. See King County at 3-4.

On April 19, 2013, the Board issued a decision instituting a new proceeding on Ballard's petitions, which includes the Board's consideration of Ballard's request to reinstate rail service and the issue regarding the transfer of the rail assets. As indicated above, the City has specifically acknowledged that the "salvage of the tracks and ties [on the Line] remains subject to the STB's exclusive jurisdiction." Ballard is a bona fide, financially sound, existing Class III rail carrier that has stated shipper and public support for its proposal to resume rail service on this extant and railbanked line. Ballard has presented a credible case that desires a full and fair hearing at the Board. Particularly given the irreparable harm that it would face in the absence of a preliminary injunction, Ballard has demonstrated a sufficiently strong likelihood of success on the merits.

III. THE CITY WILL NOT BE SUBSTANTIALLY HARMED BY THE ISSUANCE OF AN INJUNCTION.

The City will not be harmed if the Board grants a preliminary injunction. The City has always been aware that any trail use established along the Line would be subject to the reactivation of rail service. Indeed, that is the fundamental bargain created by the Trails Act:

[On a railbanked line,] the railroad (or any other approved rail service provider) may reassert control to restore service on the line in the future. In short, an interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service. If and when the railroad wishes to restore rail service on all or part of

the property, it has the right to do so, and the trail user must step aside.

Georgia Great Southern -- Abandon. & Discontin. Of Service -- GA, 6 S.T.B.

902, 906 (2003) (citations omitted). The parties, of course, are well aware of this. The “Public Multipurpose Easement” entered into by King County and the Port of Seattle (the City’s predecessor) and previously submitted to the Board in the King County proceeding³ specifically recognized and provided for the circumstance now presented by Ballard’s petition:

4.1.1 Grantor [the Port] and Grantee [King County] understand, acknowledge and agree that if the STB receives a request to use all or any portion of the Property for federally regulated interstate freight rail service, then Grantor and Grantee may each be required to, and will if so required, make available some or all of their respective interests in the Property to accommodate reactivated freight rail service.

Any claim by the City that a preliminary injunction would harm it by interfering with its plans to convert its portion of the Line to a trail simply ignores the fundamental regulatory premise that governs the Line in its current railbanked state. The City cannot be substantially harmed by what the Trails Act directly contemplates.

Nonetheless, in this case Ballard does not object to the corresponding uses of the Line for a trail and rail service, which Ballard has successfully done on two other lines and which is a viable scenario here. Thus, if the Board enjoins the City from removing the rail assets along the Line, the City can still install a recreational trail along the Line. In creating compatible rail and trail uses, it is necessary that the rail, which is, in parts, located along an elevated embankment, remain where it is, with the trail being established elsewhere within the right-of-

³ Finance Docket No. 35148, King County Petition for Exemption, Exhibit C, filed September 22, 2008. Relevant portions of the Easement are attached to this Petition as Exhibit E. The 5.75-mile portion of the Line now owned by the City was acquired from the Port of Seattle, and Ballard presumes that the Easement now governs as between King County and the City with respect to that segment.

way. Thus, if the City removes the rail assets, it will be extremely difficult, if not impossible, for Ballard, or any other future bona fide party, to reinstate rail service along the Line.

The City has also conceded that it will not be immediately harmed if the Board issues a preliminary injunction by representing that if Ballard sought injunctive relief from the Board, the City would suspend removal of the rail until the Board renders a decision on Ballard's petition. Unlike the federal courts, the Board does not have a set procedure by which it will consider a preliminary injunction in an expedited manner, and as such, it may take months for the Board to decide this petition. Thus, by volunteering to refrain from removing the rail assets during the pendency of the Board's consideration of Ballard's preliminary injunction petition, the City has acknowledged that it will not suffer irreparable harm if the Board should issue a preliminary injunction.

