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SERVICE DATE – APRIL 24, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35692

EASTSIDE COMMUNITY RAIL, LLC—ACQUISITION AND OPERATION
EXEMPTION—GNP RLY INC.

Docket No. FD 35730

BALLARD TERMINAL RAILROAD COMPANY, LLC—LEASE EXEMPTION—
EASTSIDE COMMUNITY RAIL, LLC

Docket No. AB 1316X¹

GNP RLY, INC.—ABANDONMENT EXEMPTION—IN KING COUNTY, WASH.

Digest:² The Board denies a pending request to reopen in Docket Nos. FD 35692 and FD 35730. In Docket No. AB 1316X, the Board grants a request to intervene, corrects a milepost error, denies an appeal of a decision of the Director of the Office of Proceedings, and lifts the abeyance order to allow the abandonment to proceed.

Decided: April 24, 2023

BACKGROUND

These dockets involve one or both segments of a freight rail easement (Easement) over a line of railroad that extends from milepost 23.8 in Woodinville, Wash., to milepost 38.25 in Snohomish, Wash. (the Line). The segment of the Line between milepost 26.38 and milepost 38.25 is located in Snohomish County (Snohomish Segment), and the segment between milepost 23.8 to milepost 26.38 is located in the City of Woodinville (Woodinville Segment).

¹ These proceedings are not consolidated but are being addressed in the same decision for administrative convenience.

² 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. See Policy Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Docket Nos. FD 35692 and FD 35730

The history of this case has been described in detail in the Board's prior decisions³ served in Docket No. FD 35692 et al., however certain details will be repeated here. The Line was previously owned by BNSF Railway Company (BNSF). On December 18, 2009, under the Board's line of precedent in Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991), BNSF sold the physical assets of the Line to the Port of Seattle (the Port); GNP RLY, Inc. (GNP), acquired the Easement for the Line; and GNP entered into an operations and maintenance agreement with the Port. See Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served Oct. 27, 2008). The Port later sold the physical assets of the Snohomish Segment to Snohomish County (the County), see Snohomish Cnty., Wash.—Pet. for Declaratory Order, FD 35830 (STB served Mar. 5, 2015), and the Woodinville Segment to the City of Woodinville (Woodinville), see City of Woodinville, Wash.—Pet. for Declaratory Order, FD 35905 (STB served Oct. 7, 2015).

In 2012, Eastside Community Rail, LLC (ECR), in Docket No. FD 35692, sought and received authority, via the Board's expedited notice-of-exemption process, to acquire the Easement from GNP in a bankruptcy proceeding. Shortly thereafter, in 2013, Ballard Terminal Railroad Co., L.L.C. (Ballard), in Docket No. FD 35730, sought and received authority, also via the Board's notice-of-exemption process, to operate over the Line pursuant to a lease with ECR. Some years later, in 2018, the County filed a petition to revoke the exemptions as void ab initio claiming the notices contained materially false or misleading information. The Board initially denied revocation, see generally 2018 Decision, FD 35692 et al., the County sought judicial review, and the U.S. Court of Appeals for the District of Columbia Circuit vacated the Board's decision and remanded the case, see Snohomish Cnty. v. STB, 954 F.3d 290 (D.C. Cir. 2020). On remand, the Board found that ECR's verified notice was materially misleading because of the several attempts by a principal of both GNP and ECR, Douglas Engle, to transfer the Easement prior to and during bankruptcy proceedings without notifying the Board or seeking the required Board authority. 2020 Decision, FD 35692 et al., slip op. at 4-5. As a result, the Board vacated both ECR's and Ballard's exemptions as void ab initio.⁴ Id. at 7.

After vacating the exemptions, the Board found that "Board authorization to own and operate the Line reverts to GNP, and, therefore, the Line should be returned to GNP," and it directed GNP and Engle to report to the Board on the status of the Line by February 5, 2021. Id. at 7-8. Thereafter, because it appeared that any necessary actions to return the Easement to GNP had not occurred, in the 2021 Decision the Board ordered "ECR and Douglas Engle to take any action needed to constitute an effective conveyance of the Line's [E]asement to GNP within

³ The Board served its prior decisions in these dockets on December 13, 2018 (2018 Decision), May 17, 2019, December 22, 2020 (2020 Decision), September 29, 2021 (2021 Decision), and March 8, 2022 (2022 Decision).

