

Eastside Community Rail, LLC

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SURFACE TRANSPORTATION BOARD

RESPONSE AND/OR PETITION FOR RECONSIDERATION in the matter of:

Docket NO. FD 35692, Eastside Community Rail, LLC—Acquisition and Operation
Exemption—GNP RLY Inc.

and

Docket No. FD 35730, Ballard Terminal Railroad Company, L.L.C.—Lease Exemption—
Eastside Community Rail, LLC.

This letter responds to the Decision in the above referenced matter, Service Date September 29, 2021, where the Board ordered response and actions by October 29, 2021. Douglas Engle and Eastside Community Rail, LLC (“ECR”) respond as follows.

By Decision served December 22, 2020 (“2020 Decision”)¹, the Board ruled on the petitions to revoke exemptions granted in 2012 to both ECR and Ballard Terminal Railroad Company, L.L.C. The Board ruled that the exemptions were vacated. The parties have respected that decision with all operations discontinued.

Although more cumbersome, time-consuming, difficult and expensive, the law does not preclude a party, in this case ECR/Engle, from seeking to satisfy full certification requirements pursuant to 49 U.S.C. §§ 10901(a), 10902(a). More importantly, the law does not preclude a party, in this case ECR/Engle, from filing a subsequent, corrected notice of exemption under 49 C.F.R. § 1150.31 after an exemption has been vacated as misleading. Our law also does not impose deadlines on those activities. No one except ECR/Engle is proposing to continue rail operations so the Board’s interest in regulating the line to “encourage honest and efficient management of railroads”, 49 U.S.C. §§ 10101(9) is not served by imposing deadlines that otherwise do not exist, especially while concerned or interested parties continue to pursue related state court litigations.

ECR and Engle submitted a brief status report on February 5, 2021. At that time, it was unclear and uncertain how the complicated situation could best be addressed. Since then, ECR and Engle have investigated, pursued, and prepared possible options. During this time, ECR and Engle have also been embroiled by the City of Woodinville in state court litigation pertaining to the rail easement that ECR and Engle deem to be intended to harass and cause needless litigation expense. The burdens put on ECR and Engle have been extreme.

¹ FD 35692.

ECR/Engle have made arrangements to pursue and are currently preparing a notice of exemption for filing. Every attention is being paid to being thorough and completely transparent. Any information previously omitted is being addressed and explained. ECR and Engle are mindful that the Board has admonished "Douglas Engle that any filings he makes in this or in future proceeding would be scrutinized closely."² Douglas Engle and ECR have a right to pursue what the law provides.

This Board's 2020 Decision resolved petitions to revoke exemptions. That was the subject and scope of the petitions to revoke. There was no petition to order a conveyance or pricing for a conveyance or any other disposition of the rail easement. It was always unclear what would happen next if the exemptions were revoked. That question was not fully addressed to the Board and the Board did not require the parties to address that question. While the Board has unquestioned, full authority to authorize transfers and operations, the Board does not participate in and is not statutorily authorized to conduct transfer negotiations.

Any questions of actual ownership were in no way material to the exemption decision because the question presented was squarely focused on whether the exemption should be vacated based on omission of information being deemed to be misleading. It was also in no way material to the petitions to resolve what would follow if revocation occurred. This Board has acknowledged that it had not made decisions pertaining to actual ownership interests:

It is unclear whether the October 2011 transfer ever became effective. The deed (from Earl and Joanne Engle to GNP) did not appear to have been signed by all relevant parties. 2020 Decision, FD 35692 et al., slip op., at 5. It is similarly unclear whether the attempt to transfer the easement from GNP to Earl and Joanne Engle prior to filing for bankruptcy was valid under state law.³

The Board's September 29 clarifications and directions regarding transfer negotiations came as a surprise to ECR/Engle. ECR/Engle fully acknowledge the 2020 Decision and have complied with the fact that exemptions have been revoked; however, it is a *non sequitur*, legally untenable, and a gross injustice for the Board to impose itself into business negotiations and undertake to order a transfer of an easement right to an entity, GNP, that in 2011 received one hundred seventy-five thousand dollars (\$175,000) to convey away its rights and thereafter never timely sought to undo the transfer in either bankruptcy or state courts. The law does not support the Board gifting a rail easement to GNP. The law also not require that ECR/Engle acknowledge and admit that they waive legal interests in an easement right that was paid for and transferred.

The Board is requested to reconsider the September 29, 2021 orders to that effect, because no such order was inherent in, or within the scope of, the resolved petitions to revoke. ECR/Engle maintain legal rights to pursue certification, obtain an exemption, or transfer the rail easement. The Board should vacate its order that: "ECR and Douglas Engle are directed to take any action necessary to convey the Line's easement to GNP and certify to the Board that they have done so, or to acknowledge to the Board, in writing, that, as of the date of such acknowledgement, GNP

² FD 35692, Service Date September 29, 2021, p.3.

