

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35731

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.—ACQUISITION AND
OPERATION EXEMPTION—WOODINVILLE SUBDIVISION

Docket No. AB 6 (Sub-No. 465X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN KING COUNTY,
WASH. (WOODINVILLE SUBDIVISION)

Digest:¹ This decision denies Ballard Terminal Railroad Company, L.L.C.’s request for authority to reinstitute rail service on a line of railroad owned by the City of Kirkland, Wash., Central Puget Sound Regional Transit Authority, and King County, Wash. that is currently subject to interim trail use/rail banking under the National Trails System Act, 16 U.S.C. § 1247(d). The Board also denies Ballard’s related petition to partially vacate the notice of interim trail use that had been issued for the line.

Decided: December 30, 2014

Ballard Terminal Railroad Company, L.L.C. (Ballard) seeks authority in Docket No. FD 35731 to reinstitute rail service over 11.2 miles of the former BNSF Railway Company (BNSF) rail line known as the Woodinville Subdivision (the Line). The Line is currently subject to interim trail use/rail banking under § 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). Ballard does not currently hold the reactivation right or a property interest in the Line; those interests are owned by the City of Kirkland, Wash. (Kirkland), King County, Wash. (King County), and Central Puget Sound Regional Transit Authority (Sound Transit) (collectively, the Regional Parties). The Regional Parties oppose Ballard’s petition to reinstitute service on the Line and its related petition to partially vacate the Trails Act condition imposed in Docket No. AB 6 (Sub-No. 465X) for the Woodinville Subdivision (which comprises the Line and an additional 1.35 miles of track). For the reasons discussed below, Ballard’s petitions will be denied.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The parties designated certain information in this decision as confidential. While we attempt to avoid references to confidential information in Board decisions, the Board reserves the
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BACKGROUND

In 2008, BNSF sought and received an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 that authorized it to abandon the Woodinville Subdivision, including the 11.2-mile segment of rail line at issue here. See BNSF Ry.—Aban. Exemption—in King Cnty., Wash. (BNSF Woodinville Abandonment), AB 6 (Sub-No. 465X) (STB served Nov. 28, 2008). In that proceeding, BNSF requested an exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904, but the Board found that BNSF had not justified such an exemption and therefore denied its request. Nevertheless, no OFA was submitted.

During the abandonment proceeding, King County filed a request for a Notice of Interim Trail Use (NITU) for interim trail use/rail banking on the Woodinville Subdivision pursuant to the Trails Act. BNSF Woodinville Abandonment at 4-5. Subsequently, BNSF entered into an interim trail use arrangement with King County, which became the trail sponsor. Under the Trails Act, the trail sponsor agrees to assume managerial, tax, and legal responsibility for the right-of-way and develop a trail, but does so subject to possible future reactivation of the right-of-way for rail service by the abandoning railroad or by any other approved rail service provider. See 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a). Specifically, the Board has found that the railroad that initiates the abandonment proceeding retains a residual right and obligation to resume rail service should there be a demand for such service. See Norfolk & W. Ry.—Aban. Between St. Marys & Minster in Auglaize Cnty., Ohio, 9 I.C.C. 2d 1015 (1993).

In a related proceeding, King County requested and received authority to acquire BNSF's residual common carrier rights and obligations with respect to the Line, including the right to reactivate rail service. King Cnty., Wash.—Acquis. Exemption—BNSF Ry. (September 2009 Decision), FD 35148 (STB served Sept. 18, 2009). As such, the Board authorized King County to simultaneously serve as the trail sponsor and hold the right to reactivate rail service. In response to concerns that, under these circumstances, King County might have no intent to restore rail service should there be a demand for it, the Board explained that the right to reactivate rail service on a rail-banked line was not an exclusive right for the abandoning railroad or its successor residual rail carrier, and that another bona fide petitioner could seek to reactivate the Line under appropriate circumstances. Id.³

In a third proceeding, the physical assets of the rail corridor were authorized to be conveyed to the Port of Seattle, which in turn, conveyed them to the Regional Parties. Specifically, before BNSF sought abandonment authority for the Line, the Port of Seattle, Wash.

