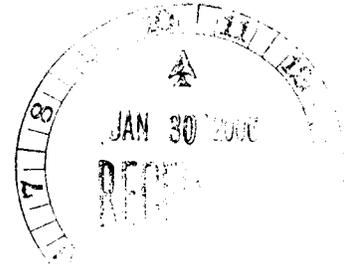


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215683



28 January 2006
by express service

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

Re: City of Alameda -- Acquisition Exemption --
Alameda Belt Line, F.D. 34798

Dear Mr. Secretary:

Enclosed for filing in the above-captioned proceeding, please find an original and ten copies of a Motion for Leave to File a Reply, and a Reply. The Reply is limited to what City of Alameda views as an entirely new claim made by Alameda Belt Line in its Supplementary Pleading filed in this proceeding on January 17.

Thank you for your assistance.

Respectfully submitted,

Charles H. Montange
for City of Alameda

ENTERED
Office of Proceedings

JAN 30 2006

Part of
Public Record

Encls.

cc. Counsel for ABL (w/encls.)
City of Alameda (w/encls.)

BEFORE THE SURFACE TRANSPORTATION BOARD

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



MOTION FOR LEAVE TO FILE LIMITED REPLY
and
REPLY

City of Alameda hereby moves to file a limited reply to clarify the record as to certain unexpected claims made by Alameda Belt Line (ABL) in a recently filed "supplementary pleading."

Background

This case involves City of Alameda's request for authority from this Board to acquire what is left of the Alameda Belt Line in the City of Alameda, California. From the inception of ABL's existence, City has a had a contract option to acquire ABL at a formula price. ABL currently provides no rail service itself, relying on Union Pacific since 1998 to provide service to ABL customers via trackage rights. Shortly after entering into the trackage rights agreement with Union Pacific, ABL engaged in unlawful efforts to sell itself off piecemeal without abandonment authority. When City gave notice in 1999 of its intent to exercise its contract option to acquire ABL in order to preserve it, ABL sued the City in California State Court to invalidate the contract option. After extensive motions practice and appeals, the case is now set for trial on April 7, 2006. Because ABL has asserted a defense of preemption by this

Board, and because City acknowledges this Board's jurisdiction, City initiated this 49 C.F.R. 1150.31 notice of exemption proceeding to obtain authority for acquisition so that the trial could go forward without risk of summary dismissal on preemption grounds.

On or about December 14, ABL filed a motion for stay in this proceeding. The gravamen of ABL's motion for a stay was that the City's contractual right to acquire the ABL was in litigation in the California state courts, and that contract litigation rendered the proposed acquisition too controversial for a notice of exemption type of proceeding. ABL indicated that City should have filed some other form of proceeding for acquisition (petition for exemption or application).

On December 15, 2005, this Board granted a housekeeping stay in this proceeding, and requested City of Alameda ("City") and Alameda Belt Line ("ABL") to file "supplementary pleadings" addressing each other's initial contentions. The Board also requested discussion of the impact of various courses of action available to the Board on rail service over the line. Pleadings were due on or before January 17, 2006. The initial contention of City of Alameda was City's "Notice of Exemption" for acquisition of the Alameda Belt Line.¹ The initial contention of ABL was ABL's motion for a stay.

City and ABL filed supplementary pleadings on January 17,

¹ City attempted to fax file a response to ABL's motion for stay, but it was not considered by the Board when the Board issued its decision.

2006. City addressed ABL's contention about contract disputes being too controversial by showing (a) that ABL initiated the state court litigation, (b) that this Board's precedent indicated that contract disputes such as the one involved here were supposed to be resolved in state court, and (c) that this Board's precedent further indicated that "notice" procedures were only inappropriate where (i) there was a change in status of the line and (ii) a government raised the objection to the "notice" procedure. Obviously neither of these conditions were applicable here.

City also addressed this Board's question about impact of possible agency action on future rail service by showing, among other things, that the City's applicable General Plan called for continued freight rail use, City intended to rely on Union Pacific to continue to provide freight rail service per its trackage rights, City also was interested in preserving the line for future light rail, open space and trail purposes, and that ABL was illegally selling or attempting to sell off the line to developers piecemeal without abandonment authority from this Board. The Chamber of Commerce and a potential shipper (Encinal) supported the City's position and the City's efforts to acquire the line.

ABL in its "supplementary pleading" presents as its primary argument an entirely new claim -- one that would bar the City from any acquisition of ABL as a line of railroad, whether by notice procedures or otherwise. ABL's new claim is that the

City desires the line only for a trail.

To support this claim, ABL relies on a draft "vision" study prepared by Rails to Trails Conservancy for a "Cross Alameda Trail." ABL also attaches some excerpts from a "Draft Feasibility Study" prepared by the City, and a newspaper article.

