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October 27, 2022

ENTERED
Office of Proceedings
October 27, 2022
Part of
Public Record

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

Re: Finance Docket No. 36261, Ballard Terminal Railroad Company, L.L.C. –
Petition for Declaratory Order

Dear Ms. Brown:

Pursuant to the Board's Decision and Order served June 27, 2019 in the above-referenced proceeding, the City of Seattle ("Seattle") hereby provides this update regarding the state court litigation.

On October 12, 2022, the Supreme Court of Washington issued an Order in Case No. 101023-1 ("Order"), a copy of which is attached hereto. The Order denied the petition for discretionary review filed by Seattle and the cross-petition filed by Ballard Terminal Railroad Company, L.L.C. The parties sought review of the Opinion of the Washington Court of Appeals in Case No. 82377-9-1 ("Opinion").

Relevant to the Board's consideration, the Opinion concluded that a railroad's agreement to relocate a portion of its existing line is subject to this Board's exclusive jurisdiction over railroad "construction" under 49 U.S.C. § 10501 and is categorically preempted. Seattle sought review of the Opinion, citing the United States Supreme Court's holding in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266 (1926) and subsequent decisions interpreting the Board's jurisdiction over "construction" as applying to extensions into new markets. *See also Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331 (1924); *Union Pac. Railroad Co.—Pet. for Declaratory Order—Rehab. Of Mo.-Kan.-Tex. Railroad between Jude & Ogden Junction, Tex.* 3 S.T.B. 646, 1998 WL 525587 (STB Aug. 19, 1998). Although the Washington Supreme Court declined to grant discretionary review, Seattle maintains its position that the Opinion was incorrectly decided, directly affecting the Board's

jurisdiction and substantially impairing governmental ability to construct or maintain infrastructure near railroad facilities. Seattle is currently evaluating its options in this litigation.

We will continue to update the Board on developments. Pursuant to the Board's Decision and Order, the parties will provide a joint status report by December 27, 2022.

Respectfully submitted,



Michael F. McBride
Attorney for the City of Seattle

cc (via email):

Joshua C. Allen Brower, Esq.

Patrick J. Schneider, Esq.

THE SUPREME COURT OF WASHINGTON

CITY OF SEATTLE,

Petitioner,

v.

BALLARD TERMINAL RAILROAD CO.
L.L.C.,

Respondent.

No. 101023-1

ORDER

Court of Appeals
No. 82377-9-I

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its October 11, 2022, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 12th day of October, 2022.

For the Court


CHIEF JUSTICE