

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 15, 2020
Part of
Public Record

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 CWalla COMMENTS ON NOTICE OF RECENT DEVELOPMENT
(EMBARGO NOTICE)**

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September 15, 2020

On September 8, 2020 CWalla Building Materials Company (“CWallA”) filed in these dockets a pleading that it styles as a reply to Snohomish County’s motion for leave to file notice of a recent development (the embargo of rail service by Ballard Terminal Railroad Co. (“Ballard”).¹ The first two sentences of CWalla’s pleading announce that CWalla does not oppose the County’s filing.

The remaining eight pages of CWalla’s pleading present what appears in substance to be a petition for a declaratory order that would “clarify” which entity will repair the line and resume freight service to CWalla. *Id.* at 2. For reasons explained below Woodinville responds that the Board’s resolution of Snohomish County’s pending petitions to revoke the operating and acquisition exemptions of Ballard and Eastside Community Rail will provide the clarity that CWalla seeks, and there is no need for the Board to institute a new proceeding for that purpose.

CWalla begins by pointing out that Ballard currently holds common carrier rights and obligations on the line, and that a carrier may not avoid its service obligations by imposing a permanent embargo. *Id.* at 4-5. Woodinville agrees with these observations.

CWalla then unveils a “railroad by conscription” theory. Woodinville and Snohomish County acquired the land and physical assets of the line from the Port of Seattle, which acquired the assets from BNSF through a “*State of Maine*” transaction.² As required by Board precedent, BNSF retained an exclusive freight easement. *Id.* The Board approved the City’s acquisition of the line in 2015, and confirmed that the transaction “would not cause the City to become a rail

¹ CWalla Reply To Motion For Leave To Tile Notice and Notice of Recent Development (Embargo), FD 35692 and FD 35730 (filed Sept. 8, 2020) (hereafter “CWalla Comments”).

² *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, FD 35158 (STB served Oct. 27, 2008) at 3 (hereafter “*Port of Seattle*”).

carrier under the Interstate Commerce Act.”³ CWalla contends, however, that the expiration of an operation and maintenance (“O&M”) agreement between the Port of Seattle and Ballard’s lessor Eastside Community Rail “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.” CWalla Comments at 7.

CWalla does not suggest that Woodinville has interfered or tried to interfere with Ballard’s provision of rail service. The reality is that Ballard, not Woodinville, walked away from the O&M Agreement, and more recently from its shipper CWalla.

When the Port of Seattle acquired the Woodinville Subdivision from BNSF in 2008 the Port did not want to become a rail carrier. The Port recruited a “third party operator” (TPO) to provide rail service on the corridor, conveyed the freight easement to the TPO and demanded that the TPO (at that time GNP) execute the O&M Agreement to protect the Port from the liability risks associated with operation of a railroad on Port property.⁴ The Agreement required GNP to maintain the rail infrastructure and grade crossings and to provide insurance coverage to the Port for liabilities associated with rail operations.⁵ Woodinville assumed the Port’s interests in the O&M Agreement when Woodinville purchased the assets of the line from the Port, in 2015.⁶

³ *City of Woodinville, Wash. – Petition For Declaratory Order*, FD 35905 (STB served Oct. 7, 2015) at 5.

⁴ *Port of Seattle* at 2.

⁵ O&M Agreement §§ 3 and 8, Ex. B to Verified Statement of Brandon Buchanan In Support of the City of Woodinville’s Reply to CWalla Comments On Notice of Recent Development (Embargo Notice) (“Buchanan Statement”).

⁶ Partial Assignment and Assumption of Operations and Maintenance Agreement, Ex. A to Buchanan Statement.

In practice, GNP quickly became insolvent, ECR purported to purchase the freight easement from GNP's bankruptcy estate,⁷ ECR assumed GNP's obligations under the O&M Agreement, and ECR leased the line to Ballard. The Lease Agreement declares: "Ballard agrees to be bound by and comply with ECRR's obligations under the terms of the O&M Agreement."⁸ When Ballard filed a notice of exemption to operate under the Lease Agreement, the Port of Seattle urged the Board to impose a short stay to give the Port time to make sure the Lease would incorporate all the requirements of the O&M Agreement, especially provisions covering insurance and tort liability.⁹ The Board denied the stay, with this comment: "Ballard represents that it will comply with the O&M Agreement."¹⁰

Ballard soon reneged on that representation. When Woodinville sought to hold Ballard to its commitments under the O&M Agreement¹¹ Ballard advised the City that those obligations ran only to ECR, not to the City of Woodinville. Ballard claimed that the City could not enforce the O&M Agreement due to lack of contractual privity between Ballard and Woodinville.¹² As the December 2019 termination date of the O&M Agreement approached the City urged Ballard not

⁷ ECR's purported acquisition of the freight easement was illusory, for reasons set forth in Snohomish County's Petition To Revoke, FD 35692 (filed July 12, 2018) at 4-5.