There will also be no harm to the City if the Board issues a preliminary injunction because Ballard has requested in its underlying petition that the Board order the City to transfer its rights to the rail assets to Ballard at the net liquidation value. Thus, the City will not lose its interest in the value of the rail assets. Nor can the City claim a prevailing right to salvage track simply because an NITU was issued for the Line in 2008. The Board's regulations permit the abandoning railroad under an NITU to salvage track and materials, consistent with interim trail use and rail banking, "as long as it is consistent with any other Board order" 49 C.F.R. § 1152.29(d)(1). Here, even putting aside the fact that the City is twice removed from BNSF, the abandoning rail carrier, the Board has issued a decision that institutes a proceeding on Ballard's petitions to resume rail service -- including specifically a petition to partially vacate the NITU -- and now has those matters under active consideration. It would be plainly inconsistent with that

decision to allow the City to proceed with salvage activities that would essentially nullify the pending proceedings.

Moreover, federal courts have found that it is appropriate to maintain the status quo with respect to the condition of even an abandoned rail line when another rail carrier seeks to continue or reinstate rail service along the track, even where the defendant would be burdened as a result. For example, in Gulf Coast Rural Rail Transp. Dist. v. Southern Pac. Transp. Co., the court issued a temporary injunction enjoining the defendant railroad, which had abandoned the relevant track, from removing the rail materials from the track while the plaintiff railroad, which was in the process of negotiating with shippers and operators to operate the line, sought financing to acquire the abandoned rail line. *See Order Granting Temporary Injunction and Findings of Fact and Conclusions of Law*, No. H-94-2749 (S.D. Tex. 1994), slip. op., attached hereto as Exhibit F. In its findings of fact, the court noted that while the defendant railroad would benefit from reusing the rail ties from the abandoned segment of track, the issuance of a temporary injunction enjoining it from removing the ties was not unduly burdensome. *Findings of Fact* at 2. Thus, the court issued a temporary injunction enjoining the defendant from removing the rail ties. *Order Granting Temporary Injunction* at 1. The City, which seeks simply to have the tracks salvaged by a contractor and will retain the net salvage value of the track assets in any event, plainly would suffer no greater harm than the railroad in Gulf Coast Rural Rail. As such, the Board should issue a preliminary injunction enjoining the City from removing its rail assets while Ballard seeks to reinstate rail service.

In all, there will be no significant harm to the City if the Board issues a motion for preliminary injunction. Moreover, to the extent there is any harm, such harm is clearly

outweighed by the substantial injury that Ballard will suffer if the Board does not issue a preliminary injunction.

IV. THE PUBLIC INTEREST WILL BE SERVED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION.

Finally, for several different reasons, the public interest will be served if the Board issues a preliminary injunction. First, reinstating rail service along the Woodinville-Bellevue line will have a beneficial effect on interstate commerce, as local shippers will have additional options for the transportation of their commodities. Moreover, Congress has made it clear that the federal policy, as noted in the ICC Termination Act, is to promote competition among rail carriers and different modes of transportation. 49 U.S.C. § 10101. Thus, reinstating rail service will allow Ballard to compete with trucks and other carriers for the transportation of commodities, promoting economic and efficient rates for such services. As noted above, issuance of a preliminary injunction and the preservation of Ballard's ability to pursue its requested relief at the Board is entirely consistent with the purposes of the Trails Act, which is to encourage the restoration of rail service on railbanked lines.

Reinstating rail service will also promote economic development in the City and surrounding areas. Jobs will be created for the individuals who will work in providing services along the Line, and the operation of the Line will increase local tax revenues. See Gen'l Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 321 (8th Cir. 2009) (the public interest is in favor of keeping jobs); Michigan Consol. Gas Co. v. Fed. Energy Reg. Comm., 883 F.2d 117, 123 (D.C. Cir. 1989); Missouri Edison Co. v. Fed. Power Comm., 479 F.2d 1185, 1189 (D.C. Cir. 1973); see also Weeks Marine Inc. v. TDM Am., LLC, 2011 WL 6217799, at *18 (D. N.J. 2011) (the public interest is "undoubtedly served" by the completion of a public works project that will create jobs and bring "economic vitality" to the surrounding region). Indeed, representatives

from the Cities of Woodinville and Snohomish and the County of Snohomish, various State of Washington legislators, and the President and CEO of the Snohomish County Economic Alliance have written letters in support of the restoration of rail service along the Line. Reinstating rail service along the Line will also reduce traffic congestion and wear and tear on the region's highways, and will reduce air pollution for diesel exhaust. Finally, as previously noted, Ballard is open to the corresponding uses of a trail and rail service. Thus, the public will benefit from the use of the Line for both purposes.

