

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
September 8, 2020
Part of
Public Record**

DOCKET NO. FD 35692

**EASTSIDE COMMUNITY RAIL, LLC- ACQUISITION AND OPERATION
EXEMPTION – GNP RLY, INC.**

DOCKET NO. FD 35730

**BALLARD TERMINAL RAILROAD COMPANY, LLC – LEASE EXEMPTION –
EASTSIDE COMMUNITY RAIL, LLC**

**REPLY TO MOTION FOR LEAVE TO FILE NOTICE AND NOTICE OF
RECENT DEVELOPMENT (EMBARGO)**

Pursuant to the procedural rules of the Surface Transportation Board (“STB” or “Board”), CWalla Building Materials Company (“CWalla”) hereby files this reply to the Motion for Leave to File Notice and Notice of Recent Development (Embargo) filed by Snohomish County, Washington (“SnoCo”) in these dockets on August 17, 2020. CWalla has no objection to the Board granting the Motion for Leave to File Notice (*SnoCo Motion*), and CWalla offers the following in reply to the *SnoCo Motion* and Notice of Recent Development (Embargo). For the reasons expressed hereinbelow, CWalla requests that the Board’s final decision in these proceedings provide all parties of record with a detailed explanation of the respective rights and responsibilities of (1) the County of Snohomish and City of Woodinville as owners of the track assets and right-of-way of the so-called Woodinville Spur at issue in these proceedings, and (2)

Ballard Terminal Railroad Company, LLC (“Ballard”), or the party who eventually is determined to own the easement to provide common carrier service that was originally an exclusive easement reserved by BNSF Railway Company but assigned to GNP RLY, Inc. with the Board’s approval. In particular, the Board should clarify the obligations of the respective parties to make capital improvements and perform routine maintenance on the line in order to fulfill the statutory obligation under 49 U.S.C. §11101(a) to provide transportation or service upon reasonable request.

I.
Identity and Interest of CWalla

CWalla is building material distributor whose facility is located at the southern end of the rail line at issue in these proceedings. Specifically, CWalla’s facility is located at approximately milepost 23.8, which is on the 2.58 miles of the Woodinville Spur that is located in Woodinville, King County, Washington. CWalla has received carload shipments of gypsum board from Ballard over the Woodinville Spur since September 2018.¹ In the ensuing 24 months preceding the line being embargoed CWalla received 86 carloads of gypsum. There are several other industrial sites located near CWalla’s facility but no other active rail shippers on the King County segment at the present time. On July 2, 2020, CWalla filed a letter in these proceedings notifying the Board that CWalla had received a notice from Ballard that it was the railroad’s intent to embargo the Woodinville Spur, and also informing the Board that CWalla reserved all of its rights to receive common carrier service upon reasonable request pursuant to 49 U.S.C. §11101. After receiving the July 2 notice CWalla received additional deliveries of rail cars, but on July 27, 2020, after CWalla had ordered the delivery of a railcar for arrival August 5, 2020, Ballard issued CWalla

¹ In its August 1, 2018 Petition to Intervene in Docket FD 35692 the City of Woodinville informed the Board that “[t]here are no shippers in Woodinville.” CWalla was in fact established in Woodinville at that time, and it first arranged for rail service with Ballard in July of 2018. However, CWalla did not receive this first shipment until September 2018 and so it reasonable to conclude that the City was not aware of CWalla’s need for rail service in August, 2018.

another notice by email, stating that the line would be embargoed that week “[due] to track conditions. We will not be able to accept this car.”

Upon receiving the second embargo notice, CWallA asked Ballard for a detailed description of the track conditions that caused it to embargo the line, and for Ballard’s plans to make the necessary repairs and lift the embargo and put the line back into service. CWallA also cancelled the scheduled delivery of the loaded railcar in transit to its plant and made alternative arrangements at a considerable cost. Ballard responded to CWallA’s request for information through its counsel on August 13, 2020, stating in part Ballard estimated elimination of the embargo would require approximately \$3-5 million in what it termed “capital repairs” to remedy “unstable track conditions.” Attachment A. Ballard further stated its view that SnoCo and the City of Woodinville would need to upgrade and/or replace track trestles before the line could be put back into service, which it also characterized as “capital repairs.” Ballard also stated that it was not the party required to make the “capital repairs” necessary to restore service over the line and that that responsibility fell on the two track owners.

