

SURFACE TRANSPORTATION BOARD SUBMISSION
POST-REMAND COMMENTS

POST-REMAND COMMENTS 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.

300942

Submission by:

Appearing as Counsel for Eastside Community Rail, LLC

Jami K. Elison, Esq.

The Collins Law Group, PLLC

98 NE Gilman Blvd., Suite 201

Issaquah, WA 98027

(jami@tclg-law.com)

ENTERED

Office of Proceedings

July 30, 2020

Part of

Public Record

Comments submitted: July 30, 2020

Our law firm, The Collins Law Group, PLLC, has been engaged and hereby appears as counsel for Eastside Community Rail, LLC in this matter. On March 27, 2020, the United States Court of Appeals for the District of Columbia Circuit ordered that this matter be remanded to the Surface Transportation Board (the “Board”) for further proceedings consistent with this opinion. *Snohomish County, Washington v. Surface Transportation Board*, 954 F.3d 290 (D.C. Cir. 2020). The Board is accepting post-remand filings made by July 30, 2020 into the record.

The Court of Appeals did not require that the Board reach a different conclusion or disposition in this matter. In fact, the Court stated: “The Board might or might not ultimately determine that it has not been misled by Engle’s maneuvering.” *Id.* at 303. Rather, the Court of Appeals required that the Board articulate “the reasoning behind its decision with sufficient clarity to enable petitioners and this court to understand the basis for its decision.” *Id.*

That requirement from the Court of Appeals is easily met and the Board should again reach the same conclusion supplemented by articulated reasoning that specifically addresses the two prohibited criteria, “false or misleading,” that are included in 49 CFR § 1150.32(c). The Board must explain why it did not find that the Notice of Exemption was either false or misleading. Indeed, it is not. Nothing has been presented to the Board that shows the Notice of Exemption to have been “false” and it is also not materially “misleading” under the Board’s precedent.

Meaningful review necessitates reference to the specific language of the applicable regulations. “Determining a statute’s or regulation’s plain meaning requires examining the specific language at issue” *Ortiz-Valles v. McDonald*, 28 Vet. App. 65, 69 (2016), citing *Gardner v. Derwinski*, 1 Vet. App. 584, 586 (1991). 49 CFR § 1150.32(a) provides:

- (a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in §1150.34, for publication in the Federal Register.
- (b) ...
- (c) If the notice contains false or misleading information, the exemption is void *ab initio*. ...

Second, we turn to 49 CFR § 1150.34 for the Notice of Exemption form:

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

Surface Transportation Board Notice of Exemption Finance Docket No. (1) - Exemption (2)-(3)

(1) Has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Board and served on (5). (6).

Key to symbols:

- (1) Name of entity acquiring or operating the line, or both.
- (2) The type of transaction, e.g., to acquire, operate, or both.
- (3) The transferor.
- (4) Describe the line.
- (5) Petitioners representative, address, and telephone number.
- (6) Cross reference to other class exemptions being used.

When compared to the requirements of the form, there is nothing that can be found to be false in the Notice of Exemption at issue here. Although Snohomish County makes arguments out of prior and post transactions all involving the principal Douglas Engle, transactions that the Court of Appeals called “maneuvering,” the Notice of Exemption form does not require such information and requires instead only an accurate representation of who “has filed a notice.” None of the arguments presented give any reason for the Board to doubt who it was who “has filed a notice.” Eastside Community Rail, LLC filed the notice.

Continuing the same review for the remainder of the Notice of Exemption leads to the same conclusions. Nothing submitted to the Board presents reason to find false the name of entity acquiring or operating the line, the type of transaction, the transferor, the description of the line, or any other information contained in the Notice of Exemption at issue. It is not for the Board to make decisions about which Douglas Engle entity or family member could have “filed the notice” or how they could have structured the transaction differently, or which entity name could have acquired the line. None of that is material for the Surface Transportation Board’s decision that the Notice of Exemption was not false. Even if irregular or maneuvering, the content is colorable and not false. Not rising to the level of “false,” the only question would be whether it is “misleading.” Under Board precedent it is not materially misleading because none of the transactions, even if irregular, are germane to the Board’s authority in this matter.

