

BEFORE THE SURFACE TRANSPORTATION BOARD

300951

Eastside Community Rail, LLC –	)	ENTERED
Acquisition and Operation Exemption –	) F.D. 35692	Office of Proceedings
GNP RLY, Inc.	)	August 3, 2020
		Part of
		Public Record
Ballard Terminal Railroad Company, LLC	)	
-- Lease Exemption --	) F.D. 35730	
Eastside Community Rail, LLC	)	

Snohomish County's Reply to
Eastside Community Rail/Engle/Jensen
Comments filed July 30, 2020

Snohomish County ("SnoCo") replies as follows to the "comments" filed by James Jensen, Eastside Community Rail, and Douglas Engle on July 30, 2020.

1. ECR comments. Eastside Community Railroad (ECR) in its July 30 pleading in essence claims that railroads have no duty to be truthful or candid in representations about transfers of rail property pursuant to 49 C.F.R. 1150.34. To the contrary, the relevant regulation requires railroads it to be truthful,¹ and this Board's Notice of Exemption granting ECR's license states that "if [ECR's] Notice contains false or misleading information, the exemption is void ab initio."²

¹ "If the [railroad's] notice contains false or misleading information, it is void ab initio." 49 C.F.R. 1152.34.

² STB Notice of Exemption in F.D. 35692, served Nov. 23, 2012, slip at p. 2.

Although ECR suggests it did not mislead or prevaricate, it clearly did. ECR's verified notice of exemption (executed by Douglas Engle on November 6, 2012)³ represented to this Board that ECR "will be purchasing" all assets of GNP RLY, Inc., in a bankruptcy proceeding. The verified notice said the assets specifically included "a line of railroad formerly owned by ... BNSF...extending from approximately milepost 23.8 in Woodinville to approximately milepost 38.25 in Snohomish..."⁴ To this day, there is no deed from GNP RLY, Inc. to ECR for the line of railroad. In fact, any deed would from GNP to ECR flowing from the bankruptcy proceeding would have been meaningless, and the action of purchasing it impossible at all times relevant herein, since GNP (by its then-officer Douglas Engle) had previously conveyed the "line" to Douglas's father Earl and his then-wife Joanne before GNP went into bankruptcy.⁵ GNP's deed to Earl and Joanne was recorded. The ECR Notice of Exemption was false and at the very least misleading in failing to disclose the prior conveyance out by Mr. Engle. See, e.g., Black Hills Transportation d/b/a Deadwood, B H & W Railroad – Modified Rail Certificate, F.D. 34924, served Jan. 27, 2010 (revoking license ab initio because applicant failed to reveal claims that rail line had already reverted to adjoining

³ Notice of Exemption in F.D. 35692, filed Nov. 7, 2012, p. 8.

⁴ Id. p.3.

⁵ Neither Earl nor Joanne Engle ever sought STB authority to acquire the rail line from GNP.

landowners and this was misleading by omission) & other cases discussed at pp. 6-8 & 13-14 of SnoCo Pet. to Revoke in this proceeding, filed July 12, 2018. ECR contends that it does not matter that GNP deeded the property to other Engles and that ECR never received the rail property, such that the actual owners receiving the property never sought or received an STB license to do so, and such that the entity (ECR) licensed to receive the property did not. ECR (unpaginated p. 3) says this is just an Engle family matter which the Board should disregard. This amounts to claiming the Engles can say one thing to the Board and then do as they please. Federal rail policy calling for “honest and efficient” management of railroads (49 U.S.C. 10101(9)) would be meaningless in such a universe.

In any event, this Board has already in effect noted that the Engles violated a host of regulations in failing to acquire Board prior authorization for the various transfers of the rail easement that occurred and that Douglas Engle admitted below. Decision served Dec. 13, 2018, slip at 8. It follows that ECR’s verified notice must be false and misleading, in that it amounted (according to ECR) as a cover for a number of regulatory violations. Revoking the licenses in F.D. 35692 and F.D. 35730 is the only action that will remedy the other violations of this Board’s regulations by the Engle family, and it will do so by rendering the other violations superfluous, so long as the Engles (and any successors) quitclaim back to GNP the property diverted to them pre-bankruptcy.

2. Engle letter. The ECR pleading does not reference the Engle letter to this Board dated July 29, 2020. Because ECR's attorney filed a certificate of service covering both the ECR pleading and the Engle letter, SnoCo regards the Engle letter as independently filed on behalf of Engle personally.

