

BEFORE THE SURFACE TRANSPORTATION BOARD

Eastside Community Rail, LLC -	)	247055
Acquisition and Operation Exemption -	) F.D. 35692	247056
GNP RLY, Inc.	)	ENTERED
		Office of Proceedings
		February 4, 2019
Ballard Terminal Railroad Company LLC -	)	Part of
Lease Exemption -	) F.D. 35730	Public Record
Eastside Community Rail, LLC	)	

Verified Petition for Reconsideration

Snohomish County ("County") hereby petitions for reconsideration from the Board's decision in F.D 35692 and in F.D. 35730 served December 13, 2018, (1) denying revocation of the acquisition and operating license claimed by Eastside Community Railroad ("ECR") for a 14.45 mile line of railroad from MP 38.25 in or near Snohomish, WA to MP 23.8 in Woodinville, WA, and (2) similarly denying the petition to revoke the derivative license held by Ballard Terminal Railroad Company (BTRC) to operate pursuant to a lease from ECR.

Summary. ECR per its manager Douglas Engle attested that it was acquiring a freight rail easement from GNP Railway ("GNP") in a bankruptcy proceeding on property now owned by County as successor to Sound Transit. The County has shown this representation to be false. It is incontrovertible that the

bankruptcy trustee never issued a deed to ECR. Indeed, the County showed that the trustee could not because of another incontrovertible fact: record title resides in Mr. Engle's father and his now ex-wife, to whom Mr. Engle as an officer of GNP transferred the rail easement prior to GNP's entry into bankruptcy proceedings. False or misleading statements by Mr. Engle concerning ownership are material to invocation of this Board's exemption authority for acquisition and operation. Accordingly, under this Board's regulation (49 C.F.R. 1150.32(c) and applicable precedent, ECR's notice exemption for acquisition of and operation over the rail easement is "void ab initio." The County sought revocation of ECR's license so the County could remove the trespasser from the premises.

This Board declined to revoke ECR's license on the ground, raised by the Board sua sponte, that the matter was a dispute over local property law better resolved in state courts. This is a material error. The gravamen of the County's Petition is that ECR never obtained title (an easement) to operate on what is now the County's property. ECR is a trespasser, but for its STB license authority. Trespass actions against railroads, like eminent domain proceedings against railroads, remove railroads from rail lines. This Board repeatedly holds that such actions are preempted by STB's rail licensing authority. Were the County to bring a trespass action in state court in accordance

with this Board's December 13 decision, the complaint would presumably be dismissed under WA Superior Court Rule 12(b)(6), which, like F.R.Civ.P. 12(b)(6), provides for dismissal of claims for which relief cannot be granted. The agency's December 13 decision in directing the County to rely on state courts in effect directs the County to seek relief that a state court cannot grant due to the agency's preemptive rail license. The Board's decision creates a circularity which in effect allows a trespasser to occupy premises belonging to the County for so long as the Board leaves ECR's rail license in place.

This is a material error, both in failing to follow precedent and in failing to consider relevant factors (e.g., federal preemption of trespass claims against STB licensees). Material error necessitates reconsideration per 49 C.F.R. 1115.3.¹ On reconsideration, the Board must revoke ECR's license so the County in fact can pursue a state court action for

¹ An agency acts arbitrarily and capriciously if it "reverse[s] its position in the face of a precedent it has not persuasively distinguished," Louisiana Pub. Serv. Comm'n v. FERC, 184 F.3d 892, 897 (D.C.Cir.1999); see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57, 103 S.Ct. 2856, 2873, 77 L.Ed.2d 443 (1983). An agency must also consider all relevant factors. N. Mun. Distribs. Group v. FERC, 165 F.3d 935, 941 (D.C.Cir.1999); see Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43, 103 S.Ct. at 2866 (agency action "arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem").

trespass against ECR. At the very least, the Board must clarify its Decision by providing that federal preemption in the circumstances here does not bar a state court hearing a trespass action by the County against ECR and awarding an ejectment remedy, even if ECR is an STB licensee.

ARGUMENT

A. Failure to Comply with Regulation and Precedent

It is elementary that an agency must comply with its own regulations and with its own precedent. This Board authorized ECR to acquire and to operate the line in question pursuant to an exemption governed by 49 C.F.R. 1150.31. 49 C.F.R. 1150.32 provides that the exemption applicant must provide certain information and 1152.32(c) provides that the exemption authority is void ab initio if the information is false.