CONCLUSION

For the reasons stated above, the Board should grant Ballard's motion for preliminary injunctive relief.

Respectfully submitted,

By: 

Myles L. Tobin
Thomas J. Litwiler
Thomas C. Paschalis
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

**ATTORNEYS FOR BALLARD TERMINAL
RAILROAD COMPANY, L.L.C.**

Dated: May 7, 2013

EXHIBIT A



Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

Re: Finance Docket No. 35731: Ballard Terminal Railroad Company, LLC-Acquisition and Operation Exemption—Woodinville Subdivision
Docket No. AB-6 (Sub-No. 465C): BNSF Railway Company—Abandonment Exemption—in King County, Washington

Dear Ms. Brown:

I'm writing you today to express Economic Alliance Snohomish County's strong support for retaining the Eastside Rail Corridor rail and express our significant concerns over the potential loss of Eastside rail infrastructure as planned by the City of Kirkland.

The Eastside Rail Corridor represents an irreplaceable opportunity for the communities along the Corridor and the region. This unique, typically 100-foot wide strip of land can at once:

- Provide opportunities for economic development in existing industrial-zoned lands supporting our County's robust aerospace and advanced manufacturing sectors;
- Increasing opportunities for recreation in east Snohomish and King Counties;
- Serve the region's growing freight and passenger transportation needs; and,
- Foster sustainable, vibrant, and attractive communities.

We support the retention of the Eastside Rail Corridor track and thus support a moratorium on all removal of track in the entire Eastside Rail Corridor, specifically Kirkland's 5.75 mile portion. Kirkland's portion is critical to the long-term goal of providing commuter rail connecting Snohomish County to communities along the eastside of Lake Washington.

We believe the rails and trails concept provides the most public benefit and is consistent with the public's intent when purchasing the line in 2009. King County's existing easement for the rail line articulates the intent "that the property be used for regional recreational trail and other transportation purposes, including...rail." In a 2010 court deposition, then Port of Seattle Commissioner Gael Tarleton stated that "the reason for that paragraph was to make it explicit that the rail had to be preserved; that you couldn't have just a recreational trail."

Our highways and rails are important assets to protect to generate economic development and provide transportation for the public. Maintaining and upgrading publically owned transportation lifelines is always a high priority for the public. The Eastside Rail Corridor is a precious asset that has been owned by the public since 2009 and must be preserved. To this end, we also support the \$6.2 million funding for the first phase of maintaining the Eastside Rail Corridor.

Thank you for your time and consideration of this issue.

Sincerely,

Troy McClelland
President & CEO

EXHIBIT B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BALLARD TERMINAL RAILROAD
COMPANY, LLC, a Washington limited
liability company,

Plaintiff,

v.

CITY OF KIRKLAND, a Washington
municipal corporation,

Defendant.

No. 2:13-cv-00586 MJP

**DECLARATION OF KURT TRIPLETT
IN RESPONSE TO PLAINTIFF'S
TRO MOTION**

I, Kurt Triplett, declare under penalty of perjury as follows:

1. I hold the office of City Manager for the City of Kirkland ("Kirkland") and have served in this capacity since June 28, 2010. I have personal knowledge of, and am competent to testify to, the following facts.

2. On January 5, 2012, Kirkland and the Port of Seattle (the "Port") entered into a purchase and sale agreement for the Cross Kirkland Corridor ("CKC"), which is a 5.75 mile segment of the 12.55 mile railroad right-of-way running between the cities of Woodinville and Bellevue (the "Line"). Under the terms of the purchase and sale agreement, the Port conveyed to Kirkland its interests in the land comprising the CKC, along with its interests in the rail infrastructure and other personal property and fixtures in the CKC. A true and correct copy of the purchase and sale agreement is attached hereto as **Exhibit 1**.

**DECLARATION OF KURT TRIPLETT IN
RESPONSE TO PLAINTIFF'S TRO MOTION - 1**

Case No. 2:13-cv-00586 MJP

1 18. Kirkland was preparing to enter into the salvage contract with A&K but delayed
2 doing so after Ballard instituted this lawsuit and filed petitions with the STB to reactivate rail
3 service on the Line.