As previously noted, this proceeding involves property that is subject to a contract dispute currently scheduled for trial on April 7. City has no wish to see that trial date delayed, and indeed any delay might effectively render City's contract rights unenforceable. City accordingly does not wish to invite any unnecessary motions practice or drawn out procedures before this Board. City is thus reluctant to request a briefing schedule on this new claim by ABL, which seems contrived for the purpose of upsetting the trial date. On the other hand, City believes that ABL's claim must be addressed due to the gravity of its consequences, and in any event, the record should be clear that ABL's arguments are based on documents which are inapplicable to the conclusions ABL seeks to draw. City therefore respectfully requests this Board to allow City an opportunity to make a limited Reply. In the alternative, City reluctantly requests that the Board issue a procedural order permitting prompt briefing of ABL's new claim such that the Board may resolve the issue in a fashion permitting trial to go forward on April 7.

Limited Reply

City flatly denies that it is seeking to acquire the ABL for a trail, let alone exclusively as a trail. City's purpose is best revealed by City's applicable General Plan, which calls for ABL to be a freight railroad. This General Plan statement was applicable at the time (1999) that the City gave notice of its intent to exercise its contract option, and it is still applicable. Since 1999, the City's Department of Public Works has evaluated whether the corridor once acquired could be used for other transportation purposes, including light rail transit and trail. Not surprisingly, since this is an urban corridor, the Department of Public Works has found that parts of what remains of the ABL system are suitable for both light rail transit and for trail purposes. The principle parts are from roughly MP 1.8 to MP 2.61 (where the corridor is wider than necessary for rail purposes), and roughly MP 2.61 to MP 3.44, which was long ago lawfully abandoned and which is no longer in rail use.

City supplied this Board with both the City's transit and trail studies germane to the ABL. In each case, the only real overlap where light rail or trail would occupy the existing corridor is from roughly MP 1.8 to MP 2.61. As previously indicated, that portion of the ABL is broad enough to encompass both rail and trail uses. Moreover, light rail is compatible with freight rail as both operate on the same gauge. ABL long ago abandoned MP 2.61 to MP 3.44 (out to the former naval base). Except for buildings constructed at about MP 2.61, the bulk of

this "abandoned" right of way appears to remain intact, and it would make a fine light rail or trail corridor. But all of this is fully compatible with the City's intent to preserve the non-abandoned ABL as a freight rail line (operated by Union Pacific).

The City's purpose in acquiring ABL is not determined by RTC, much less a "vision" document prepared by RTC. As to the draft feasibility study prepared by the City Department of Public Works, City furnished this Board with the entire final feasibility study, which is Appendix IX to Exhibit B in the City's Supplementary Memorandum. The fact that a trail is feasible along portions of the ABL right of way does not mean that a trail is the City's purpose. City incorporates below the Declaration of Barbara Hawkins (the City Engineer in the Public Works Department) explaining that ABL is misrepresenting RTC's "vision" as well as misapplying it to the City, and further explaining that the Trail Feasibility Study itself states that it is not to be construed even to "suggest that the City should seek, or is seeking, to acquire ABL property for trail ... purposes."

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34798

City of Alameda --
Acquisition Exemption --
Alameda Belt Line

DECLARATION OF
BARBARA HAWKINS

I, Barbara Hawkins, am the City Engineer within the City of Alameda Public Works Department. In the "Supplementary Pleading" filed by Alameda Belt Line (ABL), ABL makes the claim that City seeks to acquire the remainder of ABL for use as a trail. ABL supports this statement by relying on a document entitled "Draft: Cross Alameda Trail Vision" dated July 15, 2004, prepared by Rails to Trails Conservancy (RTC), and some selected extracts from a Final Report by the Department of Public Works. I am familiar with these documents and I wish to clarify the record on a couple points raised by ABL.

1. The Alameda City Council adopted Ordinance 2817 on November 19, 1999 [attached as Appendix I to Exhibit B (City Clerk Verified Statement) to Alameda's Supplementary Pleading]. At the time of adoption of this Ordinance, the City's applicable General Plan called for the ABL to be used for freight rail transportation. Appendix VII of Exhibit B. It still does. To the Department of Public Works, that is the City's most direct expression of intent.

2. The RTC report was prepared by a private group, not by the

City. Although the referenced RTC report indicates that the Department of Public Works provided "technical support," the report is a private document, not a City document, and does not reflect the position of the Department of Public Works, much less the City of Alameda. In any event, the draft RTC report supports creation of a trail, not displacement of a railroad. Of the five alignment "sections" which it describes, it appears to call for a trail on two portions of current or past ABL property. The first section ("section 1": Main Street to Webster Street) involves a portion of ABL long ago authorized for abandonment by the ICC and not at issue in the current STB proceeding. The only other section involving ABL property is "section 3": Constitution Way to Sherman Street). The ABL property in question there is broad enough to encompass a multi-track rail line and a trail. The rest of the RTC draft report seems devoted to locating bike lanes in city streets.

