

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 35692

**EASTSIDE COMMUNITY RAIL, LLC-ACQUISITION AND
OPERATION EXEMPTION - GNP RLY, INC
(Woodinville Subdivision, MP 23.8 to MP 38.25)**

Finance Docket No. 35730

**BALLARD TERMINAL RAILROAD COMPANY, LLC - LEASE
EXEMPTION -
EASTSIDE COMMUNITY RAIL, LLC
(Woodinville Subdivision, MP 23.8 to MP 38.25)**

**CITY OF WOODINVILLE, WASHINGTON -
REPLY TO EASTSIDE COMMUNITY RAIL
COMMENTS OPPOSING REVOCATION OF EXEMPTIONS**

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REPLY TO EASTSIDE COMMUNITY RAIL
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On July 10 the Board invited comments on Snohomish County’s petitions to revoke the exemptions of Eastside Community Rail (ECR) and Ballard Terminal Railroad (Ballard) from parties who had not yet submitted a filing in response to the Court of Appeals decision in *Snohomish County v. Surface Transportation Board*, 954 F.3d 290 (D.C. Cir. 2020).¹ On July 30 ECR filed a comment letter, accompanied by two unverified submittals from Douglas Engle and James Jensen.² ECR’s comments do not challenge the key facts presented by Snohomish County in its petitions to revoke: that ECR and Mr. Engle misled the Board when they proclaimed, in a

¹ *Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP Rly Inc.*, FD 35692 and FD 35730, (STB served July 10, 2020).

² Post-Remand Comments of Eastside Community Rail L.L.C., FD 35692 and FD 35730, (filed July 30, 2020) (hereafter “ECR July 30 Comments”).

2012 Notice of Exemption verified by Mr. Engle, that ECR had signed an asset purchase agreement to acquire from GNP Rly's bankruptcy trustee all of GNP's interest in the rail line running between Woodinville and Snohomish.³ The Notice of Exemption was misleading because GNP, through a deed signed by Mr. Engle, had previously conveyed those property interests (the "Freight Easement") to his father and spouse in a recorded deed.⁴ As a result, GNP had nothing to convey, and ECR and Mr. Engle withheld that fact from the Board.

ECR's latest filing does not dispute these key facts. Instead, ECR argues that they are irrelevant. According to ECR the 2012 Notice of Exemption filed by ECR could not have been misleading, because "none of the transactions, even if irregular, are germane to the Board's authority in this matter." ECR July 30 Comments at 2. ECR supports this point by listing the information required in a notice of exemption by 40 CFR 1150.34, and contending that ECR's 2012 Notice of Exemption contained that information. *Id.* ECR's 2012 Notice, however, addressed the requirements of 40 CFR 1150.33, the section governing transactions between Class III carriers. Subsection 1150.33(e) requires the applicant to provide a brief summary of the proposed transaction, including "the name and address of the railroad transferring the subject property." In response ECR's 2012 Notice of Exemption declared that "ECR will purchase all of the GNP RLY assets and operating agreements . . ." 2012 Notice of Exemption at 4. That

³ Verified Notice of Exemption of Eastside Community Rail, LLC, FD 35692 (filed Nov. 7, 2012) at 2, 3, 4.

⁴ Petition To Revoke, FD 35692 (filed July 12, 2018) at 5; Quit Claim Deed From GNP Rly, Inc. to Earl L. Engle and Joanne M. Engle, Exhibit 2 to the Declaration of Thomas P. Stowe In Support of Petition To Revoke, FD 35962 (filed July 12, 2018).

contention was false and misleading by omission, because GNP had no assets to convey, and Mr. Engle knew it when he verified the Notice.⁵

ECR's latest filing seeks to avoid the implications of Mr. Engle's misleading statements by arguing that ECR had no obligation to document its ownership of the property rights needed to provide rail service in a Notice of Exemption. That information is, according to ECR, "plainly not a subject of Board concern . . ." ECR July 30 Comments at 3. The plain language of 40 CFR 1150.33(e)(1) negates that suggestion.⁶ But the Board need not even reach the question of whether Board rules *required* ECR to disclose in its notice of exemption the transferor of the rail line. The undisputed fact is that ECR *did* present that information in its 2012 Notice of Exemption. A notice of exemption is void *ab initio* if it contains false or misleading information. 49 C.F.R. 1150.32(c). ECR's contention that its misrepresentation was immaterial misconstrues Board rules and precedent, and the plain language of § 1150.32(c).