4 19. A&K subsequently agreed to allow Kirkland to enter into the salvage contract and
5 immediately suspend performance, and further agreed to hold the contract open for three to six
6 months, if necessary, but no later than September 2013. To preserve its opportunity to salvage
7 the rails during the 2013 construction season and keep its plan to develop an interim trail on
8 schedule, Kirkland entered into the salvage contract with A&K on April 26, 2013, and
9 immediately suspended performance. A true and correct copy of Kirkland's contract with A&K
10 for rail salvage is attached hereto as **Exhibit 10**.

11 20. If Kirkland is unable to proceed with its plan to salvage the rails during the
12 summer of 2013, it will both lose substantial expected benefits and incur several costs, including:

13 a. *Lost Investment in the CKC.* If Kirkland is unable to salvage the rails
14 during 2013 construction season, its next opportunity to do so will be during the 2014
15 construction season. Interim trail development cannot start until salvage is complete. As
16 a result, Kirkland's intended use of the CKC and the public benefits of an interim trail
17 will be delayed by at least a year. Although it may be difficult to monetize such benefits,
18 Kirkland's acquisition and borrowing costs are known. Kirkland paid \$5 million for the
19 CKC. Kirkland recently borrowed \$35 million with a simple annual interest rate of
20 approximately 3.5 percent. Applying this interest rate to the purchase price, Kirkland
21 will lose at least \$175,000 over the next year on its investment in the CKC.

22 b. *Risk of Lost Contract Value.* If A&K is unable to perform work under the
23 contract within the next six months, Kirkland risks losing its expected payment of
24 \$106,560 for the net salvage value of the rails. The possible future benefit from salvage,
25 if any, is unknown and cannot be known until Kirkland solicits new bids in the spring of
26

**DECLARATION OF KURT TRIPLETT IN
RESPONSE TO PLAINTIFF'S TRO MOTION - 6**

Case No. 2:13-cv-00586 MJP

73743188.1 0021620-00004

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BALLARD TERMINAL RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,)	CASE NO. C13-00586MJP
)	
Plaintiff,)	SEATTLE, WASHINGTON
)	May 3, 2013
v.)	
)	COURT'S RULING ON
CITY OF KIRKLAND, a Washington)	MOTION TO DISMISS
municipal corporation,)	
)	
Defendant.)	
)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MYLES TOBIN
THOMAS MONTGOMERY

For the Defendant: HUNTER FERGUSON
MATTHEW COHEN
OSKAR REY
STEWART ESTES

Reported by: NANCY L. BAUER, CCR, RPR
Federal Court Reporter
700 Stewart Street, Suite 17205
Seattle, WA 98101
(206) 370-8506
nancy_bauer@wawd.uscourts.gov

1 May 3, 2013

10:50 a.m.

PROCEEDINGS

2
3 THE COURT: Counsel, I would intend to write for you
4 on this issue, and I would get you an opinion by a week from
5 Monday. However, because time is of the essence here, I
6 think I want to get you moving on this.

7 I don't believe I have jurisdiction. Even if I did have
8 jurisdiction, I don't believe that I'm the right entity to
9 exercise concurrent jurisdiction when there is expertise in
10 the agency that's involved here, and it seems to me
11 particularly wasteful to have two adjudicatory bodies working
12 on the same issues. Nor do I think that the SEPA claim is --
13 there is no jurisdiction is one that -- that survives. So I
14 don't have jurisdiction. I'm going to dismiss.

15 You should take this oral ruling and promptly act on
16 bringing your class to the STB. If they somehow are waiting
17 for me, you can tell them Judge Pechman is now out.

18 All right. Any clarification or anything further you need
19 me to make a ruling on today? You'll get a written opinion.

20 MR. FERGUSON: No, Your Honor, nothing from Kirkland.

21 MR. TOBIN: Nothing, Your Honor.

22 THE COURT: Okay. Thank you, counsel. I appreciate
23 your arguments, and you should look for the order.

24 We'll be at recess.

25 (THE PROCEEDINGS CONCLUDED.)

