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JOSHUA C. BROWER
206.498.1804
josh@browerlawps.com
www.browerlawps.com

December 27, 2022

Via E-File only

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

Re: ***STB Finance Docket No. 36261
Ballard Terminal Railroad Company, L.L.C.
Withdrawal of Petition for Declaratory Order***

Dear Ms. Brown:

I represent Ballard Terminal Railroad Company (“BTRC”) with regard to the above-referenced matter. By this letter, BTRC is providing Notice that it is withdrawing without prejudice its Petition for Declaratory Order filed in STB Finance Docket 36261 because the “State Court” issues placed in abeyance by the Board in this matter have been fully and finally resolved by the Washington State Supreme Court, the issue of federal preemption raised herein has been resolved “in the first” instance by the Washington State courts, and no further declaratory or other relief to BTRC is necessary nor requested at this time for the reasons explained below.

On December 12, 2018, BTRC filed its Petition for Declaratory Order (“Petition”) in STB FD 36261 seeking an order holding that the City of Seattle (“Seattle”) is prohibited under 49 U.S.C § 10501(b) from requiring BTRC to remove and relocate its tracks to accommodate Seattle’s recreational trail project, colloquially known as the “Missing Link of the Burke-Gilman Trail.”

On January 28, 2019, the City of Seattle (“Seattle”) filed its Verified Reply in Opposition to BTRC’s Petition (“Reply”) requesting, *inter alia*, that the Board either hold BTRC’s Petition in abeyance or dismiss it without prejudice because Seattle claimed the issues raised in BTRC’s Petition involve “...a controversy over a contract...governed by Washington State law,” and thus “the dispute should be properly resolved in [state] court, as the Board’s precedents require...”¹ Seattle also told the Board in its Reply that on January 17, 2019, Seattle sued BTRC in King County Superior Court under Cause No. 19-2-01794-5 SEA to resolve the state law issues.²

¹ Reply, page 24.

² *Id.* page 3.

The Board granted Seattle's request and issued a Decision herein on June 27, 2019 declining to exercise its discretionary authority to issue a declaratory order... "and, instead, will hold this docket in abeyance."³ pending resolution of the related state court proceeding...". In doing so, the Board said "a court is typically the more appropriate forum for interpreting an operating agreement or other contract,"⁴ which interpretation the parties were then litigating in King County Superior Court. Regarding BTRC's underlying preemption claim, the Board said,

Abeyance would promote efficiency here because a resolution of the parties' contract dispute by the state court would possibly moot or, at the very least, help inform the preemption analysis, whether that analysis is ultimately performed by the court or the Board.

Issues involving federal preemption can be decided either by the Board or the Courts in the first instance.⁵

The state court and federal preemption issues raised in BTRC's Petition have now been fully and finally resolved by the Washington State courts.

On June 25, 2020 the King County Superior Court granted BTRC's Motion for Summary Judgement Re: Preemption, ruling for BTRC. The parties provided a copy of that Order to the Board with their Second Joint Status Report dated June 29, 2020.

On May 16, 2022, the Washington State Division 1 Court of Appeals issued a Published Opinion⁶ in Case No. 82377-9-1 affirming the King County Superior Court's ruling on preemption and its Final Order of Judgment filed January 19, 2021. Seattle provided a copy of the Court of Appeals' Decision to the Board on May 31, 2022.

On October 12, 2022, the Washington State Supreme Court entered an Order unanimously denying Seattle's Petition for review of the Appellate Court's Decision, thereby denying Seattle's appeal and upholding the lower courts' rulings regarding preemption. Seattle provided a copy of the Washington State Supreme Court's Order to the Board on October 27, 2022.

Since the Washington State courts have now fully and finally resolved the parties' "state law contract claims" and determined, in the first instance, the preemption issues raised in BTRC's Petition, BTRC respectfully requests the STB dismiss its Petition without prejudice.

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³ Decision, page 4.

⁴ *Id.*

⁵ *Id.*, at page 5.

⁶ *City of Seattle v. Ballard Terminal R.R. Co., L.L.C.*, 22 Wash. App. 2d 61, 70, 509 P.3d 844, 850, review denied *sub nom. Seattle v. Ballard Terminal R.R. Co. L.L.C.*, 200 Wash. 2d 1008, 518 P.3d 209 (2022).

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Sincerely,

BROWER LAW PS

/s/ Joshua Brower

JOSHUA C. BROWER

CC: CLIENT

PARTIES OF RECORD VIA EMAIL ONLY:

City of Seattle:

Patrick Downs (patrick.downs@seattle.gov)

Michael F. McBride (mfm@vnf.com)

Tadas A. Kisieliuss (tak@vnf.com)

Dale Johnson (dnj@vnf.com)

Clara Park (cpark@vnf.com)