

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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 DOUGLAS ENGLE/EASTSIDE COMMUNITY RAIL PETITION FOR
RECONSIDERATION**

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On November 1, 2021 Douglas Engle filed an untimely, unverified petition for reconsideration of the Board’s September 29, 2021 order directing Eastside Community Rail (“ECR”) and Mr. Engle to convey the Snohomish to Woodinville freight easement to GNP RLY, Inc. or to certify to the Board that ECR and Engle do not challenge GNP’s title to the easement.¹ The City of Woodinville urges the Board to deny the petition as untimely. If the Board deems it necessary to consider the merits of Mr. Engle’s petition it should be denied for failure to address the plain language of 49 CFR 1150.32(c) (exemption notice containing false or misleading information is void *ab initio*).

The City supports the positions taken by GNP RLY, LLC and Snohomish County that the Board should assess civil penalties against Engle and ECR for Mr. Engle’s willful refusal to comply with the September 2021 Order.

A. The petition is untimely.

Petitions for reconsideration are due within 20 days of service of a Board order.² Mr. Engle filed 13 days late, and 2 days after the deadline set by the September 2021 Order for Mr. Engle and ECR to comply with its mandate.³

The Board often treats untimely petitions for reconsideration as petitions to reopen final decisions under 49 CFR 1115.4.⁴ Mr. Engle’s pleading, however, would not meet the criteria to

¹ *Eastside Community Rail, LLC—Acquisition and Operation Exemption – GNP RLY INC.*, FD 35692 (STB served Sept. 29, 2021) slip op. at 5 (“the September 2021 Order”).

² 49 CFR 1115.3(e).

³ *Eastside Community Rail, LLC, Response and/or Petition For Reconsideration* at 2, FD 35692 and 35730 (filed Nov. 1, 2021) (“Petition For Reconsideration”).

⁴ *City of Ozark, Ark—Petition For Declaratory Order*, FD 36104 (STB served Dec. 8, 2017), slip op. at 3; *Consol. Rail Corp.—Abandonment Exemption—in Hudson City, N.J.*, AB 167 (Sub-No. 1189X) slip op. at 3 (STB served Aug. 21, 2017).

reopen the proceeding, as he offers no new evidence or “substantially changed circumstances” to warrant reopening. Mr. Engle declares that the Board’s September 2021 Order directing ECR/Engle to convey the freight easement to GNP “came as a surprise to ECR/Engle.”⁵ In fact, Snohomish County first moved for an order directing ECR to reconvey the freight easement to GNP on June 11, 2020.⁶ In December 2020 the Board directed that “the Line should be returned to GNP . . .”⁷ Only after ECR/Engle ignored that mandate did the Board issue its September 29 Order.

B. Mr. Engle has no authority to speak for ECR.

The Board’s procedural rules require that any document containing allegations of fact filed on behalf of a corporation must be verified under oath by an authorized officer of the corporation. 49 CFR § 1104.4(b)(3). This requirement has particular relevance to these dockets, in which the Board vacated a notice of exemption filed by Mr. Engle on behalf of ECR because his verified notice of exemption was “materially misleading . . .” December 2020 Order at 4.

Board rules waive the verification requirement for documents signed by an attorney, but Mr. Engle is not an attorney.⁸ Mr. Engle retained an attorney to serve the reconsideration request, but the petition is signed only by Mr. Engle, and it is not verified.

⁵ Petition For Reconsideration at 2.

⁶ Snohomish County, Motion Concerning Reconveyancing, FD 35692 and 35730 (filed June 11, 2020).

⁷ *Eastside Community Rail, LLC—Acquisition and Operation Exemption – GNP RLY INC.*, FD 35692 and 35730, slip op. at 7 (STB served Dec. 22, 2020) at 5 (“the December 2020 Order”).

⁸ ECR, Reply To Snohomish County at 2, FD 35692 (filed Aug. 14, 2018).

For these reasons Mr. Engle cannot speak for ECR, and the Board should not waive the verification requirement to entertain Mr. Engle's grievances on behalf of ECR.

