

ORDINANCE No. 118734

COUNCIL BILL No. 111841

AN ORDINANCE granting to the Ballard Terminal Railroad Company a railway franchise and the right, privilege and authority to locate, lay down, construct, maintain, own, and operate standard gauge railway tracks in, upon, along and across that portion of the Burlington Northern and Santa Fe Railway Company's former Fremont to Ballard, Washington Branch Line right-of-way between Sixth Avenue North West and North West 67th Street for a term of thirty years, specifying terms and conditions under which this franchise is granted, and providing for acceptance of the franchise, its terms and conditions.

OK

COMPTROLLER FILE No. _____

introduced: AUG 18 1997	By: MCIVER
Referred: AUG 18 1997	To: TRANSPORTATION
Referred:	To:
Referred:	To:
Reported: 9-29-97	Second Reading:
Third Reading: 9-29-97	Signed: 9-29-97
Presented to Mayor: 9-29-97	Approved: OCT - 6 1997
Returned to City Clerk: OCT - 6 1997	Publisher: full SPR
Vetoed by Mayor:	Veto Published:
Passed over Veto:	Veto Sustained:

Law Department

The City of Seattle

REF

Honorable President:

Your Committee on _____

to which was referred the within Council Bill No. _____ report that we have considered the same and re

PASS 2-0 - 9/16/97

9-29-97 Full Council Act

NO DISK

Law Department

The City of Seattle--Legislative Department

Date Reported
and Adopted

REPORT OF COMMITTEE

Honorable President:

Your Committee on _____

to which was referred the within Council Bill No. _____
report that we have considered the same and respectfully recommend that the same:

PASS 2-0 - 9/16/97

9-29-97 Full Council Action Passed 9-0

NO DISK

Committee Chair

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ORDINANCE 118734

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3 AN ORDINANCE granting to the Ballard Terminal Railroad Company a railway franchise and the
4 right, privilege and authority to locate, lay down, construct, maintain, own, and operate standard
5 gauge railway tracks in, upon, along and across that portion of the Burlington Northern and Santa
6 Fe Railway Company's former Fremont to Ballard, Washington Branch Line right-of-way
7 between 6th Avenue Northwest and Northwest 67th Street for a term of thirty years, specifying
8 terms and conditions under which this franchise is granted, and providing for acceptance of the
9 franchise, its terms and conditions.

10 WHEREAS, the Burlington Northern and Santa Fe Railway Company (BNSF) has expressed its
11 intention to abandon that part of its line between BNSF Milepost 0.09 and BNSF Milepost 02.70
12 in the Ballard area of the city; and

13 WHEREAS, in 1988 the Burlington Northern Railroad Company and The City of Seattle set forth their
14 joint objective to maintain a permanent linear corridor along selected railroad rights-of-way for
15 trail purposes, including the right-of-way designated as the "North Ship Canal," being the
16 Section from Third Avenue NW to the connection with the north/south rail line at NW 68th
17 Street, which Section includes the above Mileposts; and

18 WHEREAS, the City's long-held policy is also to support rail-served businesses along the selected
19 railroad rights-of-way; and

20 WHEREAS, Resolution 29474, passed November 12, 1996, reiterated the City's commitment to
21 railbanking the North Ship Canal right-of-way for trail purposes and specified a preferred
22 location for the trail's extension; and

23 WHEREAS, the Ballard Terminal Railroad Company (BTRC) recently has been formed to provide rail
24 service to businesses located in the Ballard industrial area; and

25 WHEREAS, BNSF intends to enter into agreements that will result in the right-of-way being railbanked
26 and owned by the City, and the rails, ties and other track materials being owned and used for rail
27 service by BTRC pursuant to a modified certificate of public convenience and necessity issued
28 by the Surface Transportation Board as authorized by 49 C.F.R. 1150.21 *et seq.*; NOW,
29 THEREFORE,

30 BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

31 **Section 1. Conditions of Grant.**

32 (a) That The City of Seattle ("the City") does hereby grant to Ballard
33 Terminal Railroad Company ("Grantee"), a railway franchise and the right, privilege and authority to
locate, lay down, construct, maintain, own and operate standard gauge railroad tracks in, upon, along and
across Burlington Northern and Santa Fe Railway Company's current Milepost designations M.P. 0.09
to M.P. 02.70 of the existing rail line previously owned by the Burlington Northern and Santa Fe
Railway Company in Ballard, for a term of thirty (30) years, expiring at 11:59 p.m. on September 29th
2027.