CWallA received no indication from Ballard that it intends to take any additional steps to make the repairs necessary to lift the embargo and restore rail transportation to CWallA. It is also apparent to CWallA that neither SnoCo nor the City of Woodinville believe they have any legal obligation to make any of the necessary repairs and fulfill those obligations to CWallA under 49 U.S.C. §11101(a). This is explicitly stated by SnoCo in the *SnoCo Motion*, and the City of Woodinville has to date shown only an interest in its segment of the line being abandoned and/or “rail banked,” as opposed to freight operations being conducted over it. *See, e.g.* City of Woodinville Reply to Snohomish County Reply, filed July 1, 2020, and other filings by the City of Woodinville in these dockets.

It is therefore plainly evident to CWalla that none of the parties who presently in combination possess the authority to own and operate the Woodinville Spur and therefore have the obligations under 49 U.S.C. §11101 fulfill the common carrier obligations attached to the line have any intention of voluntarily making the repairs necessary to put the line back into service. Because of this stalemate CWalla has accrued and will continue to accrue business losses and other costs as a result of not receiving rail service.

II. Argument

The rules governing the rights and obligations of parties purchasing active common carrier lines of railroad are well-established. When a party – including a local government or other non-carrier - purchases an active railroad line it acquires the underlying common carrier obligation to provide rail service in response to a reasonable request. 49 U.S.C. §§11101(a) and 10901. This obligation as the track owner and operator includes the responsibility to maintain the tracks and roadbed and to make capital investments to keep the rail line in good repair for safe operations. A party who acquires a common carrier line of railroad cannot unilaterally cease operations over the line or allow railroad track to go into disrepair to avoid its common carrier obligation. *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir.1998). This is true even if the party who purchased the line of railroad believes making capital repairs and performing routine maintenance would be inconvenient or unprofitable. *Id.*, *See also*, Docket No. FD 33989, *Pejepscot Industrial Park, Inc., D/B/A Grimm Industries—Petition for Declaratory Order* (STB served May 15, 2003) at 12-13 (“Respondents cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is ‘worth it’ to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing.”).

While lines of railroad may be embargoed and the common carrier obligation temporarily suspended, the railroad cannot implement an embargo indefinitely and must restore service within a reasonable period. *Louisiana Railcar, Inc. v. Missouri Pacific R.R. Co.*, 5 I.C.C.2d 542, 544 (1989). The failure to make necessary repairs in a timely manner where there is a reasonable request for rail service is a violation of 49 U.S.C. 11101(a). *Id.* at 547.

Of course, the Board and the Interstate Commerce Commission before it have long allowed parties to separate the bundle of obligations to maintain the tracks and right-of-way and to provide actual rail operations, through operating agreements, the grant of trackage rights, and other arrangements. In the case of the Woodinville Spur, a division of the total bundle of common carrier obligations to maintain the track and provide rail service was authorized pursuant to the Board's line of so-called "*State of Maine*" cases, where a state or local entity is permitted to acquire the track assets and right-of-way of an active line of railroad without becoming obligated to provide common carrier service if the selling railroad retains a permanent, exclusive easement to provide that service. As summarized by the Board in the decision involving the Woodinville Spur:

The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, including a state. *See Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 133 (1980), *aff'd sub nom. Simmons v ICC*, 697 F.2d 326 (D.C. Cir. 1982). But when a carrier selling a rail line retains a permanent easement to permit it to continue to provide common carrier freight service or, as here, transfers that easement to a third-party operator, we have typically declined to assert our jurisdiction.

STB Finance Docket No. 35128, *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company* (served October 27, 2008) ("*Port of Seattle*"), citing *Maine, DOT—Acq. Exemption, ME Central R. Co.*, 8 I.C.C.2d 835 (1991) ("*State of Maine*").

In all *State of Maine* transactions, the Board's approval to divide up the common carrier obligations attached to the line, including maintenance and repair obligations, is based on the terms of the retained easement but it is also explicitly based on the terms and conditions of the agreement between the state entity and the operating railroad governing operations and repair and maintenance of the track. If the terms of the operating and maintenance ("O&M") agreement enable the state entity to interfere unduly with the holder of the retained easement's ability to carry out the common carrier obligation to provide rail service, then Board will assert jurisdiction over the transaction transferring the rail assets and the state entity will acquire the common carrier obligation. The O&M agreement also is the approved manner in which the tracks and right-of-way are improved and maintained by the parties to the transaction.