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right to rely upon and disclose such information in decisions when necessary. In this case, we determined that we could not present our findings with respect to issues in this case without disclosing certain information.

³ See, e.g., Georgia Great So. Division—Aban. & Discon. of Service (Georgia Great Southern), 6 S.T.B. 902, 907 (2003); Iowa Power—Constr. Exemption—Council Bluffs, Iowa (Iowa Power), 8 I.C.C. 2d 858, 866-67 (1990).

(the Port) acquired from BNSF the underlying real estate corridor and trackage along the Woodinville Subdivision, subject to an exclusive freight rail easement reserved for BNSF and its successors and assigns. See Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served Oct. 27, 2008). The Port then transferred its interests in the Line to the Regional Parties. Specifically, the Port: (1) conveyed to Sound Transit a high-capacity transportation easement over the majority of the Line, as well as fee title to approximately 1.1 miles of the corridor; (2) sold a 5.75-mile section of the corridor and trackage to Kirkland; and (3) conveyed all remaining interests in the corridor and trackage to King County. As a result, the Port no longer holds any property interests in the Line.

On April 2, 2013, in Docket No. FD 35731, Ballard, a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10902 so that it could obtain authorization to acquire the residual common carrier rights and obligations on the Line, including the right to reinstitute freight rail service and to acquire the Line's physical trackage assets. Because the Line currently is subject to interim trail use/rail banking, Ballard also filed a petition to vacate the portion of the NITU issued in Docket No. AB 6 (Sub-No. 465X).⁴ As part of its petition for exemption in Docket No. FD 35731, Ballard appended letters from area businesses CalPortland and Wolford Trucking and Demolition (Wolford Trucking) expressing general support for the reinstitution of rail service over the Line.

In a notice of exemption and request for comments served and published in the Federal Register on April 19, 2013, the Board instituted a proceeding pursuant to 49 U.S.C. § 10502(b) and sought comments from interested persons on Ballard's petitions. Ballard subsequently filed a motion on May 8, 2013, for a preliminary injunction under 49 U.S.C. § 721(b)(4) seeking to prevent Kirkland from salvaging the rails on the 5.75-mile portion of the Line that runs through Kirkland. In support, Ballard argued that, absent an injunction, it would face irreparable harm because Kirkland would salvage the tracks and Ballard would not be able to afford to install new tracks once Ballard prevailed on its underlying petitions.⁵ On June 4, 2013, Kirkland filed a reply in opposition, and King County and Sound Transit filed a joint reply in opposition. Both replies cited portions of deposition testimony and other discovery responses to support their argument that Ballard: (1) would not succeed on the merits of its underlying case; (2) faced no

⁴ In Docket No. FD 35730, Ballard obtained authority to operate a short piece of adjacent track over which an entity called Eastside Community Rail, LLC (Eastside), has an operating easement. Eastside had acquired that easement from a now-bankrupt entity called GNP RLY, Inc. (GNP), which, before it went bankrupt, also sought to obtain the rights to the Woodinville segment. See GNP RLY, Inc.—Acquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision (GNP), FD 35407 et al. (STB served June 15, 2011). In its filing, Ballard stated that it operates under contract with Eastside, as it had earlier done with GNP (V.S. Byron Cole, Ballard's General Manager). It is evident from the record that Ballard is working closely with Eastside and its principal, Douglas Engle, who was a 50% owner of GNP before it went bankrupt. See GNP, slip op. at 3, 5-6.

⁵ Ballard Motion 9-11.

irreparable harm absent an injunction; (3) could not afford to reinstitute rail service; and (4) had not shown that there was any shipper demand for that service.⁶

On August 1, 2013, the Board issued a decision denying Ballard's motion for a preliminary injunction (August 1 Decision). The Board concluded that Ballard had failed to demonstrate, based on the record as it then existed, that Ballard would likely succeed on the merits by establishing that it was a bona fide petitioner. The Board considered the evidence pertaining to Ballard's ability to finance the restoration of freight rail service on the Line and whether there was actual demand for such service, and found the evidence insufficient on both counts. Following the Board's denial of a preliminary injunction, Kirkland removed the track.

