

SERVICE DATE – SEPTEMBER 29, 2021

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 The Board provides clarification concerning a decision served in December 2020 vacating the acquisition exemption of Eastside Community Rail, LLC (ECR), and the lease exemption of Ballard Terminal Railroad Company, L.L.C., for an easement over a rail line in the State of Washington. The Board clarifies that any unauthorized transfers of the easement are void and orders ECR and its principal, Douglas Engle, to take any action necessary to convey the easement back to GNP RLY Inc. (GNP) or to acknowledge that GNP has title to the easement.

Decided: September 27, 2021

BACKGROUND³

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).⁴ Shortly thereafter, in 2013, Ballard Terminal Railroad Co., L.L.C.

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 Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

³ A more detailed history of these proceedings is available in the Board's decisions served December 13, 2018, May 17, 2019, and December 22, 2020, in Docket Nos. FD 35692 and FD 35730.

⁴ The Line extends from milepost 23.8 in Woodinville, Wash., to milepost 38.25 in Snohomish, Wash., in King and Snohomish Counties, Wash. See Eastside Cmty. Rail, LLC—

(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.

In 2018, the County filed petitions to revoke the two exemptions as void ab initio. By decision served December 13, 2018, the Board denied the petitions to revoke, see 2018 Decision, FD 35692 et al., and by decision served May 17, 2019, the Board denied the County's petition for reconsideration, see Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc., FD 35692 et al. (STB served May 17, 2019). The County sought judicial review, 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. See Snohomish Cnty. v. STB, 954 F.3d 290 (D.C. Cir. 2020).

In a decision served December 22, 2020 (2020 Decision), on remand from the reviewing court, the Board found that ECR's verified notice was materially misleading and vacated both ECR's and Ballard's exemptions as void ab initio.⁵ See 2020 Decision, FD 35692 et al. (STB served Dec. 22, 2020). The Board noted that ECR and its principal, Douglas Engle, made a straightforward assertion in the verified notice of exemption: 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. Id. at 4. However, the Board explained, the facts surrounding that assertion were hardly straightforward. Id.

In January 2011, approximately one week before GNP went into bankruptcy, Douglas Engle, who at the time was a principal of GNP, purportedly deeded the easement to Earl Engle (his father) and Joanne Engle (who was then Douglas Engle's wife), thereby raising serious doubts about whether GNP even owned the easement at the time that ECR claimed it was buying it. Id.; see also Snohomish Cnty., 954 F.3d at 295-96. Douglas Engle later claimed that he had transferred GNP's easement to his relatives just days before the bankruptcy proceeding was instituted, but he asserted that the easement had been transferred back to GNP in October 2011, before the close of the bankruptcy proceeding.⁶ 2020 Decision, FD 35692 et al., slip op. at 4; see

Acquis. & Operation Exemption—GNP RLY Inc. (2018 Decision), FD 35692 et al., slip op. at 1 (STB served Dec. 13, 2018). Snohomish County (the County) owns the physical assets of the Line between milepost 26.38 and milepost 38.25, see Snohomish Cnty., Wash.—Pet. for Declaratory Order, FD 35830 (STB served Mar. 5, 2015), and the City of Woodinville (Woodinville) owns the physical assets of the Line between milepost 23.8 and milepost 26.38, see City of Woodinville, Wash.—Pet. for Declaratory Order, FD 35905 (STB served Oct. 7, 2015).

⁵ Although the Board found no improper behavior on Ballard's part, the Board vacated Ballard's exemption because Ballard's operation authority was based solely on a lease with ECR. 2020 Decision, FD 35692 et al., slip op. at 7.

⁶ It is unclear whether the October 2011 transfer ever became effective. The deed (from Earl and Joanne Engle to GNP) did not appear to have been signed by all relevant parties. 2020 Decision, FD 35692 et al., slip op. at 5. It is similarly unclear whether the attempt to transfer the easement from GNP to Earl and Joanne Engle prior to filing for bankruptcy was valid under state law.

also Snohomish Cnty., 954 F.3d at 296. The Board held that the failure by Douglas 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.⁷ 2020 Decision, FD 35692 et al., slip op. at 5.

In vacating the exemptions, the Board further stated that “Board authorization to own and operate the Line reverts to GNP, and, therefore, the Line should be returned to GNP.” Id. at 7. The Board directed GNP and Douglas Engle to report to the Board on the status of the Line by February 5, 2021.⁸ Id. at 7-8.

On February 5, 2021, Douglas Engle, as ECR’s president, filed a status report on the Line. Douglas Engle acknowledges that the Board has vacated the exemptions and states that he and ECR “have initiated steps to make necessary corrections” and that “[c]omplete, complying application materials will soon be filed with the [Board].” (ECR Status Report 1, Feb. 5, 2021.)

Also on February 5, 2021, GNP, along with NW Signal and Kevin Kucera, filed a status report, stating, among other things, that GNP is seeking to assert its rights under a 2009 deed, in which BNSF Railway Company transferred the Line’s easement to GNP. (GNP Status Report 1, Feb. 5, 2021.) GNP asserts that the 2009 deed is the last valid instrument concerning the Line’s easement and that no subsequent deed is valid, regardless of recording status, as any such deed results from the unauthorized and unlawful actions of Douglas Engle. (Id.)

