

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936
FAX: (206) 546-3739

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By e-filing

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Finance Docket 35692 (Eastside Community Rail, LLC –
Acquisition and Operation Exemption – GNP RLY, Inc.) and
Finance Docket 35730 (Ballard Terminal Railroad Company, LLC –
Lease Exemption -- Eastside Community Rail, LLC)

Expeditious Treatment Requested

Dear Ms. Brown:

On behalf of Snohomish County (WA), enclosed please find a Reply to the out-of-time “petition for reconsideration” filed on November 1, 2021 in the form of a letter (misdated September 29, 2021) signed by Douglas Engle, principal of Eastside Community Rail (ECR), in the above-captioned proceedings. Since the Engle/ECR “petition” is untimely, it must be treated as a petition to reopen. It is subject to a host of deficiencies and must be denied. The Reply also encompasses a Request for imposition of civil penalties on Mr. Engle and Eastside Community Rail for their knowing failure to comply with this Board’s September 29, 2021 clarification in this proceeding. This Board previously warned Engle/ECR of liability for civil penalties in the event they continued to engage in non-compliance, which they have now done.

Engle/ECR should have reconveyed or disclaimed title to GNP RLY in response to this Board’s December 22, 2020 decision in these proceedings. Their failure to comply with this Board’s jurisdiction and orders instead has placed this line in a state of “limbo” by their own admission. Snohomish County, which owns

the underlying property interests as well as the track and ties, requests this Board expeditiously to address the limbo by imposing civil penalties, retroactive to October 29, 2021, upon Engle and ECR if they do not reconvey or disclaim title in the line to GNP RLY within five business days of the Board's order imposing civil penalties.

Thank you for your assistance in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Charles H. Montange', written in a cursive style.

Charles H. Montange

Attorney for Snohomish County (WA)

Att. Snohomish County's Reply and Request

cc. All parties (per certificate of service) w/Reply and Request

BEFORE THE SURFACE TRANSPORTATION BOARD

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

REPLY and REQUEST FOR IMPOSITION OF CIVIL PENALTIES

(expedited treatment requested)

This Reply and Request of Imposition of Civil Penalties, by Snohomish County (“County”), is directed at the unverified “Letter” dated September 29, 2021, signed by Douglas Engle [the principal of Eastside Community Rail (“ECR”)], and filed on November 1, 2021 on behalf of ECR and Douglas Engle. In the Letter, Engle and ECR refuse to comply with this Board’s orders served December 22, 2020, and September 29, 2021, in the above dockets which call for reconveyance of ownership of the so-called “Eastside Freight Rail Easement” to GNP RLY, Inc. (“GNP”).¹ Rather than comply, the Letter purports to seek untimely

¹ The easement (referred to herein as the “Line”) extends from City of Snohomish in Snohomish County (WA) to the City of Woodinville in King County (WA). Snohomish County and City of Woodinville own the property underlying the easement but do not themselves have any common carrier obligations under this Board’s State of Maine line of cases.

reconsideration, and thus amounts to a petition to reopen a final order. The “petition” fails to make any of the required showings to justify reopening. At best, the letter alleges that the Board’s prior decisions embodied “material error,” but the letter fails to articulate any error, much less one that would be material. For the reasons stated below, this Board should impose civil penalties and deny the petition to reopen.

Background

In response to a remand by the Court of Appeals in Snohomish County v. STB, 940 F.3d 290 (D.C. Cir. 2020), the Board specifically found that representations made and verified by Douglas Engle in ECR’s Notice of Exemption to obtain authority to acquire and to operate the Line from GNP were “materially misleading.” December 22, 2020 Decision, supra, slip op. at 7. The Board ruled that ECR’s authority to acquire and to operate the Line was thus void ab initio. Id. The Board explained that the effect of the revocation was to return authority both to own and to operate the Line to GNP RLY, Inc., and affirmatively stated that the Line should be returned to GNP. Id. The Board required Douglas Engle and GNP to submit status reports to this end on February 5, 2021. Id. at 7-8.²

² Engle in his letter filed November 1, 2021 at unnumbered p. 2, suggests that reconveying was not an issue at the time of the December 22 decision. To the contrary, Snohomish County moved for a reconveyance order (and an order voiding deeds) in a motion filed in this proceeding on June 11, 2020. In their submittal filed July 30, 2020, Engle/ECR ignored the County’s motion and argued

No party sought timely reconsideration of the Board's December 22 order, nor did any party seek judicial review in the 60-day period provided in the Hobbs Act.³