In accordance with a procedural schedule adopted by the Board, Kirkland filed its comments on the merits of Ballard's petitions on September 30, 2013; King County and Sound Transit filed joint comments on October 17, 2013; and Ballard filed its reply on December 6, 2013 (December 6 Reply). In its reply, Ballard included new evidence that it had not previously submitted that allegedly demonstrated financial and shipper support for its petitions. Ballard asserted that this evidence had not been submitted earlier due to the fact that Kirkland's desire to remove the track on its portion of the Line expeditiously had required Ballard to file its initial petitions before it could gather all of its evidence supporting reactivation. Ballard argued that this new show of support merits approval of its petitions. On December 16, 2013, the Regional Parties filed a motion for leave to file a surreply, along with the surreply itself, arguing that Ballard had essentially presented its case-in-chief for the first time in its reply, rather than in its initial petitions. On January 3, 2014, Ballard filed a response arguing that the Board should not accept the surreply.

In a decision served on January 15, 2014, the Board determined that because the new evidence in Ballard's December 6 Reply substantially constituted its case-in-chief, it should be treated as a supplement to Ballard's initial petitions filed on April 2, 2013. The Board stated that it would accept and consider the new evidence. The Board also set a new procedural schedule allowing for additional discovery, the filing of comments by the Regional Parties to Ballard's supplement, and a reply by Ballard. The Regional Parties filed their response to the December 6 Reply on March 6, 2014, and Ballard filed its reply on March 24, 2014 (March 24 Reply).

DISCUSSION AND CONCLUSIONS

Under the Trails Act, the Board must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. § 1247(d); Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001). We have stated that the right to reactivate a rail-banked line is not an exclusive right. See, e.g., Georgia Great Southern; Iowa Power; September 2009 Decision; GNP. As indicated in the September 2009 Decision granting King County's petition to acquire BNSF's reactivation rights, a bona fide third-party petitioner, under appropriate circumstances, can request that a

⁶ Kirkland Reply 19-29; King County and Sound Transit Reply 19-24.

NITU be vacated to permit the reactivation of rail service. A bona fide petitioner is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation. Whether a petitioner is bona fide is a fact-bound determination.

The Board first applied the bona fide petitioner standard in 2010, when GNP, a Class III rail carrier, requested authority to reactivate rail service over a small portion of the Line and a portion of a similarly situated line called the Redmond Spur. There, the Board found, based on evidence of GNP's insolvency, that GNP was not a bona fide petitioner because it did not have the necessary financial resources to provide rail service on the rail-banked line.⁷ In addition, the Board noted that potential shippers identified by GNP did not have the facilities necessary to receive shipments by rail and that GNP had not shown how it would overcome the physical and financial obstacles to providing freight rail service to these businesses.⁸

Here, Ballard similarly has failed to show that it is a bona fide petitioner. In the August 1 Decision, the Board found, based on the evidence then before it, that Ballard was unlikely to succeed on the merits of its underlying petitions because Ballard, although not bankrupt like GNP, did not appear to be in a financial position to reinstitute service and there was no real demand to reactivate rail service over the Line. Subsequently, Ballard's December 6 Reply contained new evidence that suggested that circumstances had changed with respect to both Ballard's financial position and shipper interest, and so the Board provided for additional discovery and filings to ensure a complete record. However, the results of the additional discovery and subsequent filings still fail to demonstrate that Ballard is a bona fide petitioner with sufficient financing or shipper demand to warrant reactivation of the Line.

