

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

May 15, 2013

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

234242
234243
ENTERED
Office of Proceedings
May 15, 2013
Part of
Public Record

Re: **Finance Docket No. 35731**
Ballard Terminal Railroad Company, L.L.C. -- Acquisition
and Operation Exemption -- Woodinville Subdivision

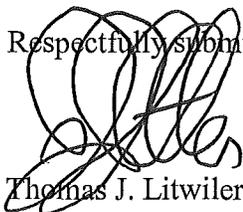
Docket No. AB-6 (Sub-No. 465X)
BNSF Railway Company -- Abandonment Exemption --
In King County, WA

Dear Ms. Brown:

Attached for filing in the above-captioned proceedings is **Ballard Terminal Railroad Company, L.L.C.'s Reply to Emergency Motion of King County, Washington to Compel the Attendance of Michael Skrivan at a Deposition or, in the Alternative, to Issue a Subpoena Compelling His Attendance**, dated May 15, 2013.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Ballard Terminal
Railroad Company, L.L.C.

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35730

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

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

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

**BALLARD TERMINAL RAILROAD COMPANY, L.L.C.'S REPLY TO
EMERGENCY MOTION OF KING COUNTY, WASHINGTON TO COMPEL THE
ATTENDANCE OF MICHAEL SKRIVAN AT A DEPOSTION OR, IN THE
ALTERNATIVE, TO ISSUE A SUBPOENA COMPELLING HIS ATTENDANCE**

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 15, 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

**BALLARD TERMINAL RAILROAD COMPANY, LLC'S REPLY TO
EMERGENCY MOTION OF KING COUNTY, WASHINGTON TO COMPEL THE
ATTENDANCE OF MICHAEL SKRIVAN AT A DEPOSITION OR, IN THE
ALTERNATIVE, TO ISSUE A SUBPOENA COMPELLING HIS ATTENDANCE**

INTRODUCTION

In accordance with the Board's May 14, 2013 Order herein, Ballard Terminal Railroad Company, L.L.C. ("Ballard"), the petitioner in these proceedings, hereby replies to the contentions levied by King County, Washington ("the County") in its motion for an emergency order compelling the deposition of a non-party witness, Michael Skrivan ("Skrivan"), an employee of CalPortland Company ("CalPortland"), by May 20, 2013, or in the alternative, for a subpoena compelling Mr. Skrivan's attendance at a deposition within the same time frame. Ballard believes the Code of Federal Regulations and the decisions of this Board dictate that the Board deny the County's emergency motion to compel on the basis that the subpoena served upon Mr. Skrivan is invalid. To the extent that the Board is persuaded to issue its own subpoena to Mr. Skrivan, such a subpoena should be limited to testimony concerning (1) the extent to which CalPortland has asked Ballard about the provision of rail services; and (2) whether

CalPortland has actual or potential demand for freight rail service, as these are the only two areas of inquiry for which the County has professed a need for information.

BACKGROUND

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. In its petition, Ballard advised the Board that CalPortland, a shipping customer, sought use of the Line. Attached to Ballard’s petition was a letter from Michael Skrivan, an employee of CalPortland, supporting the reactivation of rail service on the Line and expressing CalPortland’s interest in shipping thereon. Ballard Petition, Exhibit C. Also on April 2, 2013, Ballard also filed a related 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.

On May 2, 2013, the City of Kirkland (“Kirkland”) purported to serve a subpoena duces tecum to Michael Skrivan to appear at deposition on May 13, 2013, and to produce various documents. Kirkland later withdrew the subpoena and, thereafter, on May 10, 2013, the County purported to serve a subpoena duces tecum to Michael Skrivan to appear at deposition on May 14, 2013, and to produce various documents. County Motion, Exhibit 2. Both subpoenas indicate that they were served pursuant to 49 C.F.R. 1121.2 and 49 C.F.R. 1114, subpart B.

In the period of time between the service of the two subpoenas, on May 8, 2013, Ballard filed its Motion for Preliminary Injunction in these dockets, wherein it argued that

Kirkland should be enjoined from removing existing track on the Line during the pendency of this proceeding.