C. The reconsideration petition challenges the Board's authority to enforce its orders.

The gravamen of Mr. Engle's reconsideration petition is that the Board exceeds its authority by directing ECR and Engle to surrender their title claims to the rail freight easement. Mr. Engle does not challenge the December 2020 Order in which the Board vacated ECR's acquisition exemption.⁹ Mr. Engle takes issue, however, with the concept that the Board would impose any remedy following vacation of an acquisition exemption. In Mr. Engle's view the September 2021 Order is just a wake-up call for a new round of submittals in which Mr. Engle will file "a thorough, transparent notice of exemption that will fully address all concerns of the Board."¹⁰ While the Board and parties wait for Mr. Engle to perfect his arguments ("The original transactions in 2011 can be justified and proven as valid")¹¹ Mr. Engle contends that the Board should shield him from the practical consequences of vacating an acquisition exemption. The other parties, including GNP, Woodinville, and Snohomish County, should suspend their plans for use and development of the corridor while Mr. Engle marshals his talking points. According to Mr. Engle, "there is no urgency," because rail operations are suspended.¹²

Mr. Engle's position reflects a fundamental misunderstanding of the Board's statutory role under 49 U.S.C. 10901 to review and approve the acquisition of railroad lines by non-

⁹ Petition For Reconsideration at 2 ("ECR/Engle fully acknowledge the 2020 Decision and have complied with the fact that exemptions have been revoked").

¹⁰ Petition For Reconsideration at 3.

¹¹ Petition For Reconsideration at 3

¹² Petition For Reconsideration at 3.

carriers. Investors are not free to acquire, alienate or convey rail lines as if they were used car lots.¹³ When the Board first learned in 2018 about Mr. Engle’s surreptitious transactions affecting this rail line it commented, “Parties and practitioners alike are reminded that any acquisition, change in operator, discontinuance or abandonment of a rail line in the national network requires *prior Board authorization* through the appropriate application or exemption process.”¹⁴ The exemption that the Board vacated in 2020 was ECR’s 2012 Notice of Exemption to acquire the line from the GNP bankruptcy trustee.¹⁵ The Board’s decision to vacate the exemption did not rely on any analysis of ECR’s property rights. Rather, the Board held that ECR and Mr. Engle violated 49 CFR 1150.32(c) by providing “false and misleading information” in that 2012 notice about ECR’s title to the easement.¹⁶ The Board applied the remedy prescribed by the rule, by vacating the exemption *ab initio*.¹⁷

The Board never purported to resolve any state law property rights issues. Without Board authorization, however, ECR had no authority to acquire the freight easement. The September 2020 Order unwound that transaction by directing ECR to convey the easement back to GNP. That Order applied the normal remedy for vacation of an exemption tainted by

¹³ The Board has noted “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.” December 2020 Order, slip op. at 7.

¹⁴ *Eastside Community Rail, LLC—Acquisition and Operation Exemption – GNP RLY INC.*, FD 35692 and 35730, slip op. at 8 (STB served Dec. 13, 2018) (emphasis added).

¹⁵ December 2020 Order, slip op. at 1.

¹⁶ December 2020 Order, slip op. at 6.

¹⁷ December 2020 Order, slip op. at 4.

misrepresentation or concealment.¹⁸ Contrary to Mr. Engle’s impression, omitting material facts in an STB filing does have consequences.

Mr. Engle complains bitterly about the deprivations imposed by the September 2021 Order on ECR and himself.¹⁹ This tale of woe is, of course, unverified. Had Mr. Engle verified his petition as required by 49 CFR 1104.4, the Board might once again find that the reconsideration petition seeks to mislead the Board by omitting material facts. Most important, Mr. Engle fails to mention that a Washington state court in 2021 adjudicated the property rights issues that Mr. Engle describes as “ongoing in state court litigation.”²⁰ The King County Superior Court entered summary judgment in Woodinville’s quiet title action, holding that “Defendant GNP RLY, Inc. possesses sole legal ownership and title to the [Rail Freight]