Ballard alleges in its evidence that there are numerous investors "ready, willing, and able" to invest in the reactivation of freight rail service on the Line, and numerous shippers ready to utilize that service. However, as discussed in more detail below, Ballard's claim to have access to sufficient financing is not credible, as demonstrated by the fact that it has not even estimated how much financing it would need to restore the Line for freight rail service. Moreover, the record demonstrates that, at most, there may be potential shippers that vaguely support the idea of having freight rail service as a possible shipping option, but that Ballard has significantly overstated the actual level of commitment to freight rail service expressed by these potential shippers. Even though we do not expect that shippers located near property over which freight rail transportation has long since ceased would have shipments sitting on private sidings waiting for freight rail service—or that funding for a project such as this be entirely in place—the shipper demand and evidence of financial wherewithal to reinstate freight rail service here are far weaker than Ballard makes them out to be. Given the nature of the action that Ballard seeks in this proceeding—the divestment of property owned by the Regional Parties—it would need to make a far more convincing showing of financial feasibility and shipper demand than it has here. Accordingly, we find that Ballard is not a bona fide petitioner.

⁷ GNP, slip op. at 5-6.

⁸ GNP, slip op. at 6.

I. Ballard has not demonstrated that it has the financial wherewithal to reinstitute freight rail service.

Based on the record here, it does not appear that Ballard is in a position to obtain the funding needed to ensure that the track on the Line—which has not carried traffic since 2006—can be upgraded and rehabilitated to serve the potential shippers that Ballard has identified or pay appropriate compensation to the Regional Parties for use of the right-of-way they own.

While Ballard has outlined a general plan to secure some funding and then provide service on the Line, a review of the evidence indicates that Ballard did not present potential lenders and investors with a realistic plan for the reinstitution of freight rail service that would allow them to make an informed decision on whether to actually provide Ballard with financial support.

In particular, there is no indication in the record that Ballard provided any of its potential investors with a specific description of the scope of the project or the approximate level of funding Ballard would need to perform that work. Ballard claims that it has obtained the support of several investors, including two banks.⁹ But when a manager at one of the banks asked for information on the scope of the project—information he would need in order to assess whether to fund the restoration of the Line—one of Ballard’s principals responded that he could not provide that information without a decision from the Board on Ballard’s reactivation petition.¹⁰ If Ballard does not intend to evaluate (or is unwilling to explain to its potential investors) the scope of the work required to restore the Line for freight service until it has obtained regulatory approval, its claim to have sufficient financing available for that restoration work is not persuasive.

WATCO, presented by Ballard as a potential investor, also considered Ballard’s plan to be “preliminary and contingent on future variables.”¹¹ Indeed, there is no indication in the record that Ballard provided any of its potential investors—AmericanWest Bank, Coastal Community Bank, WATCO, EB5 Capital Partners.us, LLC, or Paul Nerdrum, Ballard’s majority owner—with a specific description of the scope of the project or the approximate level of funding Ballard would need to advance the project. As a result of Ballard’s vague plans, the alleged investors were not in a position to evaluate the project and make an informed decision on whether to provide financial support.

Ballard attempts to justify these vague commitments by arguing that none of the third-parties would provide support until the Board grants its request for reactivation. Indeed, in their letters of support included with Ballard’s December 6 Reply, WATCO, American West Bank, and Coastal Community Bank all state that they need a decision from the Board on reactivation before knowing what the full scope of the financing package would be.

⁹ Ballard December 6 Reply 5.

¹⁰ See Kirkland March 6 Comments, Ex. 18 at 5 (Engman Tr. 77:20 – 80:2).

¹¹ King County and Sound Transit March 6 Comments, Ex. 9 at 3 ¶ 8.

But there is no reason why Ballard would need a decision from the Board in order to assess the scope of the project or derive an estimate of the cost of restarting rail service. Ballard could have made these assessments on the assumption that the Board would provide the needed authorities. This is common practice when obtaining financing for infrastructure projects. This is not to say that Ballard would have needed to provide a definitive estimate of the costs of the project. We understand that after regulatory approval for an infrastructure project has been obtained, the costs of the project may change—in some instances significantly. But here, the record indicates that Ballard never even provided a rough estimate. It could also have provided a range of costs, based on different contingencies and scenarios—another practice that is common when obtaining financing for projects such as this.