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1 (b) That this ordinance shall be effective only when the following conditions
2 are first satisfied: (i) that an interchange agreement with Burlington Northern and Santa Fe Railway
3 Company exists to which Grantee is a party; (ii) that the rail line has been authorized for preservation
4 under 16 U.S.C. § 1247(d) as administered by the Surface Transportation Board; (iii) that the City has
5 acquired the rail line pursuant to 16 U.S.C. § 1247(d); (iv) that Grantee has entered into an Operating
6 Agreement with The City of Seattle in conformity to this ordinance and specifying a program of joint
7 use permitting for interim trail use alongside rail use at least in those locations where the rail is not in
8 street right-of-way; (v) that Grantee has obtained a modified certificate of public convenience and
9 necessity as provided for in 49 C.F.R. § 1150.21-.23 for operation of the rail line; (vi) the City's Risk
10 Manager has approved liability insurance policies in accordance with Section 14 herein; and (vii) that
11 the City shall not acquire any freight railroad common carrier obligations by reason of this ordinance
12 and the Operating Agreement entered pursuant thereto.

14 (c) The Operating Agreement shall provide that Grantee shall not be required
15 to pay a fee for use of City property under this ordinance, provided (i) Grantee agrees to be fully
16 responsible for all costs of maintenance, operation, and rehabilitation of the railroad, including but not
17 limited to maintenance of crossings, acquisition of liability insurance, maintenance of way, and all
18 liability for accidents occurring on the property used by the railroad or arising out of railroad operations,
19 and provided further (ii) Grantee shall provide a minimum level of freight rail service equal to 30
20 carloads picked up or delivered to freight rail customers on the line, per year, averaged over any three-
21 year period, as more particularly specified in the Operating Agreement. In the event the minimum level
22 of service is not met, or the conditions stated at Section 1 (c) (ii) are not met, the Operating Agreement
23 shall provide that, in addition to such other remedies as may be available to the City, the City in its
24 discretion may require Grantee to take appropriate action in conformity to instructions from the City
25 within no less than ninety days to terminate freight rail service, including appropriate filings with any
26 agencies with rail regulatory jurisdiction.

28 (d) The Director is authorized to enter into an Operating Agreement consistent
29 with this ordinance. The Director is further authorized to allow passenger use on terms and conditions
30 as provided in said Operating Agreement.
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1 (e) The City may, from time to time, cooperate with Grantee in seeking grants
2 in aid from State sources for rehabilitation of the line, provided, however, that the City shall not be liable
3 for repayment of the grant except to the extent funds are available to the City from salvaged materials
4 attributable to the grant in the event rail service is discontinued and provided further that the City at its
5 option may impose a fee sufficient to recover its costs for administering the grant.

6
7 **Section 2.** The tracks of standard gauge railway shall be located, laid down, constructed and
8 maintained within the portions of right-of-way described on Attachment A hereto.

9
10 **Section 3.** The City shall retain the same control of the streets, avenues, multi-use trails, and
11 other rights-of-way in and across which said railway tracks shall be laid down as over other streets,
12 avenues, multi-use trails and other rights-of-way within the City, and shall have the right at all times by
13 general ordinance, to regulate the speed of the locomotives, cars and trains within the limits of the
14 franchise right-of-way herein granted, and the maximum period of time for which such locomotives, cars
15 and trains shall be allowed to blockade travel along and across the streets, avenues, multi-use trails and
16 intersecting streets embraced in this grant, and shall have such further control and police power over
17 such franchise rights-of-way and tracks, and the use thereof, as the City Charter and the Federal and
18 State Constitutions and laws may now or hereafter permit. Grantee shall comply with SMC Chapter
19 11.66, Railroad Operation and shall erect and maintain all such safety devices, warning signs and
20 signals, lights and appliances as may be necessary to protect and facilitate public travel across each and
21 every track herein authorized.
22