In response to this Board's December 22 order requiring a status report on reconveyance issues, Engle on February 5, 2021 filed a three-sentence letter indicating he was taking no action to reconvey the property to GNP; instead, he reported that he and "ECR have initiated steps to make necessary corrections. Complete, new complying application materials will soon be filed with the STB." Letter, Engle to C.T. Brown (STB), dated and filed Feb. 5, 2021 in F.D. 35692.⁴

ECR/Engle did not file any "new complying application materials" at any time germane to this proceeding, let alone "soon." Instead, Engle's February 5 letter amounted to a kind of passive-aggressive refusal to comply with the Board's December 22 order.

only that Engle's original Notice of Exemption was not false or misleading. On August 3, 2020, Snohomish County filed a brief reply to Engle/ECR's July 30 submittal. Snohomish County reiterated at p.3 that Engle/ECR must transfer title. Snohomish County re-filed its motion on February 18, 2021. Again, Engle/ECR did not reply. Engle/ECR have simply never timely raised any opposition to reconveyancing even though put on notice by Snohomish County multiple times; ECR/Engle have only argued that Engle's representations in his Notice of Exemption were not false or misleading.

³ 28 U.S.C. 2344 (60-day period to seek judicial review). The Board's December 22 decision is therefore now final, and no longer subject to judicial review.

⁴ GNP's status report filed on February 5 in essence corroborated ECR/Engle's failure to implement the Board's December 22 decision.

In response to ECR/Engle's February 5, 2021 failure to comply with the December 22, 2020 order, Snohomish County on February 18, 2021 reiterated its earlier motion for an order specifically declaring underlying deeds purportedly issued by or on behalf of Engle without Board authority to be voided and for Engle again to be ordered to reconvey the property. City of Woodinville supported this motion. ECR and Engle did not reply.

On September 29, 2021, this Board issued a "clarification" specifically voiding the many deeds issued without its prior authority, and again ordering Engle and ECR to reconvey the Line to GNP. The Board's September 29 clarification specifically required Engle to report compliance in 30 days (i.e., by October 29, 2021). 49 C.F.R. 1119.1 provides that a party "directed to do ... a particular thing must notify the Board on or before the compliance date specified in the decision of the manner of compliance." Section 1119.1 also requires that notification must be in the form of a "verified statement showing simultaneous service upon all parties to the proceeding."

Rather than comply with the Board's order and with 49 C.F.R. 1119.1, Engle on behalf of himself and ECR on November 1 filed a non-verified statement (in the form of a letter dated September 29, 2021⁵) that shows that he and ECR are

⁵ The letter was almost certainly misdated, and its inscription should read October 29, 2021.

refusing compliance. Engle again represents, as he represented on February 5, that he intends to file a new notice of exemption (or perhaps other papers) to acquire the property. This action is irrelevant to the duty of Engle/ECR to reconvey the property. They have no authority to own or to operate it. Under 49 U.S.C. 10901(a) and relevant regulations, they must receive STB authority to own and to operate a line before they may own or operate the line. They are simply reverting to their February 5 ruse of intimating forthcoming new filings.

The Engle/ECR refusal to comply means that the Line remains in a litigious limbo. Engle/ECR apparently still claim ownership, and indicate an intent to obtain Board authority to operate. The Line in question is embargoed and requires some substantial expenditures to rehabilitate it for any continued rail use. It is unlikely that any investor will seriously consider financing the rehabilitation necessary to return the Line to operation while Engle/ECR continue to claim ownership and putative operating authority, even assuming arguendo that sufficient bona fide demand still exists for rail service to justify the required expenditures. ECR and Engle must be made to stop holding the line hostage to their dilatory refusals to comply with this Board's orders.

Request for Immediate Imposition of Civil Penalty on ECR and Engle

This Board has the power to impose civil penalties against railroads and their agents who knowingly violate an order to the Board. 49 U.S.C. 11901(a).⁶ The current maximum penalty for violation of 49 U.S.C. 11901(a) is \$8224 for each day of violation.⁷ Engle and ECR were warned by this Board on September 29 that it “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 [December 22, 2020 decision].” Decision in F.D. 35692, served Sept. 29, 2021, slip at 4. The Board specifically warned Engle and ECR that further failure to comply “may result in civil monetary penalties.” Id.

Civil monetary penalties should be immediately imposed on both Engle and ECR in the amount of \$8224 for each day of violation retroactive to October 29, 2021, unless Engle within five (5) business days of this Board’s order imposing civil penalties furnishes GNP (and e-files copies with the Board) two fully executed disclaimer/quitclaim deeds in formats suitable for recordation in Snohomish County and King County respectively, conveying all interests of Engle and ECR in the Line to GNP.