As noted above, we do not mean to imply that a party seeking to be recognized as a bona fide petitioner must have a check in hand or signed agreements with its investors for specific sums of money. We understand that some investors will not provide firm commitments until the necessary regulatory approvals have been obtained. But the petitioner still must show some reasonable basis or likelihood that it can obtain the necessary level of funding, based on a reasonable estimate of that level, if the regulatory approval is granted. Here, Ballard has not done so. It has shown only that it has access to investors that may provide some *undefined* level of financing. That is not sufficient for the Board to find that Ballard is a bona fide petitioner.

Thus, Ballard has not established that it is financially capable of reinstituting freight rail service on the Line. Ballard's efforts to demonstrate that it is in a position to obtain sufficient financing—the subject of much of the evidence in the record—are necessarily deficient because Ballard did not take the initial step of calculating the approximate amount of financing it would need. And even if Ballard were to estimate the level of funding that would be necessary to restore the Line for freight rail service, and adequately support that estimate, it would still need to demonstrate a likelihood that it could obtain access to that level of funding.

Because Ballard has not shown that it has the financial wherewithal it would need to be in a position to reinstate service, its ability to successfully undertake the project is doubtful, even if we were to grant the permissive authority it seeks.

II. There is no credible evidence of demand for freight rail service on the Line.

In addition to Ballard's failure to show that it has sufficient financing, it has also failed to demonstrate that there is a credible demand for renewed freight rail service. Although Ballard has submitted several additional letters of potential shipper support since filing its original petitions, none of the letters includes a specific request for service or a firm commitment to use the Line. While the letters, viewed together, express vague support for the idea of freight rail service as a transportation option, they do not provide a level of serious commitment to or demand for rail service. Given the lack of any such commitment in the shipper letters, we are not persuaded that Ballard is a bona fide petitioner. Below, we examine the potential demand for rail service for each potential shipper that Ballard has identified.

CalPortland. In the August 1 Decision (slip op. at 5), the Board found unpersuasive Ballard’s argument that CalPortland would ship aggregates from a yard in Everett, Wash. to a future transload facility and concrete batch plant in Bellevue, Wash., noting that CalPortland is not located on the Line and has no contract to participate in local construction projects. Ballard has not submitted new evidence with respect to CalPortland that demonstrates that CalPortland’s plans have evolved since that time. Ballard filed another letter from Michael Skrivan, CalPortland’s Aggregate Sales Manager, dated August 16, 2013, but neither it, nor the information provided in Ballard’s subsequent filings, demonstrates that CalPortland, Ballard, or Eastside has solved the logistical and economic hurdles that led the Board to find in the August 1 Decision that CalPortland is not a credible source of freight traffic for the Line.¹²

Wolford Trucking and Demolition. The Board found in the August 1 Decision that Ballard had failed to demonstrate that Wolford Trucking would be a real customer that would help make rail a realistic transportation option. Ballard has not submitted new evidence with respect to Wolford Trucking to demonstrate that circumstances have changed since then. To the contrary, the latest round of discovery confirmed that Ballard and Eastside have no updates to Wolford Trucking’s plans.¹³ Thus, we find no merit to Ballard’s claim that Wolford Trucking has a strong demand for reactivated rail service over the Line.

General Mills. In its December 6 Reply, Ballard alleges that General Mills is “desirous of re-establishing rail service to the Safeway Foods Facility at Bellevue, which has a siding on the line.”¹⁴ However, as Kirkland notes, in 2008 Safeway submitted a letter to the Board in support of BNSF’s abandonment petition. Since then, General Mills has done no more than say that delivering flour to a single customer near the Line “by rail would be a large environmental and competitive benefit.”¹⁵ That is not an indication of real demand, or that rail would actually be used.