⁸ Lease Agreement Between ECR and Ballard, § 2, Ex. C to Buchanan Statement

⁹ *Ballard Terminal Railroad Company, LLC – Lease Exemption – Line of Eastside Community Rail, LLC*, FD 35730, (STB served May 1, 2013) at 2.

¹⁰ *Id.*

¹¹ Letter of June 6, 2018 from Brandon Buchanan to Paul Nerdrum, Ex. D to Buchanan Statement.

¹² Letter of June 19, 2018 from Ballard counsel Joshua Brower to Woodinville City Manager Brandon Buchanan, Ex. E to Buchanan Statement.

to let the Agreement lapse without a successor agreement in place.¹³ Ballard ignored this request, and the O&M Agreement lapsed by its terms on December 17, 2019.¹⁴ Eight months later Ballard embargoed the line, removed its rolling stock, terminated its service contract with the local electric utility, and invited Woodinville and Snohomish to “fix its own problems.”¹⁵

With this background CWalla’s contentions about the key role of the O&M Agreement are frivolous. Woodinville acquired its property interests in the line only after the Board confirmed that the terms of the acquisition would not result in the City assuming common carrier obligations. The City did everything in its power to enforce and extend the O&M Agreement, and the Agreement itself holds the rail operator, not the City, responsible for maintenance of the line.¹⁶ CWalla’s contentions that 49 U.S.C. § 11101 compels Woodinville to “provide transportation to CWalla” or to make capital improvements to enable such transportation, CWalla comments at 7, are flights of fancy. Woodinville did not sign up to become a rail carrier, or to underwrite capital investments to restore service on a badly neglected rail line.

Woodinville can sympathize with CWalla’s desire, as a shipper, to know what entity is willing or can be compelled to provide rail service on the line. Within the scope of the current dockets, the most effective way for the Board to address CWalla’s request is to promptly grant Snohomish County’s petitions to revoke the acquisition and operating exemptions of ECR and Ballard. The County’s position is both correct on the merits, and supported by all of the

¹³ Letter of October 17, 2019 from Woodinville City Attorney Jeffrey Ganson to Ballard counsel Josh Brower at 2, Ex. F to Buchanan Statement.

¹⁴ O&M Agreement § 12.1, Ex. B to Buchanan Statement

¹⁵ Buchanan Statement ¶¶10-11 and Exhibit G.

¹⁶ O&M Agreement § 3, Ex. B to Buchanan Statement

stakeholders in this proceeding, with the exception of ECR.¹⁷ It is transparently clear that Ballard no longer aspires to serve freight customers on the line, and ECR never had the ability to do so. If the Board revokes the exemptions of ECR and Ballard, CWalla will soon find out whether GNP or another qualified operator is able and willing to provide common carrier rail service.

If, on the other hand, the Board denies the County's petitions to revoke, CWalla correctly asserts that Ballard cannot use an embargo to terminate rail service and eliminate its common carrier obligations. In that scenario CWalla can pursue the remedies referenced in its comments to compel Ballard to either repair the line and resume service, or to commence abandonment proceedings.

In conclusion, Woodinville urges the Board to reject CWalla's attempt to conscript the City of Woodinville as an involuntary investor in the line. The City urges the Board to address Snohomish County's pending petitions as a key step toward resolving the future of rail service on the line.

September 15, 2020

Respectfully Submitted,

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¹⁷ Comment Letter of J. Brower for Ballard, FD 35692 and FD 35730 (filed June 8, 2020); Certification of Kevin Kucera, FD 35692 and 35730 (filed July 1, 2020) ¶ 8.

CERTIFICATE OF SERVICE

I certify that on September 16, 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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