

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
September 11, 2020
Part of
Public Record

Eastside Community Rail, LLC –)
Acquisition and Operation Exemption –) F.D. 35692
GNP RLY, Inc.)

Ballard Terminal Railroad Company, LLC)
-- Lease Exemption --) F.D. 35730
Eastside Community Rail, LLC)

Snohomish County's Opposition to CWalla 8 Sept. Filing

On August 17, Snohomish County ("SnoCo") filed a motion for leave to file a "Notice" that Eastside Community Rail ("ECR") -- apparently acting through its lessee, Ballard Terminal Railroad Company ("BTRC") -- had embargoed the line at issue in this proceeding on August 1, 2020.¹ On September 8, 2020, CWalla Building Material Company ("CWalla") purported to file an out-of-time "reply" to SnoCo's "motion for leave to file."² Since the belated CWalla "reply" otherwise violates 49 CFR 1104.6 (timely filing required), it should have been accompanied by a motion for leave to file. But CWalla neither sought leave to file out-of-time, nor offered justification for filing late. Its purported "reply" should

¹ SnoCo did not learn of a possible embargo until August 13, and could not confirm it until August 17.

² Replies are due in 20 days. 49 C.F.R. 1104.13(a). Twenty days from August 17 is September 6.

therefore be stricken. In addition, SnoCo opposes granting CWalla leave to file for the reasons stated herein.

The CWalla pleading is not a reply but a ruse. The first two sentences of the CWalla “reply” indicate that CWalla has no objection whatsoever to granting the requested leave to SnoCo. Additionally, nothing in the pleading disputes the accuracy of SnoCo’s notice.³ But the remaining eight pages of CWalla’s pleading is totally irrelevant to SnoCo’s motion for leave to file, and this makes the CWalla filing a ruse, not a “reply.”

In addition to being a ruse, the remaining eight pages of CWalla’s pleading are also irrelevant to the issue in F.D. 35692 and F.D. 35730: the issue in these two proceedings is whether ECR made (and whether BTRC parroted) false or misleading statements in the germane “notices of exemption,” such that ECR’s STB license to acquire and to operate (and BTRC’s license to lease from ECR and operate) must be revoked, as the applicable regulations and license language dictates when false or misleading statements are made by licensees of this Board.

Rather than address the issues, CWalla’s pleading seems to seek an advisory opinion on unrelated matters. If CWalla wishes to explore these issues, it should

³ To the contrary, CWalla confirms that Eastside Community Rail, LLC (“ECR”), through its lessee, Ballard Terminal Railroad Company (“BTRC”) has imposed an embargo on the line at issue in this proceeding. The CWalla pleading has an attachment from BTRC counsel (dated August 13) also confirming the embargo.

file a proper petition in other proceedings to which the issues are germane, or a Complaint. But it should not seek, or be allowed, belatedly to hijack this proceeding, especially on the ruse that it is replying (out-of-time) to a motion for leave to file which it does not oppose.

CWallA in its pleading appears to be asking the Board to state who will be responsible for the common carrier obligation on the line at issue in this proceeding. CWallA already knows the answer: ECR and BTRC have the duty to provide common carrier services until and unless their licenses are revoked or they obtain abandonment (ECR) or discontinuance (BTRC) authority. See CWallA “reply” at 5, citing Louisiana Railcar, Inc. v. Missouri P. R.R. Co., 5 ICC2d 542, 544 & 547 (1989) and 49 U.S.C. 11101(a). Since CWallA already knows the answer, it does not need an advisory opinion or declaratory judgment. In any event, this Board has already instructed ECR and BTRC that they must provide common carrier service until abandonment is authorized. See Eastside Community Rail – Acq. and Op. Exemption – GNP Rwy, Inc., F.D. 35692, served Dec. 13, 2018, slip at 9 (specifically warning both BTRC and ECR to honor their obligations until terminated by this Board). CWallA’s request for an additional advisory opinion from the Board is thus literally moot.

The embargo does not change matters. If the embargo is lawful, then ECR and BTRC must either repair the line to the point that the embargo can be lifted, or

ECR and BTRC must seek authority from STB to abandon or to discontinue their common carrier obligations respectively. If ECR and BTRC illegally imposed an embargo, they are liable to CWallA for damages if, as CWallA claims, it has experienced financial inconvenience from the embargo. CWallA needs to file a Complaint and adjudicate the issue if it wishes to force the embargo to be lifted or to seek damages.

Evidently based on an email from BTRC's counsel which suggests that SnoCo should spend \$3-5 million to rehabilitate the line, CWallA seems to question whether SnoCo and Woodinville have the duty to rehabilitate the line. If CWallA wants this Board to adjudicate that SnoCo (or Woodinville) must repair the line, the record already and indisputably shows that neither SnoCo nor Woodinville have contractual responsibility to do.⁴ Moreover, the record indisputably shows that both SnoCo and Woodinville are not common carriers on the line. See

⁴ The O&M assigned all duties to maintain the line (including replacement of track and all other facilities) to ECR. See section 3, O&M, attached as Exhibit 14 to T.S. Stowe Dec., filed with SnoCo's Petition to Revoke F.D. 35692, filed July 12, 2018. Section 2.1(d) of the O&M specifically states that the owner (then the Port, and now SnoCo and Woodinville for their respective portions) is NOT responsible to pay for any replacements. Consistent therewith, BTRC's lease with ECR obligates BTRC to maintain the line, including providing "Heavy Maintenance ... and Capital Improvements." ECR/BTRC lease, p. 4, attached as Exhibit 20 to Stowe Dec., supra. SnoCo (and Woodinville) thus never had any contractual duty to rehabilitate the line. ECR/BTRC have repeatedly advised SnoCo that there is no privity of contract between SnoCo and ECR/BTRC at this time.