⁴ Although the Board found nothing improper with Ballard's exemption notice, the Board vacated Ballard's exemption because Ballard's operating authority was based solely on a lease with ECR. 2020 Decision, FD 35692 et al., slip op. at 7. Ballard, however, is not involved in the current proceedings, and the circumstances of its exemption proceeding will not be addressed further.

30 days of the service date of [the 2021 Decision] and to certify to the Board that they have done so.” 2021 Decision, slip op. at 5. The Board further stated that it “does not look favorably on ECR and Douglas Engle’s apparent disregard for the Board’s requirements in these proceedings, including their response to date to the 2020 Decision. ECR and Douglas Engle should be aware that their failure to comply may result in civil monetary penalties.” 2021 Decision, slip op. at 4 (citing 49 U.S.C. § 11901).

On November 1, 2021, ECR and Engle filed a pleading, captioned as a “Response and/or Petition for Reconsideration,” indicating that ECR and Engle will continue to seek authority to operate the Easement by filing a new notice of exemption, asserting that the Board exceeded its authority in ordering return of the Easement to GNP, and arguing that they are entitled to compensation if they turn over the Easement to GNP. (See ECR Response 2-5, Nov. 1, 2021, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.)⁵ ECR and Engle noted that the Board had vacated the exemptions in the 2020 Decision based on a finding that ECR and Engle made materially misleading representations regarding the Easement; however, they argued, the Board did not make a ruling as to actual ownership of the Easement. (See id. at 2.)

Replies filed by the County, GNP and related parties, and Woodinville contested Engle and ECR’s arguments about the Board’s authority and suggested that the Board impose civil monetary penalties on ECR and Engle for violating the 2021 Decision’s directive to take any steps necessary to transfer the Easement to GNP. (See County Reply 6-13, Nov. 9, 2021; GNP Reply 2-4, Nov. 10, 2021; Woodinville Reply 2-8, Nov. 12, 2021, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.) The replies also informed the Board of two state court actions involving the Easement. In the first, the King County Superior Court found in a quiet title action that GNP is the sole owner of the Woodinville Segment of the Easement and that neither Engle nor ECR has any legal interest in it. (See, e.g., GNP Reply 3 & n.2, Nov. 10, 2021, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.) ECR appealed that ruling, arguing that federal preemption strips the state courts of jurisdiction to rule on quiet title cases that involve property subject to a license issued by the Board. (See Woodinville Reply 7, Nov. 12, 2021, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.); see also City of Woodinville v. Eastside Cmty. Rail, No. 20-2-02815-1 (Wash. Sup. Ct. Apr. 16, 2021), appeal docketed, No. 82660-3 (Wash. Ct. App.). The second case is a quiet title action against ECR and Engle, among others, including the County, in the Snohomish County Superior Court concerning the Snohomish Segment of the Easement. (See GNP Reply 3 & n.3, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.); see also GNP RLY, Inc. v. Snohomish Cnty., No. 21-2-03931-31 (Wash. Sup. Ct. filed Oct. 28, 2021).

In the 2022 Decision, the Board indicated that it would not decide the request to reopen until after the state court proceedings have been completed. 2022 Decision, FD 35692 et al., slip op. at 3-4. The Board also noted that ECR and Engle’s argument that federal preemption under

⁵ As that “Response and/or Petition for Reconsideration” was filed more than 20 days after the order it challenged, it will be treated as a petition to reopen. See 49 C.F.R. §§ 1115.3(e), 1115.4.

49 U.S.C. § 10501(b) bars state courts from ruling on state property law issues concerning property subject to the Board's licensing proceedings was incorrect. *Id.* at 3. The Board stated that, although federal preemption is broad, the Board has consistently held that disputes concerning state contract and property law should be decided by appropriate courts with expertise in those matters, not by the Board. *Id.* Moreover, the Board explained that the federal authority to acquire a rail line is permissive, and that parties must also obtain the necessary property rights under state law in order to exercise that authority. *Id.* at 3-4.

On May 25, 2022, GNP informed the Board that the Court of Appeals of Washington had rejected ECR and Engle's preemption argument and affirmed the lower court's ruling that GNP is the sole owner of the Woodinville Segment of the Easement and that neither Engle nor ECR has any legal interest in it. (GNP Notice 2, May 25, 2022, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.); see also City of Woodinville v. Eastside Cmty. Rail, 510 P.3d 355 (2022). On October 19, 2022, GNP informed the Board that the Supreme Court of Washington denied a petition for review of the Court of Appeals' decision. (GNP Notice 2, Oct. 19, 2022, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.); see also City of Woodinville v. Eastside Cmty. Rail, 518 P.3d 212 (2022).