23 **Section 4.** The City hereby reserves to itself and its Grantee the right to construct all public
24 improvements (including trails) and to install and carry all public utility facilities across, underneath or
25 above the tracks hereby authorized, and the City reserves to itself full and complete right of access to
26 any space occupied by such tracks and to all of said franchise right-of-way, together with the right to
27 open and excavate the ground beneath said tracks, or within said franchise right-of-way, for all purposes
28 of construction, maintenance, repair, operation and inspection of any public utilities and public
29 improvements which rights shall, however, be exercised in such manner as not to interfere with the safe
30 operation of locomotives, cars and trains on said tracks. In all cases involving a possibility of such
31 interference, or removal of lateral support or excavation beneath the tracks of Grantee, sixty (60) days'
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1 written notice shall be given Grantee, and Grantee shall, at its own cost and expense, remove, relocate,
2 support, reinforce said tracks as necessary, provide flagging, and shall also furnish an authorized agent
3 or representative at Grantee's own cost and expense, who shall supervise such removal, relocation,
4 support, reinforcement or excavation or other work; provided that, in case of emergency repairs, the
5 length of such notice may be less than sixty (60) days, but not less than twelve (12) hours. Grantee shall
6 have the option of requiring that any such construction, repair, renewal, maintenance or inspection of
7 municipally owned utility be done by tunneling or jacking beneath said tracks, if such utility determines
8 that tunneling or jacking is practicable, and upon Grantee's providing assurances, satisfactory to such
9 municipally owned utility, that Grantee will pay the extra cost of tunneling or jacking, over the cost of
10 open cutting. If it is necessary that such tracks should be removed, relocated, supported, or reinforced
11 during the progress of the construction, repair, renewal, maintenance, or inspection of any municipally
12 operated utility, or for any public improvement, Grantee shall remove or relocate said tracks and shall
13 construct and place such support and provide a flagman as necessary, and shall attend to the replacement
14 and readjustment of its tracks, all at its own cost and expense. Grantor may agree to assume a share of
15 the costs for removal or replacement of track due to any such public improvement or public utility that
16 generally parallels said tracks and requires the removal of more than 100 feet of track.
17

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19 **Section 5.** Grantee shall be solely responsible for the maintenance and safety of the right-of-
20 way granted herein, including all tracks and all grade crossings, and shall cooperate and coordinate with
21 the City of Seattle Director of Transportation to assure adequate rehabilitation, repair and maintenance
22 of all tracks and grade crossings herein authorized, all at Grantee's sole cost and expense. Grantor shall
23 issue permits to Grantee which shall set forth the terms and conditions for railroad track work within the
24 limits of The City of Seattle, pursuant to applicable law, including State and Federal Law.
25

26 **Section 6.** Grantee shall construct and maintain the tracks herein authorized so that the top of
27 the rail thereof shall at all times conform to the street grade (except where change is made in separation
28 of grades), and the City hereby reserves the right to change the grade of any streets, avenues or public
29 places at any time, and when the City shall change such grade the Grantee, by acceptance of this
30 ordinance, hereby covenants and agrees with the City, to waive any and all damages that it may sustain
31 on account of having to readjust its tracks by reason of such change of grade. Such waiver is made upon
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1 condition that any change of grade hereafter made by the City to the streets and avenues upon which the
2 franchise is hereby granted, shall not be unreasonable, or such as to interfere with the proper and
3 practical operation of said track when the same shall have been adjusted to said new grade.

4
5 **Section 7.** Grantee shall, upon permit issued by the Director or such other body as may in the
6 future be by law authorized to act, allow each owner or occupant of a warehouse or industry contiguous
7 or adjacent to said track herein authorized, or to any street, avenue or other public place along or across
8 which said tracks shall be constructed, a spur track or tracks connecting said track with such warehouse
9 or industry; provided, however, that Grantee may require that such spur track or tracks and all street
10 grading, surfacing or paving appertaining to the right-of-way of such spur track or tracks, be constructed
11 and maintained at the expense of such owner or occupant of such warehouse or industry; and provided
12 further that any such spur track shall start from such point on said track as Grantee shall determine upon
13 as the most proper therefor; and shall be subject to such rules and regulations as to the opening and
14 closing of switches controlling access to and as to the use of said track as Grantee may from time-to-
15 time establish. All of the obligations and duties of Grantee expressed in this franchise shall apply with
16 full force and effect to each and every spur track laid down, constructed, maintained or operated by
17 Grantee connecting with the tracks or right-of-way granted in Section 1 of this franchise.

18
19 **Section 8.** Nothing contained in this ordinance shall be construed as granting an exclusive
20 franchise or privilege for the use of the right-of-way described in Section 2, or any portion thereof, and
21 the rights granted by this ordinance shall be subject to the right of the City Council to at any time
22 hereafter, to repeal, amend or modify this ordinance and grant, with due regard to the rights of Grantee
23 and of the interests of the public, and to cancel, forfeit and abrogate any right or privilege granted by this
24 ordinance if the franchise hereby granted is not operated in full accordance with the provisions hereof, or
25 at all, and at any time during the grant to acquire by purchase or condemnation, for use of the City itself,
26 all the property of the Grantee within the limits of said streets and right-of-way at a fair and just value,
27 which shall not include any valuation of the franchise itself, which franchise shall thereupon terminate.