Relevant to this case, the Board has previously confirmed that the regulations at issue do not require the Notice of Exemption to include information about possible or even pending property interest disputes: “[T]he railroad is correct that it was not specifically required by the regulations to provide information regarding the pending property interest disputes...” *Black Hills Transp. Inc. d/b/a/ Deadwood, Black Hills & Western R.R.—Modified Rail Certificate*, FD 34924, 2010 WL 302027, at *3 (STB served Jan.27, 2010).

The Board has only in exceptional circumstances found a failure to disclose to be misleading by omission. In the *Black Hills Transp. Inc.* decision, the Board found an omission materially misleading only because it affected whether the Board had jurisdiction over the property. In that matter, a dispute existed about whether the state had obtained a necessary interest in the right-of-way (“ROW”). The Board stated: “When an abandonment has been consummated, the agency loses jurisdiction over the property.” *Id.* Because the omission affected the authority of the Board, it was materially misleading. The Board has also found a failure to disclose information to be materially misleading in the case of a condemnation action. *US Rail Corp.—Lease & Operation Exemption—Shannon G., LLC*, FD 35042, 2008 WL 4534375, at *3 (STB served Oct. 8, 2008). And the Board has found an omission materially misleading when it involved “lease of and operation over a line of railroad that has been constructed without Board authority.” *US Rail Corporation—Lease and Operation Exemption—Shannon G.*, STB Finance Docket No. 35042, at 3-4 (STB served Oct. 8, 2008).

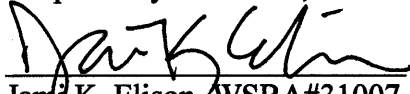
This matter is distinguishable from all instances when the Board has found an omission to be materially misleading. Here, it was not material for the Board to consider imagined disputes, none of which have come to fruition, for this Notice of Exemption. Instead, the general rule continues to be, as the Board decided in the *Black Hills Transp. Inc.* matter, that applicants are “not specifically required by the regulations to provide information regarding the pending property interest disputes.” Consequently, because the extraneous information was not required, and because the information does not affect the Board’s jurisdiction or authority, the Board was not materially misled.

If, owing to “irregularities” or “maneuvers,” Douglas Engle and his entities or family members have disputes between them, it is for them to raise on their own and not for the Board to speculate about. It is not clear that Snohomish County has articulated a sound interest. While expressing concerns about trespass, if there are defects in the transaction it is a *non sequitur* to say that someone is trespassing against the County; rather, one Douglas Engle entity might be trespassing against another Engle entity or family member.

The Notice of Exemption is available to entities before transactions have been completed, when a transaction is still inchoate. Thus, the exact details of final transactions or documents appertaining thereto, are plainly not a subject of Board concern and not something upon which the Board could be materially misled. The only concern for the Board is to determine whether the Notice of Exemption is false or misleading. There is no reason to determine it was false. Consistent with Board precedent, it was also not materially misleading.

The Board made the correct decision. The Court of Appeals asked for more rationale. The above information fully responds to the remand from The Court of Appeals.

Respectfully submitted,



Janet K. Ellison, WSBA#31007

Eastside Community Rail, LLC

Attn: Douglas Engle, President
4117 S. Lamonte, Spokane, WA 99203
cell: 509.319.0471 | e-mail: DEngle76@comcast.net

July 29, 2020

To: Surface Transportation Board
Re: FD 36295 & FD 35151

The freight easement in question has been owned by the entity for which I was a member since 2009. It was used as collateral to loans within my family. Washington State is a community property state, so even as collateral it has been under my control. Here are important facts:

The freight easement quit claim has been properly filed under Eastside Community Rail, LLC ("ECR") in Snohomish County.

There was no intent to make false or misleading claims or filings with the STB.

Freight has continuously operated on the line under my ownership since 2009 and under previous prior railroads for over 100-years.

No other party is making a claim of ownership of the freight easement.

Snohomish County Parks and Recreation Dept. initiated this STB action is a last-ditch attempt to force abandonment for a trail.

I have a buyer, Jim Jensen, for the freight rail easement pending a favorable decision by the Board. He and his attorney, Michael Essig, have diligently worked on the quit claim title issue and are satisfied that the title belongs to ECR. Further, over the past year, Mr. Jensen has identified significant freight opportunities along the line, which Ballard overlooked.