ARGUMENT

I. The County's Claimed Urgency in Filing its Emergency Motion to Compel is a Consequence of its Own Failure to Seek Non-Party Discovery in a Timely and Proper Manner

As set forth above, Ballard filed its petition in this matter on April 2, 2013. Its petition included the letter from Mr. Skrivan and was served upon the County by first-class mail.¹ Between April 2, 2013, and May 2, 2013, no entity, including the County, took any action to request a deposition or documents from Mr. Skrivan. Four weeks passed until such time as Kirkland made Ballard, and presumably CalPortland, aware that it sought to depose and obtain documents from Mr. Skrivan. An additional week passed before the County served its current subpoena on May 10, 2013, wherein it demanded the Mr. Skrivan appear for deposition and produce six categories of documents, including “emails,” “letters,” “faxes,” “blueprints,” “maps,” “diagrams,” “schematics,” “invitations for bids,” “proposals,” “studies,” “estimates,” and “contracts,” on four days’ notice. Such a brief window in which to compile such information is *per se* burdensome and unreasonable. Ballard notes that the minimum time for responding to most forms of STB discovery is fifteen days, see 49 C.F.R. §§ 1114.26(a), 1114.27(a), and the timeframe for document production requests must similarly be “reasonable.” 49 C.F.R. § 1114.30(b).

Additionally, both the County and Kirkland caused additional delay by not availing themselves of the proper procedures for obtaining non-party discovery. As described below, these entities should have petitioned the Board for a subpoena, thereby allowing the

¹ While the official filing date of Ballard’s petition with the Board is April 2, 2013, it was actually mailed to King County on March 29, 2013.

Board to consider the reasonableness of the requested information and the appropriate time period for Mr. Skrivan to respond. Overall, any claimed urgency with respect to the resolution of the County's emergency motion and the deposition of Mr. Skrivan has been created by the County and has not been the result of actions on the part of Ballard or CalPortland.²

Nor is it clear why the County's current motion should be considered an "emergency" even today. Comments on Ballard's petitions to reinstitute rail service on the Line are due on June 18, 2013 -- more than a month from now and a date that could presumably be extended if required. It was plainly not necessary that Mr. Skirvan's deposition be taken yesterday, which is literally what the County's motion sought. The rushed atmosphere surrounding the County's efforts at discovery has caused confusion and engendered suspicion. In any event, while the Board should act in a timely manner on the County's motion, it should not consider this situation an "emergency."

II. The Subpoena Served by King County is Invalid and Unenforceable

A. A Party to an STB Proceeding is Not Able to Issue a Subpoena to a Non-Party

In arguing for the validity of the subpoena issued on May 10, King County cites to 49 C.F.R. § 1114.21(b), which provides that "discovery procedures may be used by parties without filing a petition and obtaining prior Board approval." The County further asserts that "all discovery permitted under Part 1114 subpart B is available in exemption proceedings . . . without the need to obtain Board approval." County Motion at 4. The County fails to observe, however, that non-party document requests are not among the discovery procedures authorized

² Counsel for Kirkland and King County did not attempt to contact counsel for Ballard prior to scheduling Mr. Skrivan's deposition to ascertain counsels' availability, which is counter to custom, particularly when scheduling depositions on short notice. As a consequence, the delay on the part of King County created a burden upon Ballard as well with respect to coverage.

by Part 1114. Rather, parties are only able to serve requests for documents upon other *parties* without obtaining Board approval. 49 U.S.C. § 1114.30.

Moreover, the decisions of the Board have consistently reiterated the requirement that non-party subpoenas be issued by the Board. East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express -- Petition for Declaratory Order -- Motor Carrier Transportation of Passengers in Colorado, STB Docket No. MC-F-21008 (STB served June 1, 2005) at 2; Wisconsin Power and Light Company v. Union Pacific Railroad Company, STB Docket No. 42051 (STB served June 21, 2000) at 2-3; Waterloo Railway Company -- Adverse Abandonment -- Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No. AB-124 (STB served May 6, 2003) at 3, n.4; see also Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, STB Finance Docket No. 35557 (served June 25, 2012). In each of these decisions, a party to the proceedings had to petition the Board to issue a subpoena compelling a non-party to testify and to produce documents.

