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SERVICE DATE – DECEMBER 22, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35692

EASTSIDE COMMUNITY RAIL, LLC—ACQUISITION AND OPERATION
EXEMPTION—GNP RLY INC.

Docket No. FD 35730¹

BALLARD TERMINAL RAILROAD COMPANY, LLC—LEASE EXEMPTION—
EASTSIDE COMMUNITY RAIL, LLC

Digest:² This decision vacates the acquisition exemption of Eastside Community Rail, LLC (ECR), and the lease exemption of Ballard Terminal Railroad Company, L.L.C. (Ballard), for a line of railroad in the State of Washington. The Board finds that ECR's verified notice contained materially misleading information about the easement over the line and that the exemption is therefore void ab initio. Because ECR's exemption will be vacated, Ballard's exemption, which derived from ECR's easement, will also be vacated.

Decided: December 21, 2020

The facts at issue in these proceedings are set out in detail in the Board's decision served on December 13, 2018,³ and will be repeated here only briefly. In 2012, in Docket No. FD 35692, Eastside Community Rail, LLC (ECR), sought and received authority, via the Board's expedited notice-of-exemption process, to acquire in a bankruptcy proceeding the easement of GNP Rly Inc. (GNP) over a rail line in Snohomish County, Wash. (the Line). Shortly thereafter, Ballard Terminal Railroad Co., L.L.C. (Ballard), in Docket No. FD 35730, sought and received authority, also via the Board's notice-of-exemption process, to operate over the Line pursuant to a lease with ECR.

¹ These proceedings are not consolidated but are being addressed in the same decision for administrative convenience.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc. (2018 Decision), FD 35692 et al., slip op. at 7-8 (STB served Dec. 13, 2018).

In 2018, Snohomish County (the County), which had recently acquired ownership of the underlying property, filed petitions to revoke the two exemptions as void ab initio. The County argued that the sworn information provided by Douglas Engle—who had been a principal in both ECR and GNP—concerning the ownership of the easement was “materially false and misleading,” (Cnty. Pets. to Revoke 4-5), or, “[a]t the very least[,] misleading by omission,” (*id.* at 14).⁴ Specifically, the County claimed that GNP did not own the easement at the time ECR filed its verified notice of exemption, as ECR had claimed, and that, therefore, the easement could not have been transferred to ECR. (*Id.*)

In its 2018 Decision, the Board denied the petitions to revoke. Although it found “several of the actions described in this record . . . troubling,” the Board determined that the record before it did not provide enough information for it to fully address the veracity of the representations. 2018 Decision, FD 35692 et al., slip op. at 7-8. Noting that the truth of ECR’s claims regarding ownership under state law would need to be determined by an appropriate court, the Board found that it could not at that time conclude that ECR’s attestation that GNP owned the easement was false. *Id.* The Board reiterated this position in its decision rejecting the County’s petition for reconsideration. See Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc., FD 35692 et al., slip op. at 4-5 (STB served May 17, 2019).

The County appealed, and on March 27, 2020, the U.S. Court of Appeals for the District of Columbia Circuit vacated the 2018 Decision and remanded the case. The court found that, irrespective of whether the ownership claims made to the Board were false, the Board should have considered separately whether the notices were independently misleading under the Board’s regulations and precedent, even if not demonstrably false as a matter of state or federal law. Snohomish Cnty. v. STB, 954 F.3d 290 (D.C. Cir. 2020). Following the D.C. Circuit’s remand, the Board has received filings from the County, Ballard, ECR, GNP (along with NW Signal Maintenance, LLC, and Kevin Kucera), the City of Woodinville, Wash. (Woodinville), and CWalla Buildings Materials Co. (CWalla).⁵

For the reasons discussed below, the exemptions will now be vacated as void ab initio.⁶

⁴ Unless otherwise noted, record citations are to filings submitted in both Docket No. FD 35692 and Docket No. FD 35730.