3. The Department of Public Works secured funding for its own trail feasibility study, and coordinated its public outreach efforts with RTC so that the public input would "not be constrained by the needs or goals of the City." Final Report at p. I-1. The Department's study is set forth in Appendix IX of Exhibit B, and is entitled Cross Alameda Trail Feasibility Study, dated July 5, 2005, and was prepared for the Association of Bay Area Governments. ABL attached only a couple excerpts from that Report to its "Supplementary Pleading." For purposes here, it is germane to note

that the Study itself expressly states that it is not to be construed as indicating an intent to acquire the ABL property for trail purposes and it indicates that any acquisition at this time must be consistent with continued freight use of the operating railroad corridor. On page ii of the Preface -- a portion of the Report which ABL did not include in its pleading -- the Study states:

"Nothing in this study should be construed to suggest that the City should seek, or is seeking, to acquire ABL property for trail, and most especially solely for trail, purposes. Rather, the Study is designed to evaluate, among other things, whether the property, if acquired, could appropriately be employed for trail use, or for transit and trail use....

"[T]his Study assumes that the ABL is an operating freight railroad... and that it remains under the jurisdiction of the federal Surface Transportation Board (STB). Under that assumption, an acquisition by the City at the current time should be consistent with the continued discharge of all freight rail obligations in connection with the shippers served by ABL and would be subject to STB authorization."

These caveats are hardly surprising since the report (per p. I-1) was not intended to be constrained by the City's needs and goals.

4. The Department of Public Works looks at the feasibility of many potential City projects. This does not convert our feasibility studies into projections of City intent. We also have feasibility studies or consultant reports on light rail using portions of the ABL corridor (portions attached in Appendix X to Exhibit B, from 2000 and discussed in our subsequent Transit Plan, attached in Appendix XI to Exhibit B). In my view, these are all compatible with continued freight rail use of the railroad corridor

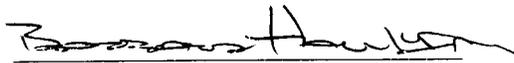
in accordance with the applicable General Plan.

5. The Department of Public Works has become increasingly aware that ABL's current owners were attempting to sell off the railroad's property piecemeal. (That is referenced in the 2005 Trail Feasibility Study at p. II-2, last paragraph.) This leads the Department to support City acquisition as a means to keep as much of this important transportation corridor intact as possible. The main point of our studies is that it appears that several portions of the ABL property could support light rail and trail use as well as freight rail use -- hardly a surprise in an urban setting.

6. Union Pacific provides all rail service on ABL per trackage rights authorized by this Board. Consistent with continued freight rail use, City of Alameda does not propose any interruption to that arrangement. Indeed, it seems to me it is ABL, not the City, that is acting inconsistently with continued freight rail intent.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 01/27/06.


Barbara Hawkins

The only remaining document presented by ABL is what appears to be a newspaper article from June 2004. The article quotes no city official and purports to be report of statements by a local "bike activist" and by RTC's project coordinator. It indicates only that bike activists and RTC would like to see a cross Alameda trail and that the Department of Public Works was conducting a feasibility study.

ABL may as well claim that the City wants the ABL for light rail; there are groups supporting that effort and the City has a feasibility study for light rail as well.

But then ABL must also claim that the City wants ABL for all rail, because that is what the City's General Plan says, and that Plan is what governs City actions, not RTC visions, or feasibility studies, or newspaper articles. Certainly the Chamber of Commerce and Encinal seem satisfied that the City's motivation comports with freight rail.

City does not understand how ABL can seriously maintain that this acquisition is somehow exclusively for a trail, and not for rail purposes, when City proposes to leave one of ABL's owners (Union Pacific) in place as operator of a freight rail line. ABL's claims are polemical conjectures based on draft documents that do not support the conjectures.

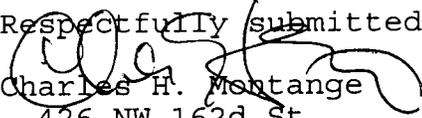
Other Matters

ABL discusses some other arguments in its supplemental filing. Our silence here should not be construed as conceding

anything ABL is arguing; rather, City feels the law obviously to the contrary, or already addressed by City in our Supplemental Memorandum.

Conclusion

Leave to file this Reply should be granted, the housekeeping stay lifted, and the Notice of Exemption allowed to become fully effective.

Respectfully submitted,

Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206)546-1936
Counsel for Applicant
City of Alameda (CA)

Certificate of Service

I hereby certify service upon Sydney Strickland, attorney for BNSF, by express delivery service, next business day delivery, this 27th day of January, 2006, at 3050 K Street, N.W. Suite 101, Washington, D.C. 20007-5108.