However, the Engle letter appears to be misfiled in F.D. 35692 and F.D. 35730. The Engle letter on its face instead references dockets F.D. 36295 and 35151. It is not clear to SnoCo why the Office of Proceedings placed the letter in the F.D. 35692 and F.D. 35730 docket rather than the docket the letter references. Rather than rewrite the letter for Mr. Engle to belong to dockets other than those it states, SnoCo will treat it as tendered and appropriately filed in the dockets Mr. Engle indicates, namely F.D. 36295 and F.D. 35151. F.D. 36295 involves SnoCo's petition for a declaratory order relating to 0.2 miles of trackage in the City of Snohomish. This Board resolved that case in Snohomish County – Pet. Declaratory Order, F.D. 36295, served August 16, 2019. F.D. 35151 involves termination of the modified certificate issued to GNP RLY for the same 0.2 miles. The Board granted relief terminating the modified certificate. GNP Rly Inc. – Modified Rail Certificate, F.D. 35151, served August 16, 2019. The period for timely filing of petitions to reconsider those decisions [20 days per 49 C.F.R. 1115.3(e)] has long since passed.

Mr. Engle in his letter seems to be seeking reopening of this Board's Decision served August 15, 2019, in F.D. 36295 and 35151 well out-of-time for the purpose of reinstating the modified PCN, on the ground that he now has a buyer for ECR's interests. But Mr. Engle fails to address, much less make, the showings required to reopen a proceeding out of time. See 49 C.F.R. 1115.4 (Jensen must show material error, new evidence or changed circumstances to obtain reopening).⁶

There are additional problems with Mr. Engle's July 29 letter. Engle is not an attorney or a practitioner. To the extent the letter asserts facts (as it does), it must be verified per 49 C.F.R. 1104.4(b), but it is not. It therefore must be expunged from the record, and certainly no reliance placed upon it, except to the extent it makes admissions against interest.

If not expunged and stricken from the record, SnoCo notes that the Engle letter makes a number of statements against the interest of Engle's company (ECR). It is confusing to address Engle's misstatements, because he speaks of a freight

⁶ In addition, the property involved in F.D. 35151 and F.D. 36295 is the south end of SnoCo's Centennial Trail at the City of Snohomish. (The Centennial Trail is located on a rail line abandoned many years ago.) This property is now totally severed from the interstate rail network by an intervening abandonment of BNSF property in the City of Snohomish; it is no longer connected to the rail line at issue in F.D. 35692 and F.D. 35730. This Board lacks jurisdiction to reopen the termination of the modified certificate in F.D. 36295 and F.D. 35151.

easement, and he may mean one thing in the dockets referenced in this pleading's caption, or he may mean something else in F.D. 35151 and 36295. SnoCo will adopt the convention that his statements relate to F.D. 35692 and 35730 for the remainder of this Reply, because those are the dockets in which his July 30 letter has been placed and we have already shown Engle is entitled to no relief in F.D. 35151 and 36295.

Engle in the July 30 letter says the freight easement was owned by “an entity” in 2009 (that “entity,” of course, was GNP). Engle states that he used the “freight easement” as “collateral to loans within my family.” Collateral, of course, is something pledged to secure a debt. GNP did not “pledge” (i.e., grant a security interest in the freight easement to Engle’s family); instead, GNP per Douglas Engle deeded the property to Earl and Joanne. Soon thereafter Douglas Engle caused GNP to go into bankruptcy. In the Declarations claiming that GNP owed them money filed in the bankruptcy proceeding, Earl and Joanne did not claim a security interest in GNP’s (now former) freight rail easement or otherwise assert it was collateral. Earl and Joanne claimed instead that all debts to them owed by GNP were past due, and did not disclose the deed of the line to them.⁷ Engle in his

⁷ Stowe Declaration, Exhibit 3 (Declarations of Earl and Joanne Engle), attached to SnoCo Petition to Revoke in F.D. 35692, filed July 12, 2018. See also Stowe Declaration Exhibit 4 at p. 4 (assertion of debt to Earl and Joanne Engle but no mention of deed to them).