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 3rd day of May 2013.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter

EXHIBIT D

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BALLARD TERMINAL RAILROAD
COMPANY, LLC, a Washington limited
liability company,

Plaintiff,

v.

CITY OF KIRKLAND, a Washington
municipal corporation,

Defendant.

No. 2:13-cv-00586 MJP

DEFENDANT’S RESPONSE TO
PLAINTIFF’S MOTION FOR
TEMPORARY RESTRAINING ORDER

NOTE ON MOTION CALENDAR:
MAY 3, 2013

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Ballard Terminal Railroad Company, LLC (“Ballard”) asks this Court to enjoin the City of Kirkland (“Kirkland”) from salvaging the track and ties on a “railbanked” railroad right of way that Kirkland owns, pending a decision by the Surface Transportation Board (“STB”) on Ballard’s petitions to reactivate rail service on a 12 mile right of way (“the Line”) that includes Kirkland’s segment.¹ Ballard argues (and Kirkland agrees) that only the STB has the authority to decide whether rail service should be reactivated on the Line. Ballard insists, however, that this Court must intervene to prevent Kirkland from removing the “rail assets.” Otherwise, Ballard contends, “Ballard will lose its opportunity to have the STB – the only authority that can properly consider the issue – render a decision.” Dkt. 2 at 2.

¹ A map showing the Line and connected rail corridors is attached hereto as an appendix.

1 would delay development of a trail (at least one year). Kirkland conservatively estimates that
2 cost at \$175,000. *See* page 9, *supra*.

3 Furthermore, Kirkland will incur at least \$211,013 in increased costs for performing
4 necessary maintenance in the right-of-way with the rails intact. It also will lose the opportunity
5 to enter the salvage contract with A&K Railroad. As a result, Kirkland will incur the expense of
6 preparing a future bid invitation and reviewing future bids (\$1,522), as well as the risk of losing
7 the value of the contract (\$106,560). All told, Kirkland stands to suffer losses of at least
8 \$494,095 if it is enjoined from salvaging the rail infrastructure that *it owns*, as authorized by the
9 STB.

10 Ballard's arguments that Kirkland has "put off" salvage "for several years" is specious.
11 *See* Dkt. 2 at 13. Kirkland has not delayed. Immediately after it purchased the CKC, it prepared
12 a plan for salvage and trail development, and moved to execute on that plan less than a year after
13 it acquired the CKC. The only entity that "put off" doing anything is Ballard.

14 Ballard's argument (Dkt. 2 at 13-14) that the unpublished order in *Gulf Coast Rural Rail*
15 *Transportation District v. Southern Pacific Transportation Co.*, C.A. No. H-94-2749 (S.D. Tex.
16 Aug. 31, 1994), favors a TRO is seriously misplaced. In that case, the railroad had *abandoned*
17 the line and, as the district court concluded, the "ICC no longer exercise[d] jurisdiction over the
18 rail line." Dkt. 2-10 at 2. Here, in contrast, the Line has been railbanked and remains part of the
19 national rail system subject to the STB's exclusive jurisdiction. *See Preseault*, 494, U.S. at 5
20 n.3; *Caldwell*, 391 F.3d at 1229; *Friends of the East Lake Sammamish Trail*, 361 F. Supp. 2d
21 at 1273-74; *Jie Ao And Xin Zhou – Petition For Declaratory Order*, STB Docket No. FD 35539,
22 slip op. at 6-7 (June 6, 2012). As such, salvage of the tracks and ties remains subject to the
23 STB's exclusive jurisdiction under 49 U.S.C. § 10502(b).

24 **5. A TRO would undermine the public interest.**

25 The public interest in no way supports Ballard's request to freeze Kirkland's
26 development of a trail on the CKC. Washington cities must weigh their capital investments in

EXHIBIT E

FORM OF PUBLIC MULTIPURPOSEEASEMENT AGREEMENT

Recording Requested By And
When Recorded Return to:

King County

Seattle, WA

PUBLIC MULTIPURPOSE EASEMENT

Grantor: Port of Seattle
Grantee: King County
Legal Description (abbreviated): _____, Additional legal(s) on Page _____.
Assessor's Tax Parcel ID# _____
Reference Nos. Of Documents Released or Assigned: _____
Project [Area]: _____
Parcel [#]: _____

This casement is granted this _____ day of _____, 2008, by the PORT OF SEATTLE a Washington State municipal corporation ("Grantor"), to KING COUNTY, a home rule charter county and political subdivision of the State of Washington ("Grantee").

