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AFTER HOURS FAX FILING

TO: 202-565-9004



ENTERED  
Office of Proceedings

DEC 16 2005

Part of  
Public Record

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: City of Alameda -- Acquisition Exemption  
-- F.D. No. 34798

Initial Response to Emergency Motion to Stay

Dear Mr. Secretary:

At close of business East Coast time on December 14, counsel (former agency Secretary Strickland) for Alameda Belt Line (ABL) faxed counsel for City of Alameda an "emergency motion to stay" the effectiveness of City of Alameda's Notice of Exemption in F.D. No. 34798. The "emergency motion" is marked "Expedited Handling Requested," which is usually short hand for a request that this Board act in an ex parte fashion without allowing the other side to be heard. In order to indicate its opposition, City of Alameda submits this letter after hours by fax.

Summary

City of Alameda objects to handling the alleged "emergency motion" without allowing City of Alameda to be heard. ABL cannot show a likelihood of success on the merits or irreparable injury in the absence of a stay, which are requirements for issuance of a stay.

BNSF also suggests a "housekeeping stay." If this Board were to issue a stay, it would have to be on this basis, but City notes its view that any stay is simply unnecessary. All the concerns ABL has raised can be fully considered under 49 U.S.C. § 10502(d), as provided in 49 C.F.R. § 1150.31, et seq. (motions to revoke exemptions). There is no impact at all on any shipper arising from City's Notice of Exemption; no alteration in ownership or service will suddenly materialize. There is nothing of substance behind ABL's effort to precipitate

a stay that cannot be handled by the procedure envisioned under § 10502(d).

### Background

City is seeking an efficient, responsible way to comply with this Board's regulations in City's efforts to acquire the remaining portion of the ABL property in City of Alameda. ABL in its filing acknowledges that City holds an option to acquire that property. The option is contained in a 1924 contract which served as the basis the Interstate Commerce Commission (ICC) decision authorizing ABL and its extension to what is now M.P. 2.61 in 1925. ABL agrees that the decision is reported at Alameda Belt Line, 105 I.C.C. 349 (1925).

In a statement of its case recently filed in California state court litigation, ABL indicated that this Board has exclusive and primary jurisdiction over the City's proposed acquisition. City has also recently confirmed through discovery that ABL, although not providing any current rail customers, remains an active line of railroad (not authorized for abandonment) between M.P. 0.0 and M.P. 2.61. Since City seeks to acquire the line as a rail line consistent with rail use, and not as abandoned property, the appropriate remedy under City's contract with ABL is for the City to seek an appropriate authorization from this Board for acquisition. After review of this Board's precedent, City concluded that the only "controversy" concerning the City's acquisition was over the terms of the applicable purchase contract. This Board has repeatedly indicated that controversies over contract terms (like price) are for the state courts, not this Board to resolve. City accordingly filed a notice of exemption under 49 C.F.R. § 1150.31, so that ABL would not move for summary judgment against City or otherwise attempt to forestall trial on grounds of federal preemption.

### Initial Response to ABL Claims

ABL cites BNSF -- Acquisition and Operation Exemption-- State of South Dakota, F.D. 34645, served Jan. 14, 2005, in support of the proposition that the exemption process is applicable only to "routine" transactions that are "non-controversial." But the only non-routine aspect of the transaction in F.D. 34645 was that the railroad (BNSF) was seeking to acquire State-owned property over the objection of the State. No state or other governmental entity, let alone one with an interest, is objecting to City's proposed acquisition. Ultimately, even though this Board required BNSF to file an application, the "issues" were left for state court resolution.

There are numerous decisions in the South Dakota controversy not cited by BNSF which indicate the City is

proceeding properly. For example, Burlington Northern and Santa Fe Railway<sup>1</sup> resisted certain 49 C.F.R. § 1150.31 notices of exemption relating to the South Dakota controversy on the ground that the notices of exemption were somehow

"intended to improperly influence ... pending state court litigation" presumably by suggesting some kind of STB adjudication of the contract dispute. E.g., Dakota Southern Railway Co. -- Trackage Rights, F.D. 34630-1, served Dec. 29, 2004.

This Board allowed the exemption to go into effect despite BNSF's concern, but noted that

"the Board makes no determination, one way or the other, concerning the right of the State to grant these trackage rights ..... The contractual dispute respecting the scope of the rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement must be resolved in a court of competent jurisdiction." Id. (final full paragraph).

The City does not plan to argue that the Notice of Exemption resolves contract issues in State Court. The City merely seeks this Court's authorization so it will be able to argue its contract rights in State court and obtain enforcement of its rights if the State court agrees with the City's position.