As the Board acknowledges (Opinion p. 3, para 2), ECR stated in its notice of exemption that it was acquiring a rail easement on the line. But ECR in fact never did acquire a rail easement. There is simply no deed from the trustee in bankruptcy of GNP Railway to ECR. Moreover, as demonstrated by Snohomish County, record title for the rail easement is vested in the father of Douglas Engle and in his (ex-)wife, to whom Mr. Engle caused GNP Railway to deed the easement prior to forcing GNP into bankruptcy. The Board seems to suggest that perhaps

the federal bankruptcy court might be able to invalidate the deeds to the current record title holders and otherwise remedy ECR's lack of title. See Dec. 13 Slip Op. at 7 (Board cites bankruptcy court rules about voiding deeds to Douglas Engle's father and ex-wife).

Even if federal bankruptcy court reopened the GNP bankruptcy to void Mr. Engle's deeds to his relatives (and/or other deeds) and to issue a deed to ECR, it remains crystal clear that any corrective action would be too late. Mr. Engle attested ECR was acquiring the easement, but his new company (ECR) did not and could not do so because of Mr. Engle's own prior actions. Mr. Engle never undertook any corrective action, and instead commenced operations anyway. In short, ECR not only violated the 49 C.F.R. 1150.32 but also commenced actual operations in the absence of lawful acquisition and remains in violation to this day. Mr. Engle in essence falsely asserted ECR would comply with this Board's Notice of Exemption requirements, and on this basis obtained permissive acquisition and operation authority, but never complied, and occupied the line anyway.

Under this Board's precedent, misleading or false representations as to property ownership are material and result in invalidation of acquisition and operation exemptions ab

initio. E.g., San Francisco Bay Railroad-Mare Island - Operation Exemption - California Northern Railroad, F.D. 35304, slip op. 3-4, served Dec. 6, 2010 (acquisition authority void where no acquisition); see also Black Hills Transportation, Inc. d/b/a Deadwood, Black Hills & Western Railroad - Modified Rail Certificate, F.D. 34924, served Jan. 27, 2010 (equivalent of acquisition/operation authority void where no property left to acquire and to operate upon).

To reiterate, ECR lacks any deed to the premises from the bankruptcy trustee (or otherwise). Record title is in Engle's father and ex-wife. This condition applied at the time of Engle's representation that ECR was acquiring title, and remains the case today. There was no easement for ECR to acquire from GNP, due to the actions of the man who signed ECR's verification to the contrary. The agency violated its regulation and precedent when it failed to void ab initio ECR acquisition and operation license.

B. Not a State Court Issue

The agency justifies its decision on the ground, which the Board raised sua sponte, that the case raises questions of property law and relies on precedent elsewhere that such disputes are resolved in state court. The County has great respect for the principle that questions of state property law

are best resolved in state courts. But the gravamen of the County's claim is not a dispute involving an operating agreement or boundary line, or contract of some sort, which are the sorts of matters on which STB defers to state tribunals. Instead, the issue is what ECR received from the federal bankruptcy court, which is easy to answer: it received nothing. Any change in that condition would require not an adjudication in state courts, but a reopening of the federal bankruptcy proceeding. A state court does not create deeds for trespassers; it grants ejectment remedies. In effect, there is no state court issue other than to eject the trespasser in the situation under discussion. The Board in sua sponte referring the County to state courts for relief overlooked the fact that state courts do not create deeds to property. The only place to remedy ECR's lack of a deed is federal bankruptcy court, not state court.

It follows that if this Board wished to defer to some court, then it would refer the case not to state court but to federal bankruptcy court, which is what the Board seems to hint on page 7 of its Dec. 13 opinion. But Snohomish County has no standing or cause of action at this time on which to reopen the bankruptcy proceeding. The County seeks to oust ECR from the premises, not band-aide over possible fraudulent transfers in which ECR's manager has engaged or otherwise to secure him title. If the Board wants the bankruptcy court to fix the mess,

then it needs to do something to require Douglas Engle or ECR to seek to reopen the bankruptcy proceeding. But the Board in its December 13 decision provides no incentive or reason for Engle or his company to do anything. Revocation of the ECR license would at least force ECR to attempt to reopen the bankruptcy proceeding to seek to obtain a deed so it would have a defense against the County's trespass action.²

But even if all this occurred, the fact remains that ECR's notice of exemption was false and misleading when filed years ago, just as it remains today, because ECR did not have title and never received title. Record title did not reside in GNP at the time of the bankruptcy, the trustee never issued a deed to ECR, and record title still does not reside in GNP or ECR. Thus, the notice of exemption is void ab initio under 49 C.F.R. 1150.32(c) regardless whether ECR were successful in getting a "fix" from bankruptcy court, even if the Board's decision of December 13 provided incentive for ECR to seek that fix, which it does not.