⁵ The filings discuss a variety of matters, including the need for rail service on the Line, an apparent embargo on the Line initiated by Ballard, and other requests for relief outside the scope of this proceeding. (See, e.g., ECR Comments, Engle & Jensen Letters, July 30, 2020; Snohomish Cnty. Mot. for Leave to File Notice 1, Aug. 17, 2020; CWalla Reply 1-2, Sept. 8, 2020; Snohomish Cnty. Opp’n to CWalla Reply 1-2, Sept. 11, 2020; Woodinville Reply to CWalla Reply 1, 5, Sept. 15, 2020). This decision will address only the issue raised in the court’s remand order: whether ECR’s notice of exemption (and hence Ballard’s as well) was misleading and should therefore be vacated as void ab initio.

⁶ On July 10, 2020, the Board accepted all post-remand filings made up to that point and provided an additional 20 days for post-remand filings by parties that had not already filed. Additional filings were received after that point, including motions for leave to file replies or notices, and requests that the Board strike and/or not consider certain pleadings. In the interest of having a more complete record, the Board will accept all submissions made following the

DISCUSSION AND CONCLUSIONS

The 2018 Decision expressed serious concerns with the verified notice of exemption filed by ECR and, in particular, statements or omissions in Engle’s submission. But the 2018 Decision, because it concluded that the case turned on issues of state law or federal bankruptcy law, declined to revoke or vacate the exemption. In its remand decision, the reviewing court concluded “that the Board’s failure to consider whether the notices of exemption were misleading, even if not demonstrably false as a matter of state or federal law, was arbitrary and capricious.” Snohomish Cnty., 954 F.3d at 301. Because the Board’s regulations direct the agency to consider whether notices of exemption contain false **or** misleading information, as underscored by the D.C. Circuit, see id. at 301-303, the Board now considers separately whether Engle’s testimony—regardless of whether it was false—was misleading, and thus whether ECR’s 2012 verified notice of exemption (and, by extension the subsequent verified notice filed by Ballard) should be vacated.

The notices of exemption at issue in these proceedings were submitted by ECR and Ballard under the class exemption procedures found at 49 C.F.R. part 1150, subparts D and E, respectively. These procedures, which provide an expedited process for obtaining acquisition authority, were adopted pursuant to 49 U.S.C. § 10502. Section 10502 directs the Board to exempt proposed transactions from regulation when certain findings are made indicating that a full regulatory review is not necessary.⁷ The class exemption allowing noncarriers (such as ECR at the time it filed its verified notice) to acquire or operate a rail line was “designed to meet the need for expeditious handling of a large number of requests that are rarely opposed” and “to reduce regulatory delay and costs.” Class Exemption for the Acquis. & Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 811 (1985), aff’d sub nom. Ill. Commerce Comm’n v. ICC, 817 F.2d 145 (D.C. Cir. 1987).⁸

In essence, the requisite statutory findings for a class exemption are made up-front in the rulemaking for qualified transactions, and so, as long as a party shows that its transaction fits within the class, detailed review is unnecessary. Under the class exemption procedures at issue here, a party simply files a verified notice containing the information required by the regulations, and, unless the Board determines that the notice is incomplete or raises issues that require further examination, the exemption becomes effective automatically 30 days after the notice is filed.

Board’s July 10 decision and, accordingly, will deny the requests to strike and/or not consider filings made in these proceedings.

⁷ Specifically, the exemption provision states that, in matters of rail regulation, the Board, to the maximum extent possible, “shall exempt . . . a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part . . . is not necessary to carry out the transportation policy of [§] 10101” and either “the transaction or service is of limited scope” or “the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.” 49 U.S.C. § 10502(a).

⁸ See also Class Exemption for Acquis. or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902, 1 S.T.B. 95, 96-97 (1996) (acquisitions by smaller rail carriers).

See 49 C.F.R. §§ 1150.32(b), 1150.33. For this reason, the agency has often stated that streamlined class exemption procedures are intended for routine and noncontroversial transactions.⁹ Moreover, an integral component of all of the Board's processes is candor and full disclosure, and that is particularly important to the notice-of-exemption process, which is expedited and often proceeds without opposition or input from other parties. To protect the integrity of the streamlined process, the regulations provide that any exemption granted is void ab initio if the submitted notice contains "false or misleading information." 49 C.F.R. §§ 1150.32(c).¹⁰ The Board has stated that notices of exemption may be false or misleading by assertion or omission, and that, to be found void ab initio, the false or misleading information must be material. See Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016).