Contrary to suggestions by ABL's counsel (e.g., ABL mot. at P. 2), City is not seeking STB authority to acquire a rail yard over which this Board lacks jurisdiction. City is seeking authority to acquire the rail properties under this Board's jurisdiction. Ironically, ABL (which seems at p. 2 of its Motion to be suggesting lack of jurisdiction to STB) is claiming in its defenses in the California litigation that STB has exclusive jurisdiction.

Contrary to ABL's counsel's claim (e.g., ABL mot. at p. 2), City is not seeking to acquire the rail property for \$30,000. While that is the "original cost" ABL paid for a piece of the rail line originally constructed by the City, the rail line was extended at much greater cost as provided in the contract which this Board's predecessor approved in the decision set forth in 105 I.C.C. 349 (1925). Under that contract, ABL upon one year's notice from the City must sell the line to the City at original cost plus investment and extension costs, but not upkeep and maintenance, as established in reports similar to those filed with the ICC and California Railroad Commission (presumably as

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<sup>1</sup> City understands that BNSF handles legal services for ABL.

set forth in the balance sheets prepared under railroad regulatory accounting rules). In short, City is seeking to acquire the property at the price ABL is obligated to sell the property under the contract to which ABL voluntarily agreed. No one doubts that this will be much more than \$30,000. State courts have already determined that the contract option is enforceable on its face.

Contrary to ABL's counsel's claim (ABL mot. at p. 3), City's purposes will preserve the national rail system. It is ABL, not the City, that is seeking to sell portions of MP 0.0 to MP 2.61 to developers, including but not limited to the old ABL rail yard which lies between approximately MP 1.9 and MP 2.5. ABL is objecting to City's Notice of Exemption because City's action forestalls ABL's effort to abandon and to dispose of the rail line in segments without first seeking this Board's authorization and without allowing the City any viable opportunity to exercise its contract option, even in an effort to keep the line intact.

As stated by City in its Notice of Exemption, if City acquires the property, City intends not to interfere with Union Pacific's trackage rights, and instead to preserve the line consistent with this Board's jurisdiction and procedures and pursuant to the contract that was at the crux of ICC's decision in 1925. ABL at one point seems to suggest the City is seeking to "adversely abandon" the line. ABL Mot. p. 2. To the contrary, City is seeking to acquire the line intact. City's action will not deprive any shipper of any rail service, and City's action is the last hope to preserve the line so service can be provided now or in the future to potential shippers on the line.

ABL shows no harm flowing to ABL that will be averted if the Notice is stayed. On the other hand, if the Notice is stayed, there will be harm to the City in the form of further costs, and to the public, in that the state court proceeding where the contractual issues will inevitably be handled will again face delays and interference. ABL has likewise no reasonable likelihood of prevailing on the merits: the ultimate outcome in contract disputes involving rail line sales is that they are resolved in state court.

#### Miscellaneous

If this Board grants a housekeeping stay to allow briefing of the motion for stay, then counsel for the City requests five business days from this Board's order, with the housekeeping stay expiring in ten business days from this Board's order unless the Board acts otherwise.

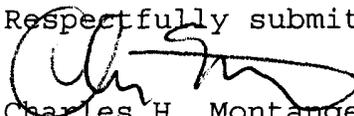
City in all events requests that this Board exercise its

jurisdiction in a fashion that does not simply raise costs and create delays in the state court litigation, or result in a delay of the trial date (counsel understands the trial, already much delayed, is currently set for on or about April 7, 2006).

Conclusion

In sum, the City opposes any stay on the ground that the only dispute relates to the construction of a contract option. Those kinds of disputes belong in State court under this Board's precedent. The fact that there is litigation does not render the matter "non-routine."

Respectfully submitted,



Charles H. Montange  
for City of Alameda

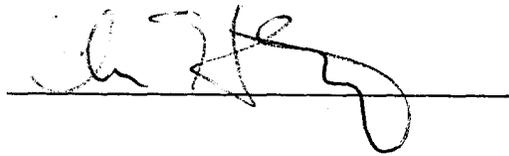
cc. Sidney Strickland, Esq.  
by fax: 202-672-5399

Before the  
SURFACE TRANSPORTATION BOARD

City of Alameda -- )  
Acquisition Exemption -- ) F.D. 34798  
Alameda Belt Line )

Certificate of Service

The undersigned hereby certifies service of the foregoing Letter dated 14 December [which was filed by fax transmission with the Board (202-565-9004) after hours on 14 December 2006] by fax transmission upon Sidney Strickland, counsel for Alameda Belt Line, at his firm's fax number 202-672-5399, coterminous with transmission to the Board. On 15 December, the undersigned further certifies that he served an additional copy by Federal Express, next day delivery, upon Mr. Strickland, 3050 K St., N.W., Suite 101, Washington, D.C. 20007-5108.

A handwritten signature in black ink, appearing to be "J. H. [unclear]", is written over a horizontal line.