C. The Board's Decision Creates a Circularity that
Wrongfully Deprives the County of Relief

² The County would reserve all rights to oppose relief to ECR in federal bankruptcy court.

The County's state law claim is that Mr. Engle's railroad (ECR) is trespassing (occupying without title or right) the County's property and must be ejected. The County's claim is for practical purpose identical in effect on a trespasser to an eminent domain action to acquire an entire rail line. Both result in expulsion of a railroad from the premises. Just as STB jurisdiction preempts eminent domain actions seeking all (or even an outboard portion of) a right of way (e.g., City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005)), so do trespass actions. E.g., Mark Lange - Petition for Declaratory Order, F.D. 35037, slip at 2, served Jan. 28, 2008 ("it is clear that the state law claims ... in his trespass suit ... are preempted to the extent that Lange seeks to eject WCL from the property or seeks monetary compensation under tort claims for alleged harm..."). It follows that the County cannot bring a state law trespass action to remove Engle's ECR from the property unless or until this Board revokes the ECR license. To the contrary, any trespass action would be subject to dismissal under WA Superior Court Rule 12(b)(6) for failure to state a claim on which relief could be granted due to federal preemption by STB jurisdiction. See also F.R.Civ. P. 12(b)(6). The Board's sua sponte rationale that the dispute can be resolved in state courts is fatally flawed in that it fails to consider what is a key relevant factor: there is no state forum in which the

County can seek relief due to federal preemption (49 U.S.C. 10501(b)) arising from the Board's refusal to revoke ECR's acquisition and operating authority. In cases such as this, the Board customarily grants relief lifting federal preemption so the aggrieved party (here, the County) can pursue state court relief. E.g., City of Alameda - Acquisition Exemption - in Alameda Beltline Railroad, F.D. 34798, served April 3, 2006 at p. 5. The Board accordingly must either revoke the ECR license ab initio, as its regulations provide, or clarify its December 13 decision to provide that federal preemption shall not apply to preclude a state court action by Snohomish County against ECR for trespass for which ejectment is the remedy. In short, even if the Board's authority is only "permissive" (Dec. 13 slip op. at 7-8), the Board must afford the County relief from federal preemption to pursue issues in state court, or to force ECR to pursue title in bankruptcy court.

D. The Board's Decision Does Not Comport with
Applicable Federal Rail Policy

As the County has demonstrated, Douglas Engle on behalf of GNP purported to deed GNP's rail easement to his father and to his then-wife before the bankruptcy court had jurisdiction over the property. They promptly recorded their deeds and to this day are the record owners of the rail easement. By statute and regulation STB must pre-authorize transfer of freight rail lines

(which for purposes here is the freight rail easement). But neither Engle's father nor then wife sought STB authority for acquisition or operation of a railroad. In addition, Mr. Engle in his pleadings in this proceeding and in other proceedings has made representations about subsequent transfers by his father and his ex-wife, at one point claiming his ex-wife's interest became his in a divorce settlement. There is no record at STB indicating anyone sought the required federal pre-authorization for any of these transfers. In another filing, Mr. Engle and his father purported to deed some mileage of the easement to a third party. Again, there is no record that STB authority was sought. The Board recounts these numerous transfers of a regulated line without authority in its December 13 opinion, even noting that in a filing in another proceeding before this agency, Mr. Engle claimed yet another entity owned the easement. Dec. 13 opinion, slip at 8 n.11. Again, no STB license for a transfer to such an entity was sought.

A state court cannot sort out or remedy all the violations of STB regulations -- or representations of violations of STB regulations - involving Mr. Engle's failure to obtain required STB authorization for these many transfers. The agency indicates that any claimant to the easement must obtain a Board authorization for the transfer to be "valid" (slip op. at 8) and warns that repeat offenders are subject to increased scrutiny

(slip at 8).³ However, despite the myriad unlawful transfers admitted by Mr. Engle, this agency failed to provide relief to the County so it could pursue state law claims for trespass. Federal rail policy, which governs this agency, calls for "honest and efficient management" of rail lines. 49 U.S.C. 10101(9). Repeatedly flipping rail lines between relatives and entities without required STB authorization is hardly "honest and efficient management." Rather than refer this case to state court, the agency should enforce its regulations by invalidating the ECR acquisition and operation license so the County can pursue trespass actions as the Board appears to suggest.