Because the Board now finds that ECR's verified notice at issue in this case was materially misleading, the exemption will be vacated. In its verified notice of exemption, ECR and its principal Engle¹¹ made a simple and straightforward assertion: that ECR was acquiring, as part of a bankruptcy proceeding, rail assets and a rail easement owned by GNP, which would continue to be operated by Ballard. (Verified Notice 1-2, FD 35692.) But as the court recognized, the facts surrounding the assertion were hardly simple or straightforward. See Snohomish Cnty., 954 F.3d at 297, 302. Approximately one week before GNP went into bankruptcy, Engle, who at the time was a principal of GNP, purportedly deeded the easement at issue here to his wife and father (Joanne Engle and Earl Engle), *id.* at 295-96, thereby raising serious doubts about whether GNP even owned the easement that ECR claimed it was buying. In his August 2018 reply to the County, Engle conceded that he had indeed transferred GNP's easement to his relatives just days before the bankruptcy proceeding was instituted. But he then asserted that the easement had been transferred back to GNP during the bankruptcy proceeding (in which Joanne and Earl Engle identified themselves as creditors of GNP rather than owners of

⁹ See Kan Rail, Inc.—Acquis. & Operation Exemption—in Wapakoneta, Ohio, FD 35794, slip op. at 2 (STB served Aug. 27, 2014) (citing Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—South Dakota, FD 34645, slip op. at 2 (STB served Jan. 14, 2005)); Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559, slip op. at 5 (STB served May 14, 2012).

¹⁰ The Board may also reject a notice of exemption before it takes effect or revoke it after it takes effect to protect the integrity of the Board's processes and as necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. See Jackson Cnty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982, slip op. at 7 (STB served July 31, 2019) (quoting Land Conservancy of Seattle & King Cnty.—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry., 2 S.T.B. 673, 676-77 (1997)). It is not uncommon to receive objections to notices of exemption after they have become effective. In this case, the Board notes that the County did not own the underlying property at the time the verified notice was filed. (See Snohomish Cnty. Pets. to Revoke at 8-9, 12.)

¹¹ The verified notice was submitted by ECR and included a verification by Engle that the facts asserted in the notice were true as stated.

the easement).¹² See 2018 Decision, FD 35692 et al., slip op. at 2. It is not clear whether that re-transfer ever became effective; during the Board’s proceedings, Engle included copies of certain transaction documents, but the deed (from Earl and Joanne Engle to GNP) did not appear to have been signed by all the relevant parties. (See Engle Reply, Ex. 2, Aug. 14, 2018.) What is clear is that the failure by Engle and ECR to inform the Board of these activities—all undertaken without appropriate authority and in the face of a bankruptcy proceeding—flouted the regulatory process in general and, in particular, undermined the notice-of-exemption process in this case.¹³

The Board cannot confirm that all (or any) of these unauthorized transfers, re-transfers, and further transfers of the easement actually took place or were valid. But after reviewing the record and the post-remand submissions in light of the court’s remand, the Board can confirm this much: ECR’s verified assertion in its notice of exemption that this was just an ordinary transfer from one entity to another was materially misleading.¹⁴ Given the purpose of the class exemptions at § 1150.31—to permit routine and uncontroversial transactions to proceed with minimal regulatory supervision—the Board finds that it would not have permitted ECR’s exemption to go forward had it known the full extent of Engle’s dealings with respect to the Line.¹⁵

In its post-remand comments, ECR argues that its actions in filing the notice of exemption were not misleading because the Board’s regulations contain no specific requirement that a verified notice identify property-rights disputes. (ECR Comments 1-2, July 30, 2020.) It

¹² Engle says both of those transfers were made to “protect[] the easement from third-party claims.” (Engle Reply 5, Aug. 14, 2018, FD 35692.)