ECR's July 30 Comments attach an unverified July 29 submittal from Mr. Engle, in which he continues to misrepresent his prior transactions involving the rail line. First, Mr. Engle contends that the Freight Easement "was used as collateral to loans within my family."⁷ In fact the Freight Easement was not "used as collateral." Instead, GNP conveyed it by quit claim deed

⁵ When called on this misrepresentation Mr. Engle declared that his relatives conveyed the Freight Easement back to GNP during GNP's bankruptcy proceedings, but he could not produce a recorded deed documenting that conveyance. Comments of Douglas Engle, FD 35962 filed Sept. 21, 2018) at 2-3.

⁶ See also *Snohomish County*: "[f]ailure to disclose potential issues regarding ownership of the issue line in a notice could be found to be materially misleading by omission." 954 F.3d at 303, quoting *Black Hills Transp. Inc. d/b/a Deadwood, Black Hills & Western R.R. – Modified Rail Certificate*, FD 34924, 2010 WL 302027, at *3 (served Jan. 27, 2010).

⁷ Letter of July 29 from Douglas Engle to Surface Transportation Board, attachment to ECR July 30 Comments.

to Earl and Joanne Engle, via a deed signed by Douglas Engle.⁸ Mr. Engle also asserts that “No other party is making a claim of ownership of the freight easement.” *Id.* That statement cannot be reconciled with Mr. Engle’s 2017 purported conveyance of a portion of the Freight Easement to NW Signal Maintenance.⁹

Finally, Mr. Engle announces that he would like to sell the Freight Easement to Jim Jensen.¹⁰ Mr. Jensen affirms, in an unverified submittal, that he would like to buy the Freight Easement.¹¹ These aspirations are irrelevant to the issue posed by Snohomish County’s petitions. Nothing prevents Mr. Jensen from seeking Board authorization to acquire the Freight Easement and the common carrier franchise from its rightful owner. The question currently before the Board is whether that entity is ECR, or its lessee Ballard. Snohomish County has presented undisputed evidence that the notices of exemption filed by ECR and Ballard were false and misleading by omission. ECR’s current contention that misleading statements in ECR’s 2012 Notice of Exemption do not warrant revocation ignore the obligation of an applicant to present true and accurate statements in a verified notice of exemption.

⁸ See footnote 4, *supra*.

⁹ “In October 2017, my father and I sold the freight easement to NW Signal . . .” ECR Reply to Snohomish County, FD 35692 (filed August 14, 2018) at 6. This transaction occurred six years after Mr. Engle contends that his father conveyed his interest in the Freight Easement back to GNP.

¹⁰ Letter of July 29 from Douglas Engle to Surface Transportation Board, attachment to ECR July 30 Comments.

¹¹ Undated Statement from James D. Jensen, attachment to ECR July 30 Comments.

For these reasons, Woodinville joins Snohomish County, Ballard¹² and GNP¹³ in urging the Board to revoke the acquisition and operating exemptions of ECR and Ballard.

August 6, 2020

Respectfully Submitted,

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¹² Ballard's comment letter of June 8 concurs with Snohomish County's contention that Ballard's exemption is void *ab initio* "because one depends on the other." Comment Letter of J. Brower for Ballard, FD 35692 and FD 35730 (filed June 8, 2020).

¹³ Certification of Kevin Kucera, FD 35692 and 35730 (filed July 1, 2020) ¶ 8.

CERTIFICATE OF SERVICE

I certify that on August 6, 2020 I served by email an e-filed copy of the foregoing document upon all parties of record in this proceeding as listed below per the STB service list.

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