E. Federal Rail Policy Requires a Resolution of the Trespass

The County has publicly and repeatedly stated that it wishes to maintain the freight rail line (which operates on County-owned tracks and right of way) at issue here, as well as develop the property for a trail. Unfortunately, the line generates insufficient revenue for the current operator (BTRC) to provide maintenance on the line, which is the duty of ECR and its assigns (BTRC). BTRC in fact has advised the Board it wishes to withdraw from operation of the line. Dec. 13 slip at

³ Ironically, the only transfer for which Mr. Engle sought requisite Board authority is the transfer that was never made (i.e., there was and is no trustee deed from the bankruptcy trustee to ECR).

9. At essentially the same time, BTRC has pressed the County to take over maintenance responsibilities, noting to the County that the line is at substantial risk of failing. Unfortunately, the County cannot assume ECR's and/or BTRC's maintenance obligations. This would amount to taxpayer subsidies for private parties trespassing on public property in the circumstances as well as uncompensated assumption of liabilities for for-profit entities that is contrary to the applicable operating agreement. Moreover, the County reiterates that it cannot in good conscience seek grants and appropriations from state or federal sources to maintain or to rehabilitate the line for rail purposes so long as trespassers occupy it, particularly a trespasser such as ECR whose management is implicated in repeated violations of STB regulations. BTRC has even asserted to the County that ECR diverted to non-rail use funds raised by shippers for maintenance. Given ECR's apparent lack of title and repeated infractions of STB regulations by ECR's manager (Mr. Engle), it is unlikely that ECR will be able to raise additional funds on its own to rehabilitate the line. In order to comport with federal rail policy in, inter alia, 49 U.S.C. 10101(5) ("foster sound economic conditions") as well as (9) ("honest and efficient management"), STB must provide meaningful relief to the trespass problem so the line does not remain in its current limbo of frustrating deterioration.

F. BTRC and GNP

BTRC's rights in the corridor are derivative of ECR's rights, and BTRC's claim, in its notice of exemption for its lease, that ECR owned the corridor is false for the same reason applicable to ECR. Snohomish County therefore seeks reconsideration and clarification of the Board's decision in F.D. 35730 for the same reasons and to the same extent. The County desires to enter into a direct relationship with BTRC or an alternative supplier to serve its rail shippers on the line.⁴

As the County has previously stated, upon revocation of ECR's exemption, ECR's common carrier obligation would presumably return to ECR's predecessor, GNP Railway, Inc. ("GNP"). For the reasons previously stated, GNP lacks any property interest in the rail easement (or any other rail

⁴ The County reserves the right to seek other relief from STB, including possible adverse discontinuance and adverse abandonment proceedings against any or all of ECR, GNP, or BTRC (which states that it wishes to leave the line) as the facts warrant. As the County has previously indicated, the County is prepared to seek an operator (which could be BTRC if interested) to provide freight rail service on the railroad once abandoned, pursuant to a modified certificate and a contract/operating agreement with the County, much as BTRC operates in the Ballard district of Seattle. That arrangement would be consistent with obtaining grants for rehabilitation and maintenance. Alternatively, the line will deteriorate further until it is embargoed or de facto abandoned to the detriment of shippers as well as the public.

property) at this time. The County for this and other reasons reserves its rights to seek appropriate relief against GNP.

Conclusion

The Board should reconsider and/or clarify its Decision of December 13, 2018, as provided herein.

Respectfully submitted,



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Certificate of Service

The undersigned certifies service of the foregoing inclusive of all exhibits on all parties of record (or their representatives) in F.D. 35692 and F.D. 35730 by placing a copy in the U.S. Mail (or other express service), next business day delivery, on 4 February, 2019 including specifically:

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BEFORE THE SURFACE TRANSPORTATION BOARD

COUNTY OF SNOHOMISH STATE OF WASHINGTON	Eastside Community Rail, LLC -- Acquisition and Operation Exemption -- GNP Rly, Inc., F.D.35692
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VERIFICATION

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By THOMAS P. STOWE

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THOMAS P. STOWE makes the following declaration upon personal knowledge:

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1. I am over 18 years of age and otherwise competent to testify in this matter.

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2. I am the Senior Review Appraiser for Snohomish County Public Works Department.

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I have held this position since September 6, 2016.

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3. In my capacity as Senior Review Appraiser, I am the County Parks and Recreation

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Department's project lead for research and analytics regarding ownership of the

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former BNSF railroad corridor between the City of Woodinville in King County and

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the City of Snohomish in Snohomish County, which is the line at issue in this

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proceeding. I have previously prepared verified statements for filing in this

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proceeding. I have reviewed that Verified Petition for Reconsideration prepared for

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filing in this proceeding on 4 February 2019, and certify that all the facts stated

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therein are true and correct to the best of my knowledge and belief..

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Pursuant to 28 USC 1746, I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

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Signed this 4th day of February 2019 at Everett, Washington.

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THOMAS P. STOWE

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