⁶ See also id. 11901(c) [any “person” facilitating violation of 49 U.S.C. 10901(a) (requirement for prior authorization for acquisition/operation of a line)].

⁷ The maximum penalty for violation of 49 U.S.C. 10901(c) is the same as that for violation of section 10901(a).

Nothing in this Board's policy statement relating to assessment of civil monetary penalties (Factors Considered in Assessing Civil Monetary Penalties on Small Entities, Ex Parte 764, served July 2, 2020) justifies a reduction in the penalty. ECR and Engle have not self-reported this failure, but instead seek to excuse it. The compliance history of ECR and Engle is dismal. They have failed to comply with the Board's December 22 and September 29 decision, and instead promised additional filings that have never materialized. They have failed to demonstrate any internal safeguards to encourage compliance with STB's regulations. To the contrary, Engle says he lacks resources even to prepare papers⁸ and his key papers in this proceeding since remand have not been signed by a lawyer⁹, much less verified such that they can be given any credence.

Engle/ECR have not cooperated in providing quitclaims, and they have not acted in good faith. Instead, they ignore the fact that this Line is regulated by STB and their ownership and operational claims are dependent on this Board's prior authorization, not on being paid off by someone (the United States government, GNP, local government, or shippers) to comply with the Board's orders. The line was embargoed over a year ago by Ballard Terminal Railroad and requires

⁸ Letter filed November 1, 2021, unnumbered page 3 (third full paragraph, first sentence).

⁹ E.g., letter dated September 29, 2021, filed November 1, 2021, and letter dated February 5, 2021.

substantial rehabilitation for operations to resume. So long as Engle and ECR continue to cloud title, much less assert they intend to file for a new STB license, the line will continue in its embargoed “limbo.”¹⁰ This serves to encourage previous shippers into reliance on alternative modes of transportation for the indefinite future, making rehabilitation uneconomic. There is no legitimate benefit to ECR or Engle from their conduct other than to seek some kind of pay-off from local governments, GNP, or shippers so that ECR/Engle will stop thwarting use of the line. ECR/Engle give no sign that reduction in civil penalty amounts will result in compliance. Finally, inasmuch as ECR and Engle have no STB license to provide rail service, and are nowhere providing rail service, levying a civil penalty on them for violation of STB’s orders will not jeopardize rail service anywhere. In short, there are simply no extenuating circumstances justifying reduction of civil penalties on ECR/Engle for purposes of Ex Parte 764.

Snohomish County is hopeful that framing the civil penalties that are retroactive to October 29, 2021, but provide that they will only apply if Engle and ECR continue to refuse promptly to comply and to timely show such compliance will provide sufficient incentive finally to achieve their cooperation.

¹⁰ “Limbo” is the term ECR/Engle used for the status into which their non-compliance has placed the Line. See Engle Letter filed November 1, 2021 at unnumbered p. 2, first full paragraph, second line.

A rail line that is indefinitely out of service tends both to degrade (costing more and more to restore) and to lose potential shippers. The longer the Line here is in ECR/Engle's "limbo,"¹¹ the more problematic its restoration to any kind of rail service. Snohomish County therefore requests expeditious issuance of the requested imposition of civil penalties.

The ECR/Engle Petition for Reconsideration Must Be Denied

Engle/ECR in their letter filed November 1 at unnumbered page 2 in this proceeding purport to seek reconsideration of this Board's September 29 decision ordering reconveyance. This Board's regulations provide that petition for reconsideration must be filed within 20 days of the order against which they are directed. 49 C.F.R. 1115.3(e). The filing of such a petition does not stay the effect of the order. Instead, a separate stay request is due within ten days of the relevant order. 49 C.F.R. 1115.3(f). Engle/ECR have not sought a stay. The petition for reconsideration language does not in anyway shift their legal obligation to comply with STB's September 29 order.

In point of fact, reconveyance was required by the Board's December 22, 2020 order (see slip op. at 7-8) because Engle/ECR lost legal authority to own or to operate a rail line per that decision. The Board expected compliance in the form of

¹¹ See note 10 supra.

reconveyancing (or disavowal of interests) and so clarified the matter in its decision served September 29.

Petitions for reconsideration must be filed within twenty (20) days of an order to be timely. 49 C.F.R. 1115.3(e). The Engle/ECR petition for reconsideration filed November 1 is clearly out-of-time if directed at the December 22, 2020 order (which in reality is its true target), but it is also out-of-time if directed at the September 29 order. An out-of-time petition for reconsideration must be treated as a petition to reopen under 49 C.F.R. 1115.4. As such, it may be granted only on a showing that the prior action is no longer appropriate due to “new evidence” or “changed circumstances,” or because the prior action involved “material error.”