In any event, the number of cars Mr. Engle says General Mills would ship to Safeway if service were available appears to be overstated. Ballard’s witness, Mr. Engle, estimates that 225 cars a year would be shipped by General Mills to Safeway. This figure comes from past records of General Mills’ shipments by rail to Safeway,¹⁶ and from estimates provided by General Mills to Mr. Engle.¹⁷ Ballard’s records, however, reveal that it handled only 18 carloads of flour in

¹² See Kirkland March 6 Comments 20-23, Ex. 8 at 15-16 (Cole Tr. 80:11 – 83:19), Ex. 46 at 2, Ex. 3 at 27 (Engle Tr. II 111:4 – 112:6), Ex. 47, V.S. Carol Helland ¶¶ 3-5.

¹³ See Kirkland March 6 Comments, Ex. 3 at 19 (Engle Tr. II 70:16-22), Ex. 8 at 13 (Cole Tr. 62:16-18, 63:6-11, 64:1-5).

¹⁴ Ballard December 6 Reply 6.

¹⁵ Kirkland March 6 Comments, Ex. 49.

¹⁶ Kirkland March 6 Comments, Ex. 3 at 21 (Engle Tr. II 81:12-22).

¹⁷ Ballard March 24 Reply 15.

2012 and 10 in 2013.¹⁸ Thus, even if General Mills would use rail service, the volume of its traffic appears to be limited.

RJB Wholesale. In its March 24 Reply, Ballard cites the alleged shipping needs of a company located on the Line in Kirkland called RJB Wholesale (RJB), which is a leading supplier of steel and PVC pipe to the wholesale market.¹⁹ RJB has submitted letters stating it has a “desire for rail service and ability to receive 2-3 carloads of pipe and other materials (based on current volumes) per month on the Line.”²⁰ RJB president Nick Beck also submitted a Verified Statement in which he stated that he “underst[ood] and agree[d] with the conservative car estimate of 30-40 *per annum* used by the railroad in its ‘STB Reactivation Letters Filed’ Log.”²¹

However, according to Mr. Beck, RJB has conducted business at the same location adjacent to the Line since its foundation in 1972, without requesting rail service or a price quote for rail service.²² Mr. Beck stated that, for RJB to receive rail service, a spur track, siding, or other facility would need to be built connecting its receiving yard to the Line.²³ According to Mr. Beck, RJB would welcome another shipping option, but the tight space in its yard and the cost of building a rail spur, siding, or other rail facility necessary for service have prevented RJB from pursuing this option.²⁴ In a February 13, 2014 letter, Mr. Beck states that RJB would “partner with the railroad in [the] layout and construction” of a spur, but does not indicate that RJB would pay for this construction.²⁵ Thus, although RJB has stated its interest in rail service and estimated the number of carloads it would like to receive annually, the issue that has prevented RJB from pursuing rail service in the past—the cost of constructing a spur—appears to remain unresolved. Even accepting the higher of RJB’s carload estimates, RJB’s potential as a substantial source of traffic is doubtful under these circumstances.

Aggregates West. In its March 24 Reply, Ballard alleges that Aggregates West, a major supplier of aggregate, supports reactivation in order to better take advantage of the demand for its product resulting from the construction boom occurring in Bellevue.²⁶ Ballard states that Scott Day of Aggregates West testified that he “has years of experience in getting materials around the Seattle area and that he would ‘absolutely’ figure out a way to connect to the BNSF line via a spur track or acquiring a lay down yard adjacent to the BNSF line.”²⁷

¹⁸ See Kirkland March 6 Comments, Ex. 21 at 14, Ex. 53 at 1.

¹⁹ Ballard March 24 Reply 15.

²⁰ Ballard March 24 Reply 15.

²¹ Ballard March 24 Reply, Ex. 1.

²² King County and Sound Transit March 6 Comments, Ex. 14 at 1-2.

²³ Id. at 2.

²⁴ Id.

²⁵ Ballard March 24 Reply 43.

²⁶ Ballard March 24 Reply 17.

²⁷ Ballard March 24 Reply 17.