letter excuses these machinations on the ground that Washington is a community property state. He claims that the freight rail easement was all along under his personal control. Under the ICC Termination Act, transfer of rail property is subject to prior authorization by STB (see Decision served Dec. 13, 2018, slip at 8; 49 U.S.C. 10901(a)(4)). Douglas Engle neither sought nor obtained authority for any member of his family or himself to own rail property personally, so any “control” he claims in himself is beyond what the law comprehends. In any event, his reference to “community property” is a nonstarter. Community property is marital property. Engle on behalf of GNP deeded the majority share (53.9%) in the property to his father.⁸ Engle is not married to his father and cannot assert “control” over him. The claim is also dubious as to the property deeded his then-wife Joanne. Washington State law is not patriarchal, in the sense that a woman’s property on marriage becomes her husband’s property or otherwise under his exclusive control. Community property is 50/50 and a wife shares equal control with the husband. In the end, Engle’s excuses in his letter amount to admissions of misleading this Board and facilitating transfers of rail property without this agency’s required pre-authorization.

Engle in his letter asserts he did not intend to mislead STB. Engle’s intent is irrelevant. Nonetheless, Engle (who was manager of ECR) obviously knew he

⁸ Stowe Dec. Ex. 2, filed with Petition to Revoke in F.D. 35692, July 12, 2018.

had deeded the freight rail easement on behalf of GNP to his father and then-wife when he signed the verification to ECR's notice of exemption. He knew his father and ex-wife continued to own the freight rail easement during the entire time relevant here. It follows that ECR's verified notice of exemption was knowingly false or misleading when made to this Board. See note 3. This would presumably render Douglas Engle liable for perjuring himself in a government filing. 49 C.F.R. 1104.5(c).

Engle claims this is a "last-ditch" effort by Snohomish County Parks & Recreation Department "to force abandonment for a trail." This is both irrelevant and untrue.

SnoCo is a county government, not a parks department. The relief SnoCo seeks in this proceeding is not abandonment, but revocation of the ECR and BTRC licenses. When the ECR license is revoked, the common carrier obligation goes back to GNP. STB (in accordance with its precedent) presumably will order ECR and the Engle family to cause all interests in the freight easement to be reconveyed to GNP so that GNP will hold a freight rail easement necessary to discharge the federal rail freight common carrier obligation on the rail line.⁹

Engle claims he has a buyer (Jim Jensen) for the freight easement. This is irrelevant. Even if he had a buyer, a transfer of the freight rail easement to Jensen

⁹ See SnoCo's Reply to BTRC Letter, F.D. 35692 & 35730, filed June 20, 2020.

or any other Engle nominee would not cure the false and misleading statements in ECR's verified notice of exemption.

3. Jensen letter. According to the STB website, an undated letter by Jim Jensen was filed with the ECR Reply and Douglas Engle letter on July 30. The undated Jensen letter is puzzling. It is not referenced in either the ECR pleading or the Engle letter. It is evidently tendered independently by Jensen on his own behalf. In any event, no one certifies service of the document, so it has been included in the record so far in violation of 49 C.F.R. 1104.12. Since it was not accompanied by a certificate of service, it must be expunged from the record.

In addition, Jensen is not an attorney or STB practitioner, but instead works in the local real estate industry.¹⁰ Under 49 C.F.R. 1104.4(b), he therefore must verify his pleading to the extent it asserts facts, as his letter purports to do. But his letter is unverified. The letter should be expunged from the record under 49 C.F.R. 1104.4(b). At the very least, it cannot be relied upon for any matter it asserts.

Even more confusingly, the Jensen letter (like the Engle letter) on its face indicates it is for filing in FD 36295 and 35151, not FD 35692 (ECR notice of exemption) and F.D. 35730 (BTRC notice of exemption). Because the letter does

¹⁰ See <https://opengovwa.com/corporation/604523914> (references to real estate companies at same address as that of his undated letter).

not reference F.D. 35692 or 35730, SnoCo infers that the Office of Proceedings placed it in the wrong dockets.

Rather than rewrite the letter for Mr. Jensen to belong to other dockets, SnoCo will treat it as tendered and appropriately filed in the dockets Mr. Jensen indicates, namely F.D. 36295 and F.D. 35151. As with Mr. Engle's letter, the Jensen letter so read appears to be a request to reopen F.D. 36295 and 35151 out of time apparently for the purpose of reinstating the modified PCN, on the ground that Jensen is interested in buying out whatever interest ECR/Engle claims. But Mr. Jensen lacks any standing with respect to termination of a modified certificate, and in any event, fails to address, much less make, the showings required to reopen a proceeding out of time. See 49 C.F.R. 1115.4 (Jensen must show material error, new evidence or changed circumstances to obtain reopening). See also note 6.