Snohomish County, WA – Pet. Dec. Order, F.D. 35830, served March 5, 2015

(County in acquiring physical assets in the line is not acquiring the right or legal obligation to provide freight rail service, and is not in a position to interfere unduly with freight operations); City of Woodinville – Pet. Dec. Order, F.D. 35905, served Oct. 7, 2015. SnoCo thus has no responsibility as a common carrier to repair or rehabilitate the line.

CWallA also seems to question whether this Board properly exempted SnoCo and Woodinville from common carrier requirements, given that ECR/BTRC exercised their option to terminate the “operating and maintenance” (“O&M”) agreement relating to the line.⁵ If CWallA wishes to impose common carrier responsibility on SnoCo and/or Woodinville, it would have to petition to reopen the proceedings in F.D. 35830 and F.D. 35905. In doing so, it must meet the relevant criteria for reopening (e.g., 49 USC 1322(c), 49 CFR 1115.4). It makes

⁵ The BTRC email attached to the CWallA pleading asserts that SnoCo terminated the O&M. This is false. The termination was by Douglas Engle acting on behalf of ECR (and a fortiori its lessee, BTRC). ECR’s Engle long stated he intended to terminate the agreement. See, e.g., Declaration of T.P. Stowe p.9, filed in F.D. 35692, on July 12, 2018. See also Decision in F.D. 35692, supra, served Dec. 13, 2018, slip op. at 8 (Board notes that Engle was waiting for the O&M to expire and requested the Board to terminate it “prior to its expiration”). Since ECR never had legal title to the freight rail easement on the line, ECR/BTRC have long been trespassers at state law on the line (see SnoCo Pet. to Revoke), a condition made worse when ECR/BTRC caused termination of the O&M.

no attempt to do so here, and this is not the proper forum to reopen unrelated and long-final STB proceedings. SnoCo of course would oppose any such reopening.

Finally, SnoCo is under no obligation to volunteer to ECR, BTRC or CWallA to make \$3-\$5 million in rail repairs in the absence of any contractual or common carrier obligation. Indeed, this Board would be unlikely to impose such a requirement upon an objecting common carrier railroad in the circumstances here (low annual carloadings, high rehabilitation costs, existing carrier in state law trespass and apparently claiming losses from operations), provided the carrier sought proper abandonment authority (or its license were revoked).

If this Board revokes the ECR and BTRC licenses, then the common carrier obligation goes back to GNP Railway. For the reasons stated by CWallA and this Board (see p. 3 supra), GNP then either (1) must repair the line (to the extent repairs are necessary), lift the embargo, and resume service; or (2) seek abandonment authority. But as CWallA's "reply" indicates at p. 5, CWallA knows this already.

The CWallA pleading thus seems to serve no purpose other than belatedly to clutter the record and perhaps to delay this Board in reaching a result on the pending petitions to revoke. How delay in removing ECR and BTRC from the corridor serves a shipper desiring service is unclear. In any event, Snohomish County opposes further delay, for it imposes unwarranted costs on the County,

risks further degradation of the line arising from continued lack of maintenance, and leaves the common carrier obligation on parties who not only obtained that obligation on the basis of false or misleading misrepresentations to the Board, but also are unprepared (ECR) or now unwilling (BTRC) to discharge it.

GNP Railway is now owned by the same principal (Kevin Kucera) who owns or controls NW Signal Maintenance (a party in this proceeding). NW Signal Maintenance provides rail signal maintenance. On or about September 8, a gated crossing malfunctioned in Woodinville causing traffic snarls, which are hazardous. Woodinville has informed SnoCo that it hired Mr. Kucera's company to fix the crossing.⁶ SnoCo believes it in the interest of everyone to return the common carrier obligation to GNP, as soon as possible. GNP can then address the line, including the signals, either by lifting the embargo and providing service, or by promptly seeking abandonment authority in full accord with CWalla's statement of the law at p. 5 of its "reply."

⁶ As SnoCo indicated in our August 17 notice, ECR/BTRC pulled all their equipment from the line on or about August 13 and 14. BTRC then notified SnoCo that BTRC would no longer pay for electricity at signalized or gated crossings effective August 31. But see Lease, Ex. 20 at p. 4, to T.P. Stowe Dec., supra (utility obligation is on BTRC). This created a safety hazard at the gated crossings and signalized intersections on the line (including three in Snohomish County and at least one in Woodinville). After consultation with the Washington Utilities and Transportation Commission crossings safety staff, SnoCo (for those in Snohomish County) and Woodinville (for those in King County) took on the electrical accounts to avoid railroad signal malfunctions putting motorists and pedestrians in danger. SnoCo intends to bill ECR and BTRC for these costs.

Conclusion

CWallA's September 8 "reply" must be rejected as a violation of 49 CFR 1105.6. It is also not responsive to SnoCo's motion for leave. It instead, inter alia, is apparently based on false representations in an email from BTRC's counsel, ignores the record, and/or is filed in the wrong proceeding. SnoCo opposes granting leave to file to CWallA for its out-of-time "reply," either on CWallA's motion or on this Board's own implicit motion. The petitions to revoke in F.D. 35692 and F.D. 35730 should be promptly granted without further delay.

Respectfully submitted,

/s/ Charles Montange

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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 11 September 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