WITNESSETH

RECITALS

1. Grantor and Grantee executed a Purchase and Sale Agreement and Donation Agreement ("Acquisition Agreements") with BNSF Railway Company ("BNSF"), by and through which BNSF agreed to convey a rail corridor with rails in place, known as the Woodinville Subdivision ("Subdivision"), to Grantor. In the Acquisition Agreements, Grantee received a right of first opportunity to purchase portions of the Subdivision from Grantor.

2. Grantee has been approved as an Interim Trail User by the Surface Transportation Board ("STB") for the purpose of "railbanking" the Property, and Grantee is accordingly subject to certain legal obligations related to the Property, which are referred to herein as the "Railbanking Obligations." The Railbanking Obligations consist of those obligations imposed through Section 8(d) of the National Trails System Act, also known as the Rails-to-Trails Act, 16 U.S.C. 1247(d), and 49 C.F.R. 1152.29 (collectively, and as any of the foregoing may hereafter be amended or interpreted by binding judicial or administrative authority, the "Railbanking Legislation"), the Notice of Interim Trail Use ("NITU") for the Property issued by the STB; the Trail Use Agreement ("TUA") entered into between BNSF and Grantee for the Property under which Grantee agrees to accept, exercise, and fulfill all

of the legal rights, duties, and obligations of an Interim Trail User, and the Statement of Willingness to Accept Financial Responsibility ("SWAFR"). Under the TUA, Grantee has also received BNSF's rail service reactivation rights and/or obligations for the Property as approved by the STB.

3. Grantor desires Grantee to be the Interim Trail User for the Property because Grantee has substantial expertise and experience in acquiring, developing, maintaining and operating public trails, and Grantee is willing to assume this responsibility so long as it has sufficient rights to the Property to serve as the Interim Trail User for purposes of the Railbanking Legislation.
4. Prior to the closing on the Acquisition Agreements ("Closing"), Grantor and Grantee separately entered into an Interlocal Agreement ("Interlocal") regarding their mutual rights and obligations concerning the Property. The Interlocal is premised on the Parties' intent that the Property be used for regional recreational trail and other transportation purposes, including but not limited to rail or other transportation purposes other than interstate freight service ("Transportation Use").
5. It is anticipated that such Transportation Use will be carried out by a Third Party Operator ("TPO") with rights granted by separate agreement affecting or relating to the Property ("TPO Agreements").
6. The Parties intend that if interstate freight service should be reactivated in the future, such service should be able to be integrated with and not necessarily displace the Parties' intended regional trail and Transportation Uses.
7. The Parties agree that acquisition of the Property is of substantial benefit to the region because of its potential for use for regional recreational trail use and Transportation Use, and therefore the Interlocal includes a binding commitment to undertake a formal, multi-agency process to plan and recommend appropriate uses of the Property ("Regional Process").
8. Grantor and Grantee intend that the development of a public trail authorized by this Easement will not prevent Transportation Uses on the Property, but rather will be designed and developed to accommodate Transportation Uses.

NOW, THEREFORE, the PORT OF SEATTLE and KING COUNTY, in consideration of each other's duties and obligations under this Easement, the Acquisition Agreements, the TUA, and the Interlocal, and all of them, and in exchange for the other good and valuable consideration described therein, the sufficiency of which is hereby acknowledged, do hereby agree as follows:

Use and the Railbanking Obligations, including specifically, but without limitation, the requirement to keep ownership of the Wilburton Segment intact and available with the remainder of the Property for reactivated interstate freight rail service.

4. Other Terms and Conditions.

4.1. Reactivation of Interstate Rail Service Under the Railbanking Legislation

4.1.1 Grantor and Grantee understand, acknowledge and agree that if the STB receives a request to use all or any portion of the Property for federally regulated interstate freight rail service, then Grantor and Grantee may each be required to, and will if so required, make available some or all of their respective interests in the Property to accommodate reactivated freight rail service.