On February 18, 2021, the County replied to the status reports, stating that neither report indicates that ECR and Douglas Engle have taken any action to return the Line to GNP. (County Reply 2, Feb. 18, 2021.) The County requests that the Board void the January 2011 deeds executed by Douglas Engle on behalf of GNP conveying the Line’s easement to his father and his then-wife. (Id. at 5, 7-8.) Alternatively, the County requests that ECR and Douglas Engle be expressly ordered to reconvey the Line’s easement to GNP. (Id. at 8.)

On March 17, 2021, Woodinville replied in support of the relief requested by the County. (Woodinville Reply 2-3, Mar. 17, 2021.)

⁷ The 2020 Decision cited a further instance in which Douglas Engle may have ignored the Board’s regulatory processes when he, along with Earl Engle, purported to sell the freight easement ECR may or may not have owned to NW Signal Maintenance, LLC (NW Signal), again without obtaining appropriate authority. 2020 Decision, FD 35692 et al., slip op. at 5 n.13. In addition, the Board noted that the County submitted a document that it stated was recorded by Douglas Engle many years later, in December 2019, which Douglas Engle appears to have signed in November 2019, and which purports to, among other things, “perfect” the transfer of the easement from GNP to ECR. Id. at 7 n.19.

⁸ The Board admonished Douglas Engle that any filings he makes in this or in future proceedings would be scrutinized closely. 2020 Decision, FD 35692 et al., slip op. at 7 n.23.

DISCUSSION AND CONCLUSIONS

In the 2020 Decision, the Board vacated the exemptions as void because they were based on materially misleading representations to the Board and because Douglas Engle had flouted the Board's regulatory processes. 2020 Decision, FD 35692 et al., slip op. at 4-5. The Board stated that it could not confirm that all (or any) of the unauthorized transfers, re-transfers, and further transfers of the Line's easement actually took place or were valid. Id. at 5. The Board further held that, because the exemptions were void, the Board's acquisition and operation authorization reverts to GNP, and, based on the circumstances in this proceeding, the Line should be returned to GNP. Id. at 7.

In this decision, in light of the status reports and other filings, the Board clarifies that, regardless of whether the unauthorized transfers of the Line's easement by Douglas Engle actually took place or were valid under state law, any such transfers of the Line's easement by Douglas Engle are void. The transfers were all undertaken without the required Board authority; neither Douglas Engle nor ECR has ever sought to obtain after-the-fact authority; and neither Douglas Engle nor ECR has taken any actions to correct the previous errors or remedy the misleading representations to the Board. See 49 U.S.C. § 10901(a); 49 C.F.R. § 1150.31; see also Allied Indus. Dev. Corp.—Pet. for Declaratory Order, FD 35477, slip op. at 6 (STB served Sept. 17, 2015) (explaining that a transaction is void under federal law if the Board determines that licensing authority for the transaction was necessary and no after-the-fact authority was obtained).⁹

The Board further clarifies that its statements in the 2020 Decision that “Board authorization to own and operate the Line reverts to GNP” and that “the Line should be returned to GNP” meant that the Line's easement was to be conveyed to GNP, if any such conveyance was necessary in order to ensure that GNP owns the Line's easement. Because it appears that any necessary actions have not happened, the Board will now order ECR and Douglas Engle to take any action needed to constitute an effective conveyance of the Line's easement to GNP within 30 days of the service date of this decision and to certify to the Board that they have done so. See SF&L Ry.—Acquis. & Operation Exemption—Toledo, Peoria & W. Ry. Between La Harpe & Peoria, Ill., FD 33995 et al., slip op. at 19-20 (STB served Oct. 17, 2002) (revoking an acquisition exemption to acquire an operating easement when Board processes had been abused and ordering the immediate reconveyance of the easement). In the alternative, in light of GNP's argument that it still owns the Line's easement, (see GNP Status Report 1, Feb. 5, 2021), ECR and Douglas Engle may acknowledge to the Board, in writing, within 30 days of the service date of this decision, that, as of the date of such acknowledgment, GNP has title to the Line's easement and that ECR and Douglas Engle make no claim to the contrary.

The Board does not look favorably on ECR and Douglas Engle's apparent disregard for the Board's requirements in these proceedings, including their response to date to the 2020 Decision. ECR and Douglas Engle should be aware that their failure to comply may result in civil monetary penalties. See 49 U.S.C. § 11901.

⁹ Nor has the Board received any filings that Douglas Engle and ECR indicated would soon be filed with the Board in ECR's status report. (See ECR Status Report 1, Feb. 5, 2021.)

It is ordered:

1. The Board's 2020 Decision is clarified, as discussed above.
2. ECR and Douglas Engle are directed to take any action necessary to convey the Line's easement to GNP and certify to the Board that they have done so, or to acknowledge to the Board, in writing, that, as of the date of such acknowledgment, GNP has title to the Line's easement and that ECR and Douglas Engle make no claim to the contrary, by October 29, 2021.
3. This decision is effective on its service date.

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