Michael Skrivan and his employer, CalPortland, are non-parties to this action. As a consequence, any discovery request to Mr. Skrivan must be obtained by way of a subpoena issued by the Board on petition by a party. The subpoena served upon Mr. Skrivan was not issued by the Board and, as such, it was invalid. The County's motion to compel must be denied.

B. 49 U.S.C. § 721 Does Not Require Non-Parties to Comply with a Subpoena Issued by a Party

The County's motion to compel must also be denied pursuant to 49 U.S.C. § 721. In its motion to compel, the County incorrectly claims that paragraph (d) of § 721 allows it to compel the deposition of Mr. Skrivan. The Board, in East West Resort, at 2, specifically refuted that notion, stating that “[a] non-party can be compelled to respond only to a subpoena issued

pursuant to 49 U.S.C. 721(c)” (referring to subpoenas issued by the Board). In East West Resort, the Board made clear that a non-party may decline to be deposed absent a subpoena issued by the Board. Id. Where a non-party declines to be deposed pursuant to a party’s request, the party must petition the Board and make a showing of need for the requested information in order for the Board to issue a subpoena. Id. As the subpoena served on Mr. Skrivan on May 10 was not issued by the Board, it not sufficient to compel Mr. Skrivan’s appearance for deposition or the production of documents.

III. The County’s Alternative Argument For the Board to Issue a Subpoena Does Not Adequately Reflect a Need for Extensive Questioning and Non-Party Document Production

A. Pursuant to East West Resort and BNSF Coal Dust Tariff, a Deposition of Mr. Skrivan, if Allowed, Should Be Limited in Scope

The County makes the alternative argument that its motion to compel should also be construed as a petition to the Board for the issuance of a subpoena to Mr. Skrivan. As stated above, the Board can issue a subpoena to a non-party only upon a showing of need made by a party to the proceedings. East West Resort at 2. Where a party petitions the Board for discovery, the Board must balance the relevance of the information sought to be obtained with the burden of producing requested information. BNSF Coal Dust Tariff at 4. Where information is sought from a non-party, “greater weight should be given to the burden and thus a stronger showing of relevance is required.” *Id.*

Ballard has already explained why demanding a deposition and expansive document production within days is burdensome and it will not belabor this point. With respect to the requirement that the County demonstrate a need for information from a non-party, the County has asserted only that it needs to (1) probe the extent to which CalPortland has asked Ballard about the provision of rail services; and (2) whether there exists actual or potential

demand for freight rail service. As a preliminary matter, Mr. Skrivan's letter is clear on these two points, and though counsel for the County expressed concerns that the letter is being used as evidence despite being unsworn and unverified, this concern can be cured if Mr. Skrivan is willing to verify the information in his letter in lieu of a deposition.

If the Board is inclined to allow a deposition, however, then such deposition should be limited to the areas of need that the County has identified, *i.e.*, communications with Ballard regarding the provision of rail service and whether CalPortland has a demand and interest to ship on the Line. In this manner, the County would be able to obtain the information it purports to be relevant, while CalPortland's (and, presumably, the Board's) concerns regarding the scope and length of the deposition, and the potentially intimidating nature thereof, could be at least partially mitigated. Under the circumstances, any direct examination should also be conducted only by King County; there is no reason why the other so-called "Regional Parties" -- the City of Kirkland and Central Puget Sound Regional Transit Authority -- should be able to engage in *seriatim* questioning of Mr. Skrivan. It is important that the burden on Mr. Skrivan as a third-party witness be recognized and well-balanced with the ability of County to obtain the information it seeks, in accord with the Board's decision in BNSF Coal Dust Tariff.