By letter filed on February 6, 2023, GNP, along with NW Signal Maintenance, LLC, and Kevin Kucera, informed the Board that the Snohomish County Superior Court entered an order granting summary judgment on all claims relating to ECR and Engle and finding that ECR and Engle, among others, have no legal interest in the Snohomish Segment of the Easement.⁶ (GNP Letter 1, Feb. 6, 2023, Eastside Cmty. Rail, LLC—Aquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al.)

Docket No. AB 1316X

On March 18, 2022, GNP filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon the Woodinville Segment of the Easement, along with a spur that extends into Bothell, Wash. By decision served April 11, 2022 (April Director Order), the proceeding, including the Board's environmental review, was held in abeyance to allow GNP to address whether the proposed abandonment, if consummated, would isolate a railbanked segment of rail line south of milepost 23.8, and to clarify the milepost number of the northern endpoint of the line GNP is seeking authorization to abandon. See April Director Order, AB 1316X, slip op. at 1.

GNP filed a supplement on April 19, 2022, explaining that it has reached an agreement to transfer its property interest in the Woodinville Segment of the Easement to Woodinville for interim trail use/railbanking under the National Trails System Act (Trails Act), which GNP argues will preserve the connection between the segment south of milepost 23.8 and the interstate rail network. (GNP Suppl. 1, Apr. 19, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.) GNP states that it intends to abandon the spur that extends into Bothell, which is not connected to any active or railbanked right-of-way other than the Woodinville

⁶ The order granting summary judgment was against all defendants except the County.

Segment. (See id. at 1-2.) In addition, GNP confirms that the correct milepost number of the northern endpoint of the line it is seeking to abandon is milepost 26.38. (Id. at 2.)

GNP filed an additional supplement on May 4, 2022, which includes a copy of a March 2021 Settlement Agreement between GNP and Woodinville, which GNP states commits the parties to undertake joint efforts to railbank the Woodinville Segment and implement railbanking following the Board's issuance of a notice of interim trail use or abandonment. (GNP Suppl. 1-2, May 4, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.; see also id., Ex. A.)

On May 6, 2022, Woodinville filed a verified statement executed by Brandon Buchanan, the City Manager of Woodinville, confirming, among other things, GNP's representations in the May 4 supplement regarding the March 2021 Settlement Agreement. (Woodinville V.S. Brandon Buchanan 2, May 6, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.)⁷

By decision served September 14, 2022 (September Director Order), the Director of the Board's Office of Proceedings (Director) noted that the Woodinville Segment is one of the two segments of the Easement at issue in Docket No. FD 35692 et al. See September Director Order, AB 1316X, slip op. at 2. The Director further noted that, in the 2022 Decision, the Board ruled that it would not decide the pending request to reopen in Docket No. FD 35692 et al. until after the state court quiet title actions had been completed. See id. Therefore, the Director ruled that, consistent with the 2022 Decision, GNP's notice of exemption would remain in abeyance until the state court actions involving both segments had been definitively resolved. See id.

On September 23, 2022, GNP and Woodinville appealed the September Director Order to the entire Board, arguing that the Director's decision to continue holding the proceeding in abeyance until the conclusion of the state court proceeding involving the Snohomish Segment of the Easement is effectively a decision not to issue a notice of exemption under authority delegated at 49 C.F.R. § 1011.7(a). (GNP Appeal 8-9, Sept. 23, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.) GNP and Woodinville further argue that their plan to railbank the Woodinville Segment will not impact the Snohomish Segment and that it is unnecessary to continue holding GNP's notice of exemption in abeyance until the conclusion of the quiet title action involving the Snohomish Segment. (Id. at 10-11.)