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30 **Section 9.** Except as herein provided, this franchise and the rights herein granted, or any
31 interest in them, shall not be sold, assigned or mortgaged without the consent of the City by ordinance.
32 Nor shall the same in such event accrue to the benefit of the purchaser, assignee or mortgagee unless
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1 within sixty (60) days after such consent it or they shall file with the City's Finance Department and
2 City Clerk an acceptance of all the rights, privileges and authorities hereby granted, subject to all the
3 conditions, restrictions, specifications and requirements herein expressed.

4 **Section 10.** (a) Grantee and any permitted successors or assigns, shall defend (with
5 counsel approved by the City), and shall fully indemnify and hold the City and its officers, employees,
6 and agents harmless from any and all losses, claims, actions, judgments, property damages, death,
7 personal injuries, or damages suffered by any person or entity arising out of or resulting from (1) any
8 occurrence of property damage, death or injury in or on the franchise right-of-way, including common
9 carrier liability; (2) the Grantee's operations on or off the franchise right-of-way; (3) the violation of
10 any law or breach of this Franchise Agreement or Operating Agreement by the Grantee or any of its
11 officers and directors, employees, agents or contractors; and (4) any release of hazardous material arising
12 out of Grantee's operations, actions or inactions. It is intended that the foregoing indemnity shall be
13 broad and comprehensive. In the event any suit, claim or action is brought against the City, Grantee,
14 upon notice of the commencement thereof, shall defend the same, at no cost and expense to the City,
15 and promptly satisfy any final judgment adverse to the City or to the City and Grantee jointly; Provided,
16 that in the event the City determines that one or more principles of governmental or public law are
17 involved, the City retains the right to participate in such action at its own expense.

18 (b) The above liability shall not be diminished by the fact, if it be a fact, that
19 any such death, injury, damage, loss, cost, or expense may have been, or may be alleged to have been,
20 contributed to by the negligence of the City or its officers, employees, or agents, unless such negligence
21 is solely and entirely the fault of the City.

22 (c) The indemnification provided by this section shall survive the termination
23 of the Grantee's franchise, the Grantee's surrender of use and occupancy of the franchise right-of-way,
24 and expiration of this Franchise Agreement. This indemnity is for the sole benefit of the City and shall
25 not inure to the benefit of any third party. The Grantee waives, with respect to the City only, its
26 immunity under RCW Title 51, Industrial Insurance, and to any other industrial insurance, workers
27 compensation, disability, or employee benefit legislation of any jurisdiction which would otherwise be
28 applicable.
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(d) The Operating Agreement may provide additional conditions consistent with this section.

Section 11. Grantee, by its acceptance of this ordinance, does covenant and agree with The City of Seattle, that whenever the City separates the grades of existing or future streets and multi-use trails by the construction, reconstruction, renewal, maintenance, and/or widening of any overhead structure across the franchise right-of-way herein granted, Grantee will bear its proportionate share of all costs incident to the span crossing said right-of-way and the piers or abutments supporting such span. Such proportionate share shall be determined on the ratio the length of the portion of the span crossing said right-of-way bears to the total length of said span, and Grantee shall pay its aforesaid share upon proper billing therefore by the Director; provided, however, that this section shall not apply to future changes or additions to the existing 15th Avenue North West bridge structure (Ballard Bridge).

Section 12. Insurance.

(a) The Grantee shall, at all times during the term of this Agreement, obtain and maintain continuously, at its own expense, and file with the City's Risk Manager, evidence of a policy or policies of insurance satisfactory to the City's Risk Manager, as further specified in the Operating Agreement, including a policy of Comprehensive Railroad Liability Insurance for operations in an amount no less than \$5,000,000 for bodily injury and property damage; provided, however, the Risk Manager may consider reducing said coverage to no less than \$3,000,000 based on at least three years of experience with actual operations.

(b) The Operating Agreement shall provide such additional terms and provisions relating to insurance for rail operations (including operating by Grantee's contractors or subcontractors) as shall reasonably protect the City from liability arising out of Grantee's actions or actions.

Section 13. The Operating Agreement may provide that rail operation and rail equipment shall be inspected by the Federal Railroad Administration (FRA), Washington State Department of Transportation (WSDOT), Washington Utilities and Transportation Commission (WUTC) or successor agencies, or equivalent inspectors and that Grantee should be responsible to remedy, at Grantee's

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1 expense, all deficiencies identified in any inspection. Grantee shall be responsible to comply with all
2 laws and regulations relating to railroad operations. Nothing herein shall reduce the City's police
3 powers of enforcement and inspection.