Engle/ECR do not purport to assert any new evidence or changed circumstances. There is none germane here. Engle/ECR’s sole claim is “material error.” A party alleging material error “must do more than simply make a general allegation; it must substantiate its claim of material error.” 212 Marin Boulevard, LLC – Pet. Declaratory Order, F.D. 35825, served April 24, 2015, slip op. at 4. Moreover, an error is “material” only if it “would mandate a different result.” Id. (citations omitted). In the absence of material error, reopening must be denied. See id.

ECR/Engle to not specify any material error on which reopening can be predicated. At best, ECR/Engle make general allegations that they are still (as they

asserted last February) contemplating some form of reapplication for authority to own and to operate the Eastside Freight Corridor and imply that this will moot the revocation of their ownership/operating authority. They also assert that they should be compensated (paid off) for their property claims before complying with STB's orders. Neither argument has any merit.

Engle/ECR argued on February 5 that they intended to file new papers soon that would rectify the deficiencies that resulted in license revocation. There have been no new papers, let alone soon. In any event, the unperformed Engle/ECR promise to file a new proceeding of some sort would not cure the defects in the prior proceeding. The Board correctly dismissed this Engle/ECR argument. The Engle/ECR "new papers" argument is less persuasive today than on February 5 due to nine more months of non-performance by those parties.

The alternative Engle/ECR claim that their property interest must be bought out before they must comply with STB's orders fails for two reasons. First, Engle/ECR never raised this argument in response to Snohomish County's requests for reconveyance despite multiple opportunities. Instead, Engle/ECR argued only that their misrepresentations should be overlooked.¹² It is too late for ECR/Engle to assert an issue that they could have raised over a year ago. Engle/ECR forfeited this issue by not raising it in a timely fashion. Accord, Pyco Industries – Feeder

¹² See references in note 2 supra.

Line Application – Lines of South Plains Switching, Ltd. Co., F.D. 34890, served June 11, 2020, slip op. at 8.

Second, Engle/ECR concerns about “compensation” in effect amount to a claim that the STB orders amount to some sort of “taking” of their property. But there is no “taking.” Engle/ECR needed prior STB authorization to acquire the Line here, and they sought it per a regulation that provided the acquisition would be void ab initio if based on misrepresentations. 49 C.F.R. 1150.34. The Board has found misrepresentations and voided the license authority ab initio. The onus is on ECR/Engle to “unwind” any compensation matters. Their private contracts in this regard cannot defeat STB regulation. See Borough of Columbia v. STB, 342 F.3d 222, 235 (3d Cir. 2003) (no taking of contract purchaser’s interest by reason of conveyance to OFA applicant).¹³ In any event, the record in this proceeding shows only two recorded deeds from GNP bearing on the Line. Those two deeds did not convey anything to ECR; instead, the deeds were issued by Engle (then an officer of GNP) on behalf of GNP conveying all of the Line to his father (Earl) and

¹³ “The Supreme Court has instructed that ‘contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them.’ *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) (quoted in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986)).”

his then-wife (Joanne) without the required STB licensing authority. On September 29, 2021, at slip op. p. 4, the Board specifically voided those deeds as issued on those grounds. Any subsequent deeds are accordingly spurious. ECR and Engle accordingly have absolutely no property interest in the Line. It follows that there can be no “taking.” Instead, ECR/Engle should disclaim/quitclaim their purported interests to GNP and halt their efforts to cloud title.

For all the above reasons, Engle/ECR fail to show any error, much less material error. Nothing that Engle/ECR argue justifies any result other than what the Board has already reached.

Conclusion

The Letter encompassing the Engle/ECR petition to reopen alleges no new evidence or changed circumstances, and thus rests, if on anything, on generalized claims of material error, or a presumption that the Board lacks power to enforce its orders until or unless ECR/Engle are bought out. To the extent the Letter relies on claims of material error, it fails to show any and must be denied. The Board should impose civil penalties on Engle and ECR retroactive to October 29 if they fail to disclaim/quitclaim their purported interests to GNP in recordable form for filing in Snohomish County and King County within five days of the order imposing civil penalties.

Snohomish County requests expeditious treatment of this request so this line is no longer hostage to Mr. Engle or ECR.

Respectfully submitted,

/s/

Charles H. Montange

426 NW 162nd St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739

c.montange@frontier.com

Attorney for Snohomish County

Certificate of Service

By my signature below, I certify service by email attachment on or about 9 November 2021 upon all parties (or their counsel) of record in this proceeding as set forth in the current version of the service list in this proceeding, 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/Engle), Douglas Engle.

/s/

Charles H. Montange