³ FD 35692, Service Date September 29, 2021, p. 2, fn.6.

has title to the Line's easement and that ECR and Douglas Engle make no claim to the contrary, by October 29, 2021." There is no urgency regarding operation of the rail line because it has been suspended and no one except ECR and Engle intend to continue service if authorized. ECR and Engle respectfully request the Board preserve the status quo, preserve legal rights, and vacate the order from the September 29, 2021 clarifications.

The exemptions have been vacated. The operation of the freight line has been suspended. There is currently a limbo as to what ownership of the rail easement will be authorized by the Board. If authorization is not renewed for ECR, then it is apparent that the rail line will be abandoned and lost as a rail line. The Board's language regarding ownership reverting to GNP is a fiat decision because the Board itself has made no determination about the underlying transfers other than to rule that it was misleading to not fully disclose them to the Board when the original exemptions were obtained. It is improper and an illegal deprivation of property rights to base reverting of rights to GNP based on whether actions have been taken since February 5, 2020.⁴ Actions have in fact been taken under extreme duress and financial pressures intentionally imposed on ECR/Engle by the City of Woodinville. Those actions are ongoing in state court litigation. In this federal forum, actions will soon come to fruition with the filing of a thorough, transparent notice of exemption that will fully address all concerns of the Board.

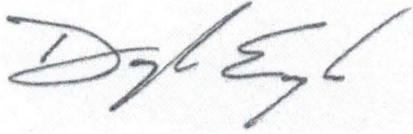
In the meantime, it is arbitrary and capricious for the Board to gift the rail easement to GNP with no resolution or resolution on competing claims of property interests. The Board has full authority to authorize transfers, but the Board is not statutorily authorized to conduct the negotiations itself or direct parties on how to conduct business negotiations. "The 'requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain the result.'" *Snohomish Cty v. Surface Transp. Bd.*, (D.D. Cir. 2020) (quoting *Jost v. Surface Transp. Bd.*, 194 F.3d 79, 85 (D.C. Cir. 1999)). The original transactions in 2011 can be justified and proven as valid. At this point, filings to the STB have been deemed to have been misleading, but that does not establish falsity of failure of the underlying transactions. Until those questions are resolved, it is arbitrary and capricious to deprive a party of property rights.

The fact that, while burdened on multiple fronts, ECR/Engle have been financially and otherwise unable to complete their efforts of accumulating and preparing thorough materials to file new notices of exemption yet is not a legal basis to deprive them of property rights and is not a basis for an abandonment argument that is neither presently ripe nor proper for consideration. Deadlines do not exist for that to occur, litigations remain ongoing, and there is no urgency because no other entity is proposing to operate the suspended rail line. The act of setting a deadline in the September 29, 2021 clarification, by which date ECR/Engle must waive property rights and gift a particular transaction, was not a statutorily authorized act and was outside the scope of the revocation of exemptions.

ECR and Engle are not disregarding the Board's requirements or the 2020 Decision. Certainly, the Board appreciates that ECR and Engle expect fair treatment under the law. ECR

⁴ The Board's September 29, 2021 reasoning appears to be in the spirit of abandonment because it focusing on whether actions have been taken and implies that perhaps something has been abandoned. This is not an abandonment proceeding and the facts do not support an argument for abandonment because ECR/Engle have been constantly litigating the matter in order to preserve, not abandon, legal property rights.

and Engle duly purchased a rail easement and obtained exemptions that remained valid for over 8 years. The exemptions were vacated, but that's all that was addressed and reasonably resolved. The validity of the transfers and the unquestioned ownership of the easement will be thoroughly addressed for the Board's review of the filing of the notice of exemption. To avoid a great injustice, ECR and Engle respectfully request the Board vacate its premature and unsound order.

A handwritten signature in black ink, appearing to read 'D. Engle', is positioned above the printed name.

Douglas Engle
President
Eastside Community Rail, LLC

Dated: September 29, 2021

CERTIFICATE OF SERVICE

Docket NO. FD 35692, Eastside Community Rail, LLC—Acquisition and Operation Exemption—GNP RLY Inc.

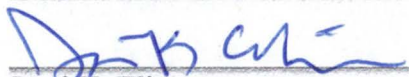
I certify that on October 29, 2021 that I served an e-filed copy of the following documents attached hereto via e-mail upon all parties of record listed below in the proceeding.

Filed and Served Documents:

- 1) Eastside Community Rail, LLC letter, Response and/or Petition for Reconsideration to STB dated 10/28/2021

Parties Served:

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Jami K. Elison
Eastside Community Rail, LLC & Douglas Engle counsel

10-30-2021
Date