4.1.2 Grantor and Grantee agree that if the STB receives a request for approval to use the Property for reactivated freight rail service, then Grantor and Grantee will cooperate in order to cause the party making such request, including Grantor or Grantee if either makes the request, (a) to bear all costs to restore or improve the Property for reactivated freight rail service; (b) to bear responsibility to take all steps necessary before the STB and any other regulatory agency, governmental or quasi-governmental body having jurisdiction over such work, to cause the relevant NITU to be vacated; and (c) to compensate Grantor and Grantee for the fair market value of any and all of their respective rights or interests in the Property, or in improvements thereon that may be destroyed, lost, compromised, or otherwise reduced in value or function when the Property or any portion of it is put to use for reactivated freight rail service.

4.1.3 Grantor will indemnify, hold harmless, and defend Grantee, its officers, employees, agents and contractors from all costs or liability arising out of or relating to Grantor's failure to make available its interests in the Property to accommodate reactivated freight rail service in compliance with the Railbanking Obligations.

4.1.4 Grantee will indemnify, hold harmless, and defend Grantor, its officers, employees, agents and contractors from all costs or liability arising out of or relating to Grantee's failure to make available its interests in the Property to accommodate reactivated freight rail service in compliance with the Railbanking Obligations.

4.2 Insurance, Indemnification, and Hazardous Substances

4.2.1 Grantee As Additional Insured for Transportation Use

Grantor shall require any entity utilizing the Property for Transportation Uses to name Grantee as an additional insured on any insurance policy maintained by the entity or required under the applicable TPO Agreement.

4.2.2 Indemnification by Grantor

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

#15
AUG 31 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Michael N. Milby, Clerk

GULF COAST RURAL RAIL	§	
TRANSPORTATION DISTRICT	§	
	§	
VS.	§	
	§	CIVIL ACTION NO. H-94-2749
SOUTHERN PACIFIC	§	
TRANSPORTATION COMPANY AND	§	
SOUTHERN PACIFIC	§	
INTERNATIONAL, INC.	§	

ORDER GRANTING TEMPORARY INJUNCTION

Southern Pacific Transportation Company and Southern Pacific International, Inc. ("SP") have filed an Emergency Motion to Quash State Court TRO, and Gulf Coast Rural Rail Transportation District ("Gulf Coast") has filed a Request for Temporary Injunction. A hearing was held on August 12, 1994. Having considered the pleadings, the evidence, and the arguments of counsel, the Court ORDERS that:

1. Until further order of this Court, SP is enjoined from removing rails, ties, or other track materials from its line in Wharton County between milepost 25.8 and milepost 42.

2. The temporary injunction granted in paragraph 1. above is conditioned upon Gulf Coast posting a bond in the amount of \$168,000 with the United States District Clerk for the Southern District of Texas no later than 4:00 p.m. on September 1, 1994.

3. Gulf Coast's action for condemnation against SP shall not be remanded to the District Court of Wharton County until either of the following have occurred:

a. SP does not appeal this Order and 30 days have passed from the entry of this Order, or



3

b. SP appeals this Order and it is affirmed in Gulf Coast's favor by the court of last resort (Fifth Circuit or United States Supreme Court depending on how far it is appealed). If neither a. nor b. occur, then this case shall not be remanded to state court.

4. Concurrently with the entry of this Order shall be entered the Court's findings of fact and conclusions of law, which are incorporated herein by reference.

Signed: August 31, 1994.

John D. Rainey
UNITED STATES DISTRICT JUDGE

SP appeals this Order and it is affirmed in Gulf Coast's favor by the court of last resort (Fifth Circuit or United States Supreme Court depending on how far it is appealed). If neither a. nor b. occur, then this case shall not be remanded to state court.