On September 29, 2022, the County filed a comment in support of GNP and Woodinville's appeal, along with a request to intervene in the proceeding and a motion to correct certain errors in the September Director Order. According to the County, the September Director Order incorrectly describes the northern endpoint of the Woodinville Segment as milepost 26.58, instead of milepost 26.38. (County Comment 3, Sept. 29, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.) In addition, according to the County, the September Director Order incorrectly states that the Woodinville Segment "comprises part of the [1]ine GNP

⁷ On May 27, 2022, the Hon. Suzan K. DelBene, Member of Congress, filed a letter discussing GNP and Woodinville's plans to railbank the right-of-way and urging the Board's "expeditious, full, and fair consideration" of this proceeding. (DelBene Letter 1-2.)

is seeking to abandon through its notice of exemption.” (Id. at 4 (citing September Director Order, AB 1316X, slip op. at 2).) The County therefore moves to correct the September Director Order by substituting milepost 26.38 for milepost 26.58 and to substitute “the entirety” for “part” when describing the line GNP is seeking to abandon. (County Comment 4-5, Sept. 29, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.)

In support of GNP and Woodinville’s appeal, the County states that the September Director Order appears to be based on an incorrect understanding that there is an ongoing dispute as to who has title to the Woodinville Segment of the Easement, and, because of the incorrect milepost designation in the September Director Order, that this title dispute concerns property in the County. (Id. at 5.) The County argues that the Board need not wait for the Washington state courts to decide the quiet title actions involving the Easement because the Board has already vacated ECR and Engle’s exemption and ordered that the Easement should be returned to GNP. (See id. at 9.)

In addition, the County notes that the December 18, 2009, deed from BNSF to the Port, which created the Easement, contains a covenant requiring the holder of the Easement to consent to railbanking the Line’s right-of-way if the Easement is authorized for abandonment. (See id. at 16; see also id., Ex. C.) According to the County, the covenant also permits any party interested in the Line to file for adverse abandonment if the holder of the Easement does not seek abandonment authority within a reasonable time of stopping service. (See id. at 16.) The County therefore argues that the September Director Order prevents the application of the covenant and requests that the Board grant the appeal so GNP and Woodinville can railbank the Woodinville Segment and the County can file an adverse abandonment application for the Snohomish Segment of the Easement so that segment can also be railbanked. (See id. at 15-20.)

On October 19, 2022, GNP filed a reply, concurring in part with the County’s comment. GNP reiterates that the September Director Order should be reversed and concurs with the County’s statement that the correct northern endpoint of the Woodinville Segment is milepost 26.38. (GNP Reply 3, Oct. 19, 2022, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.) GNP argues, however, that once the northern endpoint of the Woodinville Segment is corrected and the 0.2 miles of the Snohomish Segment removed, the County will have no further standing to participate in this proceeding, and the Board should reject the County’s remaining arguments. (Id.)

On February 17, 2023, Woodinville filed another verified statement, executed by Brandon Buchanan, reiterating Woodinville and GNP’s intention to railbank the Woodinville Segment and stating that further delay could jeopardize Woodinville’s ability to utilize already secured federal funding and to obtain additional federal funding for the planned trail. (See Woodinville V.S. Brandon Buchanan 1-2, Feb. 17, 2023, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.)

Also on February 17, 2023, GNP informed the Board of the Snohomish County Superior Court’s order granting summary judgment and holding that ECR and Engle, among others, have no legal interest in the Snohomish Segment of the Easement. GNP urged the Board to lift the

abeyance imposed in the September Director Order. (See GNP Letter 2-3, Feb. 17, 2023, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.)

The County filed a reply on February 27, 2023,⁸ noting the recent decision of the Snohomish County Superior Court and repeating many of the arguments from its September 29, 2022, comment in support of Woodinville’s appeal.

On April 5, 2023, GNP and Woodinville filed a letter with the Board stating that the Superior Court of Snohomish County’s summary judgment order is now final and no longer subject to reconsideration or appeal. (GNP Letter 2, Apr. 5, 2023, GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash.)

DISCUSSION AND CONCLUSIONS

Docket Nos. FD 35692 and FD 35730

ECR/Engle’s Request to Reopen. Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reopening to be granted. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018).

ECR and Engle’s argument that the Board exceeded its authority in ordering the Easement to be returned to GNP is now moot, as the Washington state courts have ruled that neither ECR nor Engle has any legal interest in either the Woodinville Segment of the Easement or the Snohomish Segment of the Easement.⁹ Therefore, the Board will deny the request to reopen. The Board will also decline to impose civil monetary penalties on ECR or Engle.

Docket No. AB 1316X

The County’s Intervention Request. The Board finds that the County satisfies the standard for intervention, as its participation will not disrupt the filing schedule and will not unduly broaden the issues raised in this proceeding. See 49 C.F.R. § 1112.4. The County clearly has an interest in this proceeding, given that it owns the physical assets of the adjoining Snohomish Segment, and it filed the petition to revoke the exemptions related to the Easement in Docket No. FD 35692 et al.