Because the Board has filed Mr. Jensen's letter under incorrect dockets (F.D. 35692 and 35730), SnoCo is filing its opposition to relief sought by Jensen in the same incorrect dockets. SnoCo reserves the right to file additional arguments should this Board actually entertain Jensen's letter in F.D. 35692 and F.D. 35730, and not simply expunge or otherwise dismiss it for failure to meet the Board's requirements inter alia for a certificate of service (49 C.F.R. 1104.12), lack of verification (49 C.F.R. 1104.4(b)), or reopening (49 C.F.R. 1115.4).

Mr. Jensen claims that he might acquire a freight rail easement from Engle if the Board allows Engle to keep his license (apparently in dockets 36295 and 35151). This is irrelevant to any issue before this Board in F.D. 35692 and F.D. 35730. But if the Board were to rewrite Jensen's letter to apply to F.D. 35692 and F.D. 35730 (the Board ought not to attempt to rewrite pleadings), Jensen's claim is still irrelevant. ECR's license is void ab initio due to ECR's false and misleading verified notice of exemption. Jensen submits no evidence to the contrary, and certainly no relevant evidence.

SnoCo welcomes Jensen's corroboration that there are problems with ECR's title¹¹ (that is an understatement), but Jensen's letter is not verified so his findings must be disregarded. Mr. Jensen's letter speculates about an "opportunity" to secure 3500 carloadings "to be shipped across the easement." Again, what and where this may be is obscure at best, since the letter references dockets other than those in this case. But it is irrelevant¹² and unverified speculation in whatever docket this Board places it, and it must be disregarded.¹³

¹¹ Undated Jensen letter misfiled in F.D. 35692 and F.D. 35730, last sentence of paragraph 3.

¹² It does not explain away ECR's false or misleading representations and attendant licensing violations.

¹³ If the Jensen "opportunity" is on the "easement" in dockets 35151 and 36295 referenced in his letter, that "easement" and any rail traffic on it disappeared decades ago (that line is now the Centennial Trail). If the Jensen "opportunity" is on the "easement" in dockets F.D. 35692 and 35730, it remains equally inconsistent with existing facts and business realities. Traffic on the line in F.D.

4. Conclusion. All remaining assertions by ECR, Engle and Jensen not discussed above are both unverified and irrelevant. Except to the extent expressed herein, none are admitted and they may not be relied upon by this Board. The Engle and Jensen letters should be expunged from the record as misfiled (and the Jensen letter expunged as well for lack of a certificate of service). The ECR and BTRC licenses must be revoked ab initio.

Respectfully submitted,

/s/ Charles Montange

Charles H. Montange
426 NW 162nd St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
c.montange@frontier.com
Attorney for Snohomish County

35692 and 35730 has withered under ECR ownership and, per the data BTRC has provided SnoCo, is now under 100 carloadings per year, despite valiant efforts by BTRC to find business. See Stowe Dec., supra, exhibit 21. The line has suffered from deferred maintenance for years and SnoCo is concerned (among other things) about failure of the owner and its lessee to maintain the track (which belongs to SnoCo and which the owner and its lessee were obligated to maintain). See Stowe Dec. at pp. 11-12. SnoCo has not been contacted by any shipper expressing an interest in 3500 carloadings per year. SnoCo believes that a shipper with that kind of traffic would exhaust opportunities to locate on the nearby BNSF mainline with its own siding before considering shipping across more than 10 miles of trackage that has not been maintained for decades and is being operated under FRA excepted status by a shortline “managed” with the checkered history of the one at bar.

Certificate of Service

By my signature below, I certify service in accordance with 49 C.F.R. 1104.12 upon all parties of record or their attorneys of record at their addresses of record by USPS first class, and electronically by courtesy email attachment, on or by 4 August 2020, including but not necessarily limited to the following: Joshua Bower (BTRC), Matthew Cohen (Woodinville), Thomas Wilcox (CWallA), Richard Welsh (NARPO), Charles Spitulnik (King County), James Savage (GNP/NW Signal/K. Kucera), Jami Elison (ECR); Douglas Engle (for himself); James Jensen (for himself).

/s/

Charles H. Montange