Mr. Day, however, testified that he did not view his letter regarding reactivation (attached to Ballard's December 6, 2013 filing) as a request to receive rail service from Ballard.²⁸ Mr. Day also indicated that Aggregates West does not have a spur into its yard, and so requesting rail service would require his company to figure out how much it would cost to construct access to the Line.²⁹ When Mr. Day stated that he would "absolutely" figure out a way to access the Line, he was addressing whether he would pursue this option if he found it to be cost-effective.³⁰ As with RJB, whether it is cost-effective for Aggregates West to construct a spur is a significant question. Because Aggregates West remains uncertain as to whether it would even incur the construction expense necessary to access rail service, counting its potential carloads as an indicator of shipper interest would be unduly speculative.

CT Sales. In its March 24 Reply, Ballard states that CT Sales manufactures rebar used in construction projects, and would like to ship its finished product to Bellevue where construction is "exploding."³¹ Ballard states that "there are no customers aware of the potential for receiving rebar by rail because CT Sales does not market a non-existent option, but [that CT Sales] has at least one current customer on the Line."³² In its December 6 Reply, Ballard states that "[a] multiplicity of shippers have requested service on the line, including . . . CT Sales."³³

However, the president of CT Sales, James House, testified that CT Sales has not requested service on the Line and that it would need to perform an in-depth cost analysis before deciding whether to request rail service.³⁴ Mr. House also stated that CT Sales would need a spur into its yard to receive rail service.³⁵ According to Mr. House, CT Sales does not have a "cost basis" for deciding whether to construct a spur.³⁶ Thus, as with RJB and Aggregates West, CT Sales is a step removed from even considering whether to request rail service, as it has yet to decide whether to pay for the construction of a spur. Again, under these circumstances, CT Sales' potential as a significant source of traffic is doubtful.

Woodinville Whiskey. On February 20, 2014, Woodinville Whiskey filed a letter in support of reactivating the Line. In its letter, Woodinville Whiskey describes itself as a growing distillery located on the Line, which seeks to receive grain, glass products, and wooden barrels

²⁸ King County and Sound Transit March 6 Comments, Ex. 19 (Day Tr. 23:20-25).

²⁹ King County and Sound Transit March 6 Comments, Ex. 19 (Day Tr. 28:14-22).

³⁰ Ballard March 24 Reply 236 (Day Tr. 75:11-16).

³¹ Ballard March 24 Reply 17.

³² Ballard March 24 Reply 17.

³³ Ballard December 6 Reply 5.

³⁴ King County and Sound Transit March 6 Comments, Ex. 15 (House Tr. 54:9-10, 55:3-16).

³⁵ King County and Sound Transit March 6 Comments, Ex. 15 (House Tr. 24:5-24).

³⁶ Kirkland March 6 Comments, Ex. 11 at 4 (House Tr. 27:10-12).

by rail.³⁷ King County and Sound Transit argue that the small volumes Woodinville Whiskey estimates it might need—1-2 cars per month—would neither support the Line, nor even contribute substantially to its revenues.³⁸

Kirkland notes that because Woodinville Whiskey's support letter was filed a few days after discovery ended, Kirkland had no opportunity to explore the facts underlying the letter.³⁹ Nevertheless, Kirkland states that it conducted a site visit of the distillery and claims that Woodinville Whiskey has no existing physical access to the Line and that there are obstacles to building access, such as a spur. Specifically, Kirkland points out that the Line runs 2 to 25 feet above the building that houses the distillery; Woodinville Whiskey does not own the building housing its distillery; and the building owner recently obtained a permit to landscape the slope between the Line and the building.⁴⁰

Taking into account the obstacles Woodinville Whiskey would face in obtaining access to the Line, as well as the small number of carloads it estimates it would ship, we find Ballard's claim that there is a strong demand for reactivation of rail service by this shipper to be unfounded.

In short, after considering all of the evidence in the record on shipper need, we find that while a few local businesses might consider using rail service if it were available, none of the potential shippers here showed a serious commitment to rail; some would have high logistical and financial hurdles to overcome for rail service to even be possible, such as building a spur for access; and none appear to have the potential for sufficient traffic to warrant the reactivation of rail service.