¹³ Engle may have subsequently flouted the regulatory process once more by purporting to sell, along with Earl Engle, the freight easement ECR may or may not have owned to NW Signal, again without obtaining appropriate authority. (Engle Reply 6, Aug. 14, 2018, FD 35692.) The 2018 Decision, although it did not revoke the exemption, found the actions of ECR and Engle troubling and concluded that there were “several instances described in the record here that, even when viewed in the best possible light, demonstrate a disregard for the Board’s regulatory process.” 2018 Decision, FD 35692 et al., slip op. at 8.

¹⁴ The Board has already found that ECR and GNP, the two parties that filed notices of exemption here, did not dispute the materiality of the question of the easement’s ownership in responding to the revocation request. 2018 Decision, FD 35692 et al., slip op. at 7.

¹⁵ The D.C. Circuit recognized the misleading nature of Engle’s statements, in both his 2012 and 2018 filings. See Snohomish Cnty., 954 F.3d at 302 (“The record before the Board contained ample evidence of potential misleadingness, notably the omissions and inconsistencies in Engle’s account that the County and others flagged. For example, Engle’s verified notice for the Eastside acquisition stated that Eastside had purchased ‘all assets, operating and lease rights of GNP RLY,’ including a ‘line of railroad formerly owned by BNSF,’ all the while omitting the publicly recorded transfer (and the purported but unrecorded re-transfer) of the easement between Engle and his family that Engle now claims occurred. In addition, Engle’s reply to the Eastside petition appears to be internally inconsistent, stating both that Engle and his family relinquished ownership of the easement by October 2011 and that they retained enough of an interest in the easement to sell it to NW Signal in 2017.” (citations omitted)).

also argues that Board precedent requires notification of such disputes only when they involve questions concerning the Board's jurisdiction or authority, citing to cases involving consummated abandonments, condemnation proceedings, or operations on a rail line constructed without authority. (*Id.* at 3.)¹⁶

ECR's arguments are incorrect. First, while the regulations do not specifically require that an applicant disclose disputes relating to the line, see generally § 1150.33, § 1150.43, the regulations do require applicants to provide a brief summary of the proposed transaction, including the entity transferring the property and a description of the property. As part of that summary, ECR provided information about the ownership of the property and, in doing so, had an obligation to present that ownership information in a way that was not misleading. In its notice, ECR described the Line and identified GNP as the transferor, but these statements were misleading given the uncertain nature of GNP's ownership of the easement due to the multiple unauthorized transfers of the easement. And as noted, once the Board finds that a party's information is false or misleading, as here, the notice of exemption is void *ab initio*. 49 C.F.R. § 1150.32(c).

Second, the cases ECR cites do not limit the Board's authority as ECR suggests. Contrary to ECR's assertions, (see ECR Comments 3, July 30, 2020; ECR Obj. to Post-Deadline Filings 2 n.1, Sept. 15, 2020), there is nothing in either the Black Hills or U S Rail Corp. proceedings that supports ECR's claim that these types of omissions are material **only** when they involve the Board's jurisdiction or authority, see Black Hills, FD 34924, slip op. at 3-6; U S Rail Corp.—Lease & Operation Exemption—Shannon G., LLC, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008). Indeed, the principles on which these cases rest support the conclusion reached by the Board here. In Black Hills, the agency revoked an operating license (granted under the modified certificate regulations at 49 C.F.R. §§ 1150.21-23) after affirmatively concluding that the property over which the services would be provided had already been abandoned. Black Hills, FD 34924, slip op. at 4-6. In U S Rail Corp., the Board rejected a notice of exemption for failing to inform the agency of a pending condemnation proceeding regarding a line that was already being constructed. U S Rail Corp., FD 35042, slip op. at 3-4. Each decision was based on the determination that the omission of information regarding ownership disputes was materially misleading in the circumstances presented, and on the fact that the party from which the property was to be obtained may not have owned it in the first place.¹⁷ In fact, the railroad in Black Hills, similar to ECR here, unsuccessfully asserted that, because it allegedly provided the information regarding ownership required by the regulation, it

¹⁶ ECR's July 30, 2020 post-remand comments quote Black Hills Transportation, Inc.—Modified Rail Certificate, FD 34924, slip op. at 4 (STB served Jan. 27, 2010), and U S Rail Corp.—Lease & Operation Exemption—Shannon G., LLC, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008).