I look forward to Mr. Jensen purchasing the freight easement, which I have preserved over the past 11-years. It will allow me to continue pursuing a business venture related to my primary experiences and get out of the railroad business, which will mean terminating ECR.

It is in all interested parties' best interest for the Board to affirm ECR's ownership and provide a favorable ruling to facilitate the sale of the freight easement to Mr. Jensen so the line can profitably operate going forward.

Respectfully submitted,



Douglas Engle, President

James D. Jensen
12408 217Th St Se
Snohomish WA 98296
(425) 492-5191
Jensenllc58@gmail.com

Re: FD 36295 & FD 35151

STATEMENT TO THE SURFACE TRANSPORTATION BOARD

I have been working for more than a year with Douglas Engle to acquire the freight easement from Eastside Community Rail, LLC ("ECR"). During that time, I have met with Snohomish County and Woodinville city officials, King County officials, and numerous businesses near and along the freight line as part of my due diligence in the acquisition process.

From just one business, I have identified an opportunity for 3,500 cars per year materials to be shipped across the easement. Given a favorable ruling for ECR by the STB I will consummate the freight easement acquisition with Douglas Engle. I will file the necessary application(s) and paperwork with the STB and FRA to become a licensed railroad and operate the line separately from Ballard Terminal Railroad if that is Ballard's desire. I believe that there are more freight opportunities on the line once I obtain the freight easement. Acquisition paperwork has already been drafted

My attorney, Michael Essig, and I have done exhaustive due diligence of the title and believe there is clear lineage from GNP to ECR. Additionally, there is no person or entity making a claim to the easement except Mr. Engle. After resolution of the matter before the STB, Mr. Essig, Mr. Engle, ECR and myself have plans to perfect any title chain inconsistencies after resolution of the matter before the STB.

This should be welcome news to Ballard, Snohomish County, City of Woodinville, and STB. Most importantly, freight will continue to operate along the corridor at a profitable level for the foreseeable future, and under the stewardship of myself and Mr. Essig, we plan to expand the use of the easement to additional businesses. As stated above, our efforts have already begun.

We look forward to a favorable STB decision to facilitate completing this transaction with ECR and Mr. Engle.

I affirm these are the facts known to me, and my statement accurately represents my intentions.

Respectfully submitted,


James Jensen

CERTIFICATE OF SERVICE

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

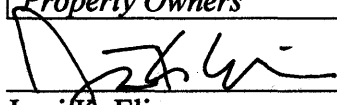
I certify that on July 30, 2020 that I served an e-filed copy of the following documents attached hereto via e-mail upon all parties of record listed below in the proceeding.

Filed and Served Documents:

- 1) STB Submission Post-Remand Comments dated 7/30/2020
- 2) Eastside Community Rail, LLC letter to STB dated 7/29/2020

Parties Served:

Joshua Brower 506 2 nd Ave. Suite 1400 Seattle, WA 98104 Email: josh@browerlawps.com <i>Attorney for Ballard Terminal Railroad</i>	Charles H. Montange 426 NW 162 nd Street Seattle, WA 98177 Email: c.montange@frontier.com <i>Attorney for Snohomish County, WA</i>
Matthew Cohen Stoel Rives 600 University Street, Suite 3600 Seattle, WA 98101 Email: matthew.cohen@stoel.com <i>Attorney for City of Woodinville, WA</i>	Charles A. Spitulnik Kaplan Kirsch Rockwell 1634 Eye (I) Street, N.W. Suite 300 Washington, DC 20036 Email: Cspitulnik@Kaplankirsch.Com <i>Attorney for King County, WA</i>
Thomas W. Wilcox GKG Law 1055 Thomas Jefferson Street Suite #500 Washington, DC, DC 20007 Email: twilcox@gkglaw.com <i>Attorney for CWalla Building Materials Company</i>	James HM Savage 22 Rockingham Ct. Germantown, MD 20874 Email: jsavagelaw@aim.com <i>Attorney for GNP RLY, LLC NW Signal Maintenance, LLC and Kevin Kucera</i>
Richard Welsh 227 Bellevue Way Ne Pmb 719 Bellevue, WA 98004 Email: dick156@earthlink.net <i>National Association Of Reversionary Property Owners</i>	


Jami K. Elison
The Collins Law Group, PLLC for
Eastside Community Rail, LLC

7/30/2020
Date