4
5 **Section 14.** In order to claim the benefits of this ordinance and to acquire the rights, privileges
6 and authorities hereby granted, Grantee must, within two (2) months after this ordinance becomes
7 effective file in the office of the City's Finance Department and City Clerk a copy of a resolution duly
8 adopted by its Board of Directors, or by the Executive Committee of said Board, which copy shall be
9 duly certified and attested by its proper officer, under its corporate seal, or comparable documentation of
10 acceptance approved by the Seattle City Attorney's Office, accepting the benefits of this ordinance, and
11 the rights, privileges and authorities hereby granted, subject to all the conditions, restrictions,
12 specifications and requirements expressed.

13
14 **Section 15.** Any act consistent with the authority and prior to the effective date of this
15 ordinance is hereby ratified and confirmed.

16
17 **Section 16.** This ordinance shall take effect and be in force thirty (30) days from and after its
18 approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after
19 presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

20 Passed by the City Council the 29th day of September 1997, and signed by me in open
21 session in authentication of its passage this 29th day of September, 1997.

22
23 John DeSigo
24 President _____ of the City Council

25 Approved by me this 6th day of October, 1997.

26
27 Mourant Bee
28 Mayor

29 Filed by me this 6 day of October, 1997.

30
31 Janice E. Papp
32 City Clerk

33 (Seal)

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COPY

BALLARD TERMINAL RAILROAD COMPANY, LLC

4725 Ballard Avenue N. W. , Seattle WA 98107

Phone: 206 937-4192 Fax: 206 937-2120

March 2, 1998

Mr. Barry Reiss, Project Manager
Seattle Public utilities
710 Second Avenue
Seattle, WA 98104

Reference: Your letter of January 16, 1998 requesting additional documentation for acceptance of franchise Ordinance No. 118734.

Dear Barry,

Attached are three items:

- 1) A newly accomplished "Acceptance of Railway Franchise" document, with the notarized signature of both of the Ballard Terminal Railroad Company's current managing members.
- 2) A copy of Ballard Terminal Railroad Company's formation documents.
- 3) A copy of Ballard Terminal Railroad Company's original acceptance submittal made to the City on January 6, 1998.

Please acknowledge receipt of these documents and advise as to their suitability for fulfilling the ordinance acceptance requirements.

Thanks,



Byron Cole
Managing Member
Operations Manager

BC/jmm
Attachments

FILED
CITY OF SEATTLE
98 MAR -3 AM 10: 09
CITY CLERK

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ACCEPTANCE OF RAILWAY FRANCHISE

Ballard Terminal Railroad Company LLC, by and through its managing members. Paul Nerdrum and Byron Cole, hereby accepts the benefits of the City of Seattle Ordinance No. 118734, granting to the Ballard Terminal Railroad Company a railway franchise and the right, privilege and authority to locate, lay down, construct, maintain, own, and operate standard gauge railway tracks in, upon, along and across that portion of the Burlington Northern and Santa Fe Railway Company's former Fremont to Ballard, Washington Branch Line right of way between 7th Ave. N.W. and N.W. 67th St. for a term of thirty years, specifying terms and conditions upon which this franchise is granted, and providing for the acceptance of the franchise, its terms and conditions.

BALLARD TERMINAL RAILROAD COMPANY, LLC

By Paul Nerdrum
Paul Nerdrum, Managing Member

By Byron Cole
Byron Cole, Managing Member

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 2ND day of MARCH, 1998, before me personally appeared Paul Nerdrum and Byron Cole, to me known to be Managing Members of Ballard Terminal Railroad Company, LLC, the limited liability company that executed the within and foregoing instrument and acknowledged the signing of said instrument to be the free and voluntary act and deed of said limited liability company, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and

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BALLARD TERMINAL RAILROAD COMPANY, LLC

By Paul Nerdrum
Paul Nerdrum, Managing Member

By Byron Cole
Byron Cole, Managing Member

STATE OF WASHINGTON)
)
COUNTY OF KING) ss.

On this 2ND day of MARCH, 1998, before me personally appeared Paul Nerdrum and Byron Cole, to me known to be Managing Members of Ballard Terminal Railroad Company, LLC, the limited liability company that executed the within and foregoing instrument and acknowledged the signing of said instrument to be the free and voluntary act and deed of said limited liability company, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and

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