Concurrent with the entry of this Order shall be entered the Court's findings of fact and conclusions of law, which are incorporated herein by reference.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS
ENTERED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

#14 AUG 31 1994

Michael N. Milby, Clerk

GULF COAST RURAL RAIL	§	
TRANSPORTATION DISTRICT	§	
Plaintiff,	§	
	§	
v.	§	C.A. NO. H-94-2749
	§	
SOUTHERN PACIFIC	§	
TRANSPORTATION COMPANY AND	§	
SOUTHERN PACIFIC	§	
INTERNATIONAL, INC.	§	
Defendant.	§	

O R D E R

On August 15, 1994 the following matters were heard by the Court: Southern Pacific Transportation Co. and Southern Pacific International, Inc.'s ("SP") Emergency Motion to Quash State Court TRO (Docket Entry # 3); and Gulf Coast Rural Rail Transportation District's ("Gulf Coast") Request for Temporary Injunction (Dkt. # 7). After considering the testimony and evidence presented, and the applicable law, the Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The SP line from Wharton to El Campo (milepost 25.8 to 42) shall be referred to herein as the Wharton line.
2. The rails, spikes and ties in the Wharton line are SP's personal property.
3. The rails, spikes and ties were not intended to be fixtures by SP. SP picks up and moves such materials from time to time for use in other parts of its system and for salvage.
4. SP has clearly expressed its intent to permanently abandon the rail line from El Campo to Victoria.

3

4:94-cv-02749
14 ks 08/31/94

5. SP sought authority from the ICC to abandon the Wharton line not through 49 U.S.C. §10903 *et seq.*, but through an exception granted pursuant to 49 U.S.C. §10505.

6. The ICC has not revoked its order of exemption under 49 U.S.C. §10905 and has not reopened the case.

7. The 180 day disposition limitation imposed by the ICC in its exemption order has expired.

8. No application to revoke the exemption order or reopen the case has been filed with the ICC.

9. SP's immediate need is for the ties and not the rails.

10. The current cost of used ties such as those in place on the Wharton line is \$12-16 per tie.

11. There are 14,000 useable ties on the Wharton line.

12. SP can find ties elsewhere at a higher cost.

13. Gulf Coast is negotiating with shippers and short line operators to operate the line and finance its acquisition cost.

14. The state court TRO is not unduly burdensome to interstate commerce because of its effect on SP's interstate operations.

15. A bond sufficient to cover the costs and damages that may be incurred or suffered by SP would need to be in the amount of at least \$168,000.

CONCLUSIONS OF LAW

1. SP has consummated its abandonment of the rail line from Wharton to Victoria, Texas.

2. The ICC no longer exercises jurisdiction over the rail line.

3. SP's desire to remove and use the ties does not make the abandonment incomplete or preserve ICC jurisdiction.

4. A state law condemnation such as is being attempted by Gulf Coast is not preempted. Hayfield Northern Railroad co., Inc. v. Chicago and Northwestern Transportation, 467 U.S. 622, 104 S.Ct. 2610, 81 L.Ed.2d 527 (1984).

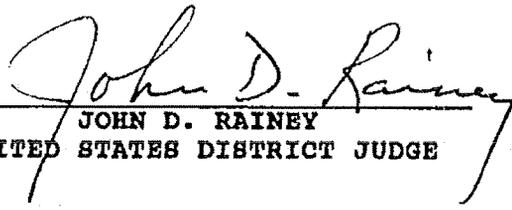
5. Gulf Coast's eminent domain authority derives solely from Article 6550c of the Texas Revised Civil Statutes. The grant of eminent domain authority is contained in the first sentence of section (5)(f) of that statute.

6. By its terms, the right of eminent domain given to Gulf Coast cannot be exercised in a manner that would unduly interfere with interstate commerce. Art. 6550c(5)(f). As being exercised in this case, Gulf Coast's eminent domain rights are not unduly interfering with interstate commerce and therefore can be exercised by Gulf Coast as a matter of state law.

7. Any findings of fact that are more appropriately considered conclusions of law, in whole or in part, shall be so considered, and vice versa.

The Clerk will enter this Order and provide all parties with a true copy.

Signed this 3/5th day of August, 1994.


JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Myles L. Tobin, an attorney-at-law of the State of Illinois, hereby Certify under penalty of perjury that I served a copy of the within pleading upon the following persons via email and First Class Mail on May 7, 2013:

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Deputy General Counsel for the Port of Seattle



Myles L. Tobin

Dated: May 7, 2013