The County’s Motion to Correct. The County and GNP agree that the September Director Order incorrectly identified the northern endpoint of the Woodinville Segment as milepost 26.58, instead of milepost 26.38. The Board agrees, and the September Director Order

⁸ The County also filed a copy of the reply in Docket No. FD 35692 et al.

⁹ As to the Snohomish Segment of the Easement, GNP and Woodinville have informed the Board that the Superior Court’s grant of summary judgment is final and no longer subject to reconsideration or appeal.

is therefore corrected by substituting milepost 26.38 for milepost 26.58 as the northern endpoint of the Woodinville Segment, which is consistent with how that segment has been described in Docket No. FD 35692 et al.

Appeal of the September Director Order. The Board will allow the abandonment in Docket No. AB 1316X to proceed so GNP and Woodinville can pursue interim trail use/railbanking of the Woodinville Segment.¹⁰ Since the September Director Order was decided, as previously discussed, the Washington state courts have ruled that neither ECR nor Engle has any legal interest in either segment of the Easement, and, as explained above in this decision, the Board has denied ECR and Engle's request to reopen in Docket No. FD 35692 et al. Therefore, now that the Board is authorizing the abandonment in Docket No. AB 1316X, the Board will deny as moot the appeal of the September Director Order.

In addition, the Board finds that authorizing the abandonment in Docket No. AB 1316X will not isolate the railbanked segment south of milepost 23.8 from the interstate rail network, a concern raised in the April Director Order. The Board has held that it will not allow track to which the common carrier obligation is attached to become isolated from the interstate rail network as a result of the abandonment of an adjoining segment. See, e.g., ABE Fairmont, LLC—Aban. Exemption—in Fillmore Cnty., Neb., AB 1106X et al., slip op. at 4 n.3 (STB served Jan. 29, 2018) (citing Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Cntys., Or., AB 515 (Sub-No. 2), slip op. at 12 (STB served Oct. 31, 2008)). In a recent decision in Elk River Railroad—Abandonment Exemption—in Kanawha & Clay Counties, W. Va., AB 1314X (STB served Mar. 25, 2022), a verified notice was rejected, notwithstanding the stated intention of the railroad and a proposed trail sponsor to railbank an adjoining segment (which was still an active rail line), because if the abandonment authority granted were consummated, it would have stranded that segment.

Here however, unlike in Elk River, the potentially stranded segment south of milepost 23.8 is already railbanked, meaning that railbanking the Woodinville Segment would add to an existing trail. In addition, although Elk River correctly notes that a stated intention to railbank a line does not necessarily ensure that an adjoining segment will not be isolated (because either party can terminate negotiations), see Elk River, AB 1314X, slip op. at 3, here the Board is satisfied that the covenant in the December 18, 2009, deed—which requires the Easement holder to consent to interim trail use/railbanking if the Easement is authorized for abandonment—and the 2021 Settlement Agreement—which commits GNP and Woodinville to undertake joint efforts to railbank the Woodinville Segment—sufficiently constrain GNP's ability to terminate Trails Act negotiations and consummate the abandonment.¹¹

¹⁰ Notice of the exemption authorizing the abandonment in Docket No. AB 1316X will be published in the Federal Register.

¹¹ The Board notes that if Woodinville intends to acquire from GNP the right to reactivate service on the Woodinville Segment, once the segment is railbanked, such an acquisition would require Board approval. See Atlanta BeltLine, Inc.—Acquis. Exemption—Norfolk S. Ry., FD 36286 (STB served June 14, 2019).

For the foregoing reasons, the Board will deny as moot GNP and Woodinville's appeal of the September Director Order and will lift the abeyance to allow the abandonment to proceed.

It is ordered:

1. ECR and Engle's request to reopen in Docket Nos. FD 35692 and FD 35730 is denied, as explained above.
2. The County's request to intervene in Docket No. AB 1316X is granted, as discussed above.
3. The northern milepost of the Woodinville Segment in Docket No. AB 1316X is corrected, as discussed above.
4. GNP and Woodinville's appeal of the September Director Order in Docket No. AB 1316X is denied as moot.
5. The abeyance order in Docket No. AB 1316X will be lifted, environmental review will proceed, and GNP's notice of exemption will be published in the Federal Register.
6. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.