In this *State of Maine* case (i.e., the original conveyance of the Woodinville Spur by BNSF to the Port of Seattle from which subsequent transactions derive) the O&M agreement between the parties was approved by the Board in 2008 pursuant to the foregoing principles. *Port of Seattle* at 2-5. The O&M agreement was for an initial 10-year term with the option for a 10-year extension, but it was allowed to expire on December 18, 2019. *See SnoCo Motion* at 2. There is therefore presently no O&M agreement in place approved by the STB that divides up the bundle of common carrier obligations attached to the Woodinville Spur between the asset owners SnoCo and the City of Woodinville and the current operator, Ballard. In reference to the possibility of the O&M agreement expiring or terminating, the Board stated:

Whether the O&M Agreement terminates prematurely or at the end of its 10- or 20-year term, the third-party operator may not abandon or discontinue operations over the Line, voluntarily or otherwise, without prior Board authorization. And any modification to the O&M Agreement, or any subsequent agreement, that expands the Port's power or control over the Line in a way that would hamper the third-party operator's ability to fulfill the common carrier obligation would trigger the need for the Port to obtain acquisition authority from the Board at that time.

Port of Seattle at 5. The absence of an approved O&M agreement dividing up the responsibilities to make capital improvements and maintain the Woodinville Spur between the owners of the track and the operating railroad raises serious questions over which of those parties are now responsible for meeting the statutory requirements of 49 U.S.C. §11101(a) to provide transportation to CWallA, including the statutory obligations to make necessary capital improvements and conduct routine maintenance to the track to enable such transportation to occur. It should not be acceptable to the Board for each of the relevant parties in this particular circumstance to take the position that they have no such responsibilities and so the track may remain out of service indefinitely. Arguably, under the principles applied in *State of Maine* cases, the expiration of the O&M agreement - which included Board-approved terms that expressly established the owner of the track assets would not unduly interfere with the operator's fulfillment of the common carrier obligation to provide service - has resulted in SnoCo and the Town of Woodinville now having significant control over the track operator since the non-interference provisions are no longer in effect. If such undue control is present for this and other reasons due to other terms no longer being in effect, then the expiration of the O&M agreement arguably triggered the need for SnoCo and the Town of Woodinville to obtain acquisition authority under 49 U.S.C. §10901, and caused those two parties to assume the common carrier obligations associated with their respective portions of track, including all of the statutory responsibilities to make capital improvements and conduct routine maintenance. On the other hand, the fact that the exclusive common carrier rail easement and obligation to provide rail service resides in Ballard currently, and perhaps will reside in another party as the result of this proceeding, also raises questions about the duties of the holder of the freight easement under §11101 in the absence of a

Board-approved O&M agreement that is a prerequisite for the easement being permitted by the Board in the first instance.

III.

Conclusion

In summary, the embargo of the Woodinville Spur appears to have been at least in part the result of a disagreement between the owners of the rail assets and right-of-way and the holder of the permanent, exclusive rail easement (or rights thereunder) over which of the parties is/are to make capital improvements to the track and which is/are to perform routine maintenance, however those terms are defined. The result of this disagreement, coupled with the expiration of the Board-approved O&M agreement that set out those responsibilities, is that CWallA and other shippers who might require rail service are currently foreclosed from receiving any such service for the indefinite future, which is contrary to 49 U.S.C. §11101(a) and the rules that apply to embargoed tracks. Accordingly, CWallA respectfully requests the Board to address the issues discussed in this Reply in the Board's final decision in this proceeding, or in any other manner the Board deems appropriate. Such guidance would provide needed clarity and hopefully facilitate the repair and restoration of rail transportation service over the Woodinville Spur.

Respectfully submitted,



Thomas W. Wilcox
Kristine O. Little
GKG Law, P.C.
1055 Thomas Jefferson St, NW Suite 500
Washington, D.C. 20007
202-365-8409
twilcox@gkgllaw.com
Attorneys for CWallA Building Materials Co.

August 8, 2020

Tom Wilcox

From: Josh Brower <josh@browerlawps.com>
Sent: Thursday, August 13, 2020 7:38 PM
To: Tom Wilcox
Subject: Re: Ballard Terminal Embargo Notice

Hi Tom, I hope you and yours are healthy and well.

Attached is a copy of Embargo Notice ECRY000120, filed 7/29-20 with an effective date of 08-01-2020. As you can see, BTRC embargoed the Line because the "Track and trestles are unsafe due to track owners' failure to perform long-term deferred capital repairs."

As you probably know, the City of Woodinville and Snohomish County own the fee simple title to the underlying Line and all rail-related improvements located thereon. They acquired all of this from the Port of Seattle, which, in approximately 2009, acquired it from BNSF.

At that time, BNSF separated the Common Carrier Freight (CCF) obligations on the Line from the underlying fee and improvements by transferring the CCF obligations via a Freight Easement. The STB approved and authorized the separation pursuant to its State of Maine doctrine.

The Freight Easement was acquired from BNSF by a now long-defunct, possibly resurrected, but assuredly bankrupt company named GNP. Shortly thereafter, GNP entered into an O&M Agreement with the underlying fee owner(s) to provide CCF obligations on the Line and then entered into a Lease with BTRC to provide the actual service. Again, the STB approved all of this and issued Operating Certificates.