¹⁷ See Black Hills, FD 34924, slip op. at 4 (citing U S Rail Corp., FD 35042, slip op. at 3-4 ("Failure to disclose potential issues regarding ownership of the issue line in a notice could be found to be materially misleading by omission. . . . If the State did not have the necessary interest in the ROW, the Railroad would not have been eligible to apply for the modified certificate, and in such circumstances the notice of exemption would have contained false information and would be void *ab initio*.")).

was not materially misleading to omit additional information regarding pending property disputes. Black Hills, FD 34924, slip op. at 4.

Appended to ECR's post-remand comments are letters to the Board from Engle and James Jensen, who describes himself as a potential buyer of the freight easement involved here. In his letter, Engle asserts that, because Washington is a community property state, he always maintained control over the property, even though he may have improperly transferred it to his wife and to his father.¹⁸ And Jensen, in his letter, states that he is working to acquire the Line from ECR and that the title to the easement is clear; but at the same time, he also asserts that, once the matter before the Board is concluded, he, his attorney, Engle, and ECR "have plans to perfect any title chain inconsistencies." (ECR Comments, Jensen Letter at 1, July 30, 2020.)¹⁹ Neither of these letters demonstrate that ECR's verified notice of exemption was not misleading. What they do illustrate is Engle's continued behavior in treating the Line as if it were a personal possession that could be passed around at will without regard to the governing regulatory process.²⁰

Because ECR's notice of exemption contained misleading information, it is vacated as void ab initio. And although the Board finds no improper behavior on Ballard's part, because Ballard's operation authority was based solely on a lease with ECR, its notice of exemption must also be vacated.²¹ Thus, Board authorization to own and operate the Line reverts to GNP, and, therefore, the Line should be returned to GNP (whose new owner says the company is willing to operate the Line²²). GNP and Douglas Engle²³ will be directed to report to the Board on the

¹⁸ The Internal Revenue Service describes community property as spousal property in which each spouse has a 50% interest. See IRM 25.18.1, *Community Property, Basic Principles of Community Property Law*, https://www.irs.gov/irm/part25/irm_25-018-001. The IRS publication does not suggest that the community property laws apply to property owners and their parents (such as Engle and his father).

¹⁹ In addition, the County submitted a document that it states was recorded by Engle in December 2019. (Snohomish Cnty. Reply, Ex. A, June 11, 2020.) The document appears to be signed by Engle in November 2019 and purports to, among other things, "perfect" the transfer of the easement from GNP to ECR. (Id.) While the document is not fully executed, it was signed by Engle and appears to be a concession that the transfer of the easement from GNP to ECR may not have previously occurred in 2012, as Engle and ECR have claimed.

²⁰ See Jefferson Terminal R.R.—Acquis. & Operation Exemption—Crown Enters., Inc., FD 33950, slip op. at 5 (STB served Mar. 19, 2001) (citing ICC v. Am. Trucking Ass'ns, 467 U.S. 354, 364-65 (1984) (agency has inherent authority to protect its statutory processes from abuse)).

²¹ Although Ballard states that it never intentionally submitted false or misleading information to the Board, it supports the County's requested relief of finding ECR's and its exemptions void ab initio. (Ballard Letter 1-2, June 8, 2020.)

²² (GNP Letter, Kucera Certification, July 1, 2020.)

²³ Douglas Engle is admonished that any filings he makes in this or in future proceedings will be scrutinized closely.

status of the Line by February 5, 2021.

It is ordered:

1. All filings submitted following the July 2020 decision are accepted into the record.
2. The County's petitions to revoke are granted, and the exemptions in FD 35692 and FD 35730 are vacated as void ab initio.
3. GNP and Douglas Engle shall file a report on the status of the Line by February 5, 2021.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.