B. The County Has No Need to Obtain Documents From CalPortland

The County has not argued, nor has it demonstrated, why it has any need to obtain documents from CalPortland. The document requests included in the County's subpoena do not purport to comport with 49 C.F.R. § 1114.30, and are unnecessary, burdensome, and likely include proprietary documents. Certainly there can be no reasonable basis to seek production of documents within four days, as the County did in its subpoena. Moreover, as feared by counsel for CalPortland, such documents will likely be used to increase the length of Mr. Skrivan's

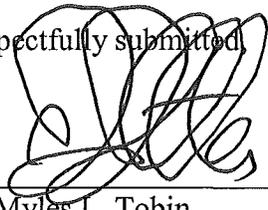
deposition, if one is required, and force him to address collateral matters. By way of example, the County has requested CalPortland's communications with BNSF Railway Company, an entity with no involvement in this matter, and documents detailing all projects that CalPortland "is targeting." Such documents in particular do not fall within the scope of information the County purports to need in this matter, and will likely lead to a focus on collateral matters that will waste time, confuse the issues, and bear little evidence relevant to the issues ultimately to be decided by the STB in this proceedings.

IV. An Unfettered Deposition of Mr. Skrivan Will Have Chilling Effects

Contrary to the County's belief, Ballard does not believe that depositions are rightly considered "routine" in STB proceedings, particularly as it relates to the depositions of non-parties. A "subpoena" to appear at the offices of the King County "Prosecuting Attorney" at the King County Courthouse, accompanied by extensive document requests and a return date two business days away, see King County Motion, Exhibit 2 is a not insubstantial consequence for a decision to offer a supporting shipper statement in an STB proceeding. The STB should be protective of the participatory interests of shippers in its proceedings, and cannot be naïve about the chilling effects that broad, unfettered and supposedly "emergency" discovery requests could have on entities that have every interest in shipping their commodities by rail but may not have an interest in retaining an attorney, devoting significant time to broadly-conceived document reviews and defending themselves from hostile questioning at open-ended depositions. It remains unclear to Ballard why those kinds of burdens are necessary in order for the County to critique Ballard's underlying petition in these proceedings or the supporting letter that CalPortland offered.

WHEREFORE, Ballard requests that the County's emergency motion be denied in whole or in part and, to the extent granted, that it be subject to the limitations described herein.

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 15, 2013

CERTIFICATE OF SERVICE

I, Thomas J. Litwiler, an attorney-at-law of the State of Illinois, hereby Certify under penalty of perjury that I served a copy of the foregoing pleading upon the following persons via email and First Class Mail on May 15, 2013:

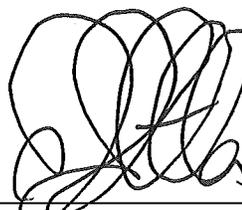
Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
Kaplan Kirsch & Rockwell, LLP
1001 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
epilsk@kaplankirsch.com
afultz@kaplankirsch.com
Counsel for King County, Washington

Matthew Cohen
Hunter Ferguson
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 386-7569
mcohen@stoel.com
hoferguson@stoel.com
Counsel for the City of Kirkland, Washington

Jordan Wagner
Jennifer Belk
Central Puget Sound
Regional Transit Authority
401 S. Jackson Street
Seattle, WA 98104
(206) 398-5224
jordan.wagner@soundtransit.org
jennifer.belk@soundtransit.org
*Counsel for the Central Puget Sound Regional
Transit Authority*

Andrew Marcuse
Peter G. Ramels
Senior Deputy Prosecuting Attorney's Office
King County
2400 King County Courthouse
516 Third Avenue
Seattle, WA 98104
andrew.marcuse@kingcounty.gov
pete.ramels@kingcounty.gov
Counsel for King County

Isabel Safora
Deputy General Counsel
Port of Seattle
Pier 69
P.O. Box 1209
Seattle, WA 98111
safora.i@portseattle.org
Deputy General Counsel for the Port of Seattle



Thomas J. Litwiler

Dated: May 15, 2013