Public support. Ballard has also submitted letters reflecting union and governmental support for the reactivation of the Line, including letters from: the Brotherhood of Locomotive Engineers and Trainmen, Washington State Legislative Board; the United Transportation Union, Washington State Legislative Board; and Washington State Representatives Luis Moscoso and Rep. Matt Manweller. Despite these statements supporting reactivation of rail service, they provide no evidence or arguments refuting our finding that Ballard is not a bona fide petitioner based on an absence of sufficient shipper and financial support.

Because Ballard has failed to demonstrate that it has a specific plan to restore the Line for freight rail service and the financial resources to implement that plan, or that there is sufficient real demand to warrant authorizing the resumption of service, we find that Ballard is not a bona fide petitioner in this case.⁴¹

³⁷ Ballard March 24 Reply 18.

³⁸ King County and Sound Transit March 6 Comments 19-20.

³⁹ Kirkland March 6 Comments 31.

⁴⁰ Kirkland March 6 Comments 32.

⁴¹ The Regional Parties also argue that Ballard's petitions are in fact a pretense to further Eastside's plan to run excursion trains instead of freight. See King County and Sound Transit
(continued . . .)

Given our findings above, we need not reach the issue of whether the petition satisfies the requirements for an exemption from 49 U.S.C. § 10902. Accordingly, we will deny Ballard's petition for exemption to acquire the right to reactivate rail service over the rail-banked Line and its petition to vacate the NITU pertaining to the segment.

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

It is ordered:

1. Ballard's petition for exemption and its petition to vacate the NITU are denied.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

Although the Board is not often asked to turn a rail-banked trail back to rail service, the circumstances surrounding this rail-banked line are unique. The Board previously took the unprecedented step of allowing King County, the noncarrier trail sponsor, to acquire BNSF's residual common carrier rights and obligations on the line, including the right to reactivate service. As a result, King County may have little or no incentive to help return this line to service, despite the underlying purpose of the Rails to Trails Act. Therefore, the Board has a particular obligation to ensure that the proponents of rail service are given the utmost consideration. Unfortunately, I do not believe that has occurred.

I disagree with the majority's summary dismissal of Ballard's qualifications as a "bona fide" petitioner and its evidence of shipper interest in rail service because I am not convinced that the record sufficiently supports those conclusions. Rather than make a series of presumptions, the Board should have sought additional information regarding Ballard's finances and the prospective shippers' service needs. The Board afforded a related case involving part of this same line such necessary attention.¹ There, the Board held an oral argument even though that petitioner provided far less supporting evidence than the record compiled here. Rather than

(. . . continued)

March 6 Comments 21-24; Kirkland March 6 Comments 33-36. Because we find that Ballard is not a bona fide petitioner in this case, we need not address this issue.

¹ See GNP RLY, Inc.—Acquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision (GNP), FD 35407 et al. (STB served June 15, 2011).

relying predominantly on the opponents' views, the Board could have heard first-hand from Ballard, prospective shippers, King County, and other interested parties.

The Board considered and rejected a petition brought by GNP to reactivate service over part of the line at issue here. I supported that decision because GNP was in bankruptcy proceedings. Ballard, however, is not financially insolvent. The majority concludes that Ballard is not a bona fide petitioner due to its lack of already-acquired financial support. But how will any petitioner that isn't self-funded meet that newly imposed hurdle? The Board should certainly consider a project's financing before granting it authority. However, the majority is rejecting Ballard's petition for an insufficient demonstration of financial "wherewithal" without clearly indicating how Ballard—or any other similarly situated party—could ever do so.

The Board routinely claims that its role in rail banking/interim trail use is ministerial.² However, our role in promoting freight rail service under the Rail Transportation Policy requires much more than a "ministerial" review in this case. Unfortunately, today's decision is in line with that misguided, hands-off policy. I dissent.

² See King Cnty., Wash.—Acquis. Exemption—BNSF Ry., FD 35148 (STB served Sept. 18, 2009).