¹⁸ See, e.g., *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, FD 33995 and 33996, slip op. at 19 (served Oct. 17, 2002) (revoking acquisition exemption and directing carrier to reconvey the right of way upon a finding that purchaser concealed its plan to abandon and salvage the line); *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, In Mahoning and Columbiana Counties, OH and Beaver County, PA*, AB-556 (Sub-No. 2X), slip op. at 11, 20 (served Oct. 4, 2000) (revoking abandonment exemption and voiding conveyances of line assets to an affiliate of the carrier during pendency of an OFA proceeding); *The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company*, FD 33389, slip op. at 3 (served Sept. 26, 1997) (revoking acquisition exemption and directing reconveyance of line to BNSF where carrier acquired the line with intent to promptly abandon service).

¹⁹ “The burdens put on ECR and Engle have been extreme.” Petition For Reconsideration at 1. “It is a non sequitur, legally untenable and a gross injustice for the Board to impose itself into business negotiations . . .” *Id.* at 2.

²⁰ Petition For Reconsideration at 3.

Easement.”²¹ The Superior Court also found that ECR and Douglas Engle possess no legal interest in the Easement.²²

ECR and Engle appealed the Superior Court decision to the Washington Court of Appeals. Their sole assignment of error on appeal is that the Superior Court lacked jurisdiction because federal law preempts the authority of state courts to resolve title issues affecting railroad rights of way. They contend that “Such authority is granted exclusively and preemptively to the STB by federal statute.”²³ ECR and Engle filed their state court brief contending that only the Board may resolve railroad title claims on October 8, 24 days prior to telling the Board that it has no authority to police “transfer negotiations.”²⁴

D. The Board should impose civil penalties on Engle and ECR for defying Board orders.

No less than five times in a four page reconsideration petition, Mr. Engle invites the Board and the parties to look for a “corrected notice of exemption under 49 CFR § 1150.31 . . .”²⁵ Mr. Engle proclaims that “actions will soon come to fruition with the filing of a thorough, transparent notice of exemption that will fully address all concerns of the Board.”²⁶ Reading between the lines, Woodinville fully expects ECR or a new entity affiliated with Mr. Engle to

²¹ Order Granting Summary Judgment at 4, Ex. A to Declaration of Matthew Cohen In Support of Woodinville Reply (“Cohen Declaration”).

²² *Id.* at 2. The Woodinville quiet title action pertains only to the Woodinville segment of the rail line. A parallel quiet title action is pending against ECR and Engle in Snohomish County Superior Court, covering the Snohomish segment of the line.

²³ ECR Court of Appeals Brief at 4, 13, Ex. B to Cohen Declaration.

²⁴ Petition For Reconsideration at 2.

²⁵ Petition For Reconsideration at 1.

²⁶ Petition For Reconsideration at 3.

misuse the Board's class exemption procedures by filing a "renewed" notice of exemption to acquire the freight easement that a Washington court has vested solely in GNP. The September 2021 Order precludes this gambit by directing Mr. Engle to acknowledge that he and ECR have no claims to the freight easement. Mr. Engle, however, did not comply with that Order, and appears unlikely to comply until meaningful sanctions are imposed.

GNP and Snohomish County each have urged the Board to assess civil penalties of \$8224 per day against Engle and ECR, running from October 29 until Engle/ECR comply with the September 2021 Order.²⁷ These parties have documented the Board's authority to impose penalties in the amount requested, and the need to do so to protect the Board's authority. The City of Woodinville supports and joins in these recommendations. The City supports the County's proposal to waive accrued penalties if Engle/ECR provide the certifications and/or deeds required by the September 2021 Order within five business days.²⁸ The City reserves judgment on whether that safe harbor will induce Mr. Engle to comply.

November 12, 2021

Respectfully Submitted,

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²⁷ GNP Letter Brief In Opposition To Douglas Engle Letter of November 1, 2021 at 4, FD 35692 and 35730 (filed Nov. 10, 2021); Snohomish County Reply and Request For Imposition of Civil Penalties at 5-8, FD 35692 and 35730 (filed Nov. 9, 2021).

²⁸ Snohomish Reply at 6.

CERTIFICATE OF SERVICE

I certify that on November 12, 2021 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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