After establishing that structure, one of GNP's former officers then conveyed, re-conveyed, partially conveyed, further separated, and thoroughly clouded title to the Freight Easement. Who now owns and/or can operate under the Freight Easement is currently and has been the subject of myriad actions in federal and state courts and before the STB.

I provide all of this background as context for what is happening now on the Line to address your questions and your client's concerns.

BTRC embargoed the Line it because it is unsafe to operate due to long-deferred capital maintenance and repairs.

This is consistent with the recent statement of Snohomish County's lawyer, Charles Montange, in FN 13 to his client's most recent filing to the STB, wherein Mr. Montange confirmed:

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)....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.

(internal references omitted). While Mr. Montange is correct that the "line has suffered from deferred maintenance for years" and "that it "has not been maintained for decades," he is incorrect that either ECYR (the party formerly in contract with the County through an O&M Agreement and incorrectly referred to as the "owner") or ECYR's lessee, my client, BTRC, were obligated to make *capital* repairs to the Line under the now-cancelled O&M Agreement. The O&M

Agreement only required maintenance and normal repair resulting from wear-and-tear, not capital improvements/repairs.

The County has repeatedly acknowledged this distinction. As part of its trail plans, the County repeatedly acknowledged the Line requires \$3MM-5MM in capital repairs to remedy unstable conditions, including, without limitation, the unstable underlying track bed, banks, slopes and cuts/fills and the need for the owner of the right-of-way, the County and the City of Woodinville, to upgrade and/or replace trestles. Again, all of these are capital repairs, not normal maintenance and repairs.

Even assuming, *arguendo*, the County or the City could convince someone that these defects were somehow normal maintenance and repairs covered by the O&M Agreement, the County cancelled it in December 2019. Because of that, neither ECYR, as the party in contractual privity, nor BTRC, as the lessee, have any responsibilities, rights or duties under the now-cancelled O&M Agreement.

Making matters worse, the County and the City of Woodinville consider ECYR and BTRC “trespassers” on the Line.

Without an O&M Agreement and classified as trespassers, and again assuming, *arguendo* they had any duty to make capital repairs, neither ECYR nor BTRC have any right to do so: How could a trespasser be required or permitted to perform repair or work on someone else’s property when the owner claims the trespasser has no legal right to even occupy the subject property?

Moreover, the County, with the City’s support, is asking the STB to void, *ab initio*, ECYR’s and BTRC’s Operating Certificates. If the STB does so, BTRC will have no further rights, responsibilities or duties regarding the Line.

And lastly, the City of Woodinville is suing ECYR and BTRC in King County Superior Court alleging they are trespassers with no claim nor interest in the Freight Easement under which CCF service has been provided. The City is asking the Court to quiet title in the Freight Easement and rule ECYR and BTRC (and a host of other defendants) have no rights nor interests in the Line.

In light of all of the above, BTRC cannot answer any of your other questions regarding when or if the County or City will make the necessary capital repairs and/or permit an operator to resume providing CCF obligations and service on the Line.

I recommend you and your client contact its local government officials and demand answers and reinstituted service over their Line.

Tom, happy to jump on a call if helpful.

Best regards, Josh

Joshua Brower
Brower Law PS
1111 Third Ave, Suite 3000
Seattle, WA 98101
206.498.1804
josh@browerlawps.com



Embargo Details

General Embargo Information

Embargo No: ECYR000120			
Request Date: 07-29-2020	Expiration Date: 07-29-2021	Effective Immediately: No	
Status: Effective	Issuing Road: ECYR - EASTSIDE COMMUNITY RAIL, LLC		
Allow Permits: Yes	Bypass Local Waybills: Yes	Effective Date: 08-01-2020	
Include Empty Revenue Cars: Yes	Include All Empty Cars: No	Min Car Allowed:	Max Car Allowed:
Permit Officer:	Email:	Phone Number:	
Original Requester: james forgette	Email: jr.forgette@bdtlrr.com	Phone Number: 2067991245	
Roads Invited to Participate:			

Commodity

Target All Commodities

Cause

Cause:	Track Conditions
Cause Detail:	Track and trestles are unsafe due to track owners' failure to perform long-term deferred capital repairs.

Geography

Target All Locations

[\[View Stations List\]](#)

Equipment

UMLER Equipment Types:
Target All UMLER Equipment Types

Total Weight on Rail:
No Weight Restrictions

Clearance Code:
No Clearance Code

Waybill Parties

Target All Waybill Parties

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of August, 2020, a copy of the foregoing Reply to Motion for Leave to File Notice and Notice of Recent Development (Embargo) was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox

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