

BEFORE THE SURFACE TRANSPORTATION BOARD

306230

EAST SIDE COMMUNITY RAIL – ACQ. & OP.) F.D. 35692

EXEMPTION – GNP RLY, INC.)

ENTERED
Office of Proceedings
February 27, 2023
Part of
Public Record

BALLARD TERMINAL RAILROAD CO. –) F.D. 35730

LEASE EX. – GNP RLY, INC.)

GNP RLY, INC. – ABANDONMENT EXEMPTION –) AB 1316X

IN KING COUNTY, WA)

SNOHOMISH COUNTY’S RESPONSE
TO COMMUNICATIONS

FILED IN F.D. 35692/35730 ON FEBRUARY 6 and
IN AB 1316X ON FEBURARY 17, 2023
BY GNP RLY, INC., AND CITY OF WOODINVILLE

This Response is on behalf of Snohomish County (“SnoCo”) to recent filings by GNP RLY, Inc. (“GNP”) in the three proceedings captioned above apprising the Surface Transportation Board (“STB” or “Board”) of certain developments in state court litigation brought by GNP.

The three captioned proceedings above deal with all or a portion of the same railroad right of way (actually, a raw freight railroad easement without any physical assets such as track or ties) between MP 38.25 near the City of Snohomish through MP 26.38 at the Snohomish/King County line to MP 23.8 near

Woodinville.¹ This Board unilaterally stayed/ placed in abeyance all three STB proceedings pending state court litigation concerning inter alia the interest, if any, held by Eastside Community Rail, LLC (“ECR”) in the relevant freight rail easement. STB also misstated the northern milepost for the AB 1316X proceeding.

By letter filed February 6, 2023, in F.D. 35692/35730 and by notice filed February 17, 2023 in AB 1316X, GNP informed the Board that pertinent state courts have now determined that Eastside Community Rail (ECR) and its owner/manager Douglas Engle (and other Engle relatives or former relatives) have no interest in the STB-regulated freight rail easement in either Snohomish County or King County (i.e., no interest in any portion of the easement).

Snohomish County concurs that the pertinent state courts have so determined.

It follows that the Board must immediately dissolve or otherwise lift the stays, deny the pending ECR/Engle petition to reopen in F.D. 35692/35730, proceed promptly to issuance of a railbanking order (Notice of Interim Trail Use or “NITU”) in AB 1316X, and correct the agency’s erroneous designation of the northern milepost in the AB 1316X proceeding.

¹ In the relevant deed from Port of Seattle to SnoCo, the Snohomish/King County line is given as MP 26.384. E.g., Exhibit A (referenced deed) to SnoCo’s Comment filed Sept. 29, 2022 in AB 1316X. MP 26.38 is thus a reasonable approximation of the Snohomish/King County line and a fortiori the northern endpoint of GNP’s proposed abandonment in AB 1316X.

Background

F.D. 35692 involves false or misleading statements made by ECR/Engle in seeking authority to acquire and to operate the former BNSF retained freight rail easement from MP 38.25 to MP 23.8 from GNP's trustee in bankruptcy.² Upon confirming that ECR/Engle had indeed made misleading or false misrepresentations, SnoCo in July 2018 -- over 4-1/2 years ago -- petitioned to revoke ECR's acquisition and operating license due to material misrepresentations concerning ownership of the easement. STB initially refused to revoke the license absent a state court determination of unspecified title questions. Snohomish County petitioned the D.C. Circuit for review. The D.C. Circuit found STB's refusal arbitrary and capricious, and remanded the case for the agency to determine

² As discussed in multiple pleadings in F.D. 35692, shortly after GNP acquired the freight rail easement at issue in these cases, GNP was forced into involuntary bankruptcy. Its only real asset was the freight rail easement, which Douglas Engle as an officer of GNP had conveyed to his father and then wife approximately a week before GNP was forced into bankruptcy. This conveyance was not disclosed to GNP's bankruptcy trustee or STB. Engle later organized ECR and represented to STB that ECR would acquire the rail easement from GNP, which was legally impossible during all relevant time periods.

Ballard Terminal Railroad Company ("BTRC") relied upon the same ECR misrepresentations made by ECR in BTRC's notice for lease exemption to lease the freight rail easement from ECR. If the license in F.D. 35692 is revoked, so must the license in F.D. 35730 for similar reasons. Ironically, BTRC was evidently one of the parties (along with Engle's father and then-wife) forcing GNP into involuntary bankruptcy. See Motion attached as Exhibit 4 to Stowe Dec. in SnoCo's Pet to Revoke filed July 12, 2018 in F.D. 35692 (p. 74 et seq. out of 449 pages).

if ECR’s misrepresentations were at least misleading, thus triggering the regulatory requirement that ECR’s license be vacated ab initio. Snohomish County v. Surface Transportation Board, 954 F.3d 290 (D.C. Cir. 2020). STB on remand found that ECR/Engle had made at least misleading statements and accordingly vacated ECR’s license ab initio.³ The Board subsequently ordered reconveyance and voided any conflicting deeds out.⁴ Engle/ECR then filed an out-of-time petition for reconsideration (which the Board must treat as a petition to reopen).⁵ In the untimely filing, ECR/Engle said they “respect[ed]” the propriety of revocation.⁶ However, ECR/Engle argued they should not be required to reconvey the property ostensibly because they were preparing new papers to obtain another acquisition and operating exemption from STB.⁷ (No such papers were filed.) ECR/Engle also asserted they should be compensated before any transfer of title, and the Board was interfering with their efforts to extract compensation.⁸ SnoCo opposed untimely reconsideration noting that ECR had failed to make any of the showings required for reopening, was simply refusing to comply with STB orders, had not

³ Eastside Community Rail, LLC – Acq. and Op. Ex. – GNP RLY, Inc., F.D. 35692 and related case, served Dec. 22, 2020.

⁴ Id., served Sept. 29, 2021.

⁵ ECR “Response and/or Petition for Reconsideration” in F.D. 35642/35730 filed Nov. 1, 2021.

⁶ ECR Nov. 1 Response at unnumbered p.1.

⁷ Id. at unnumbered p. 2.

⁸ Id. at unnumbered 2-3.

filed any new papers to obtain a license, and was illegitimately seeking some kind of pay-off as a condition of compliance.⁹ SnoCo requested the Board to level civil penalties on ECR until it complied.¹⁰ Woodinville's response to ECR's Petition was that Woodinville was pursuing quiet title litigation against ECR in King County (Woodinville Reply at, e.g., p. 7, filed Nov. 12, 2021). GNP responded that it was suing not just ECR and Engle but also SnoCo in Snohomish County (GNP Reply at, e.g., 3 and n.3, filed Nov. 10, 2021). Although Woodinville and GNP by their choice to bring state court actions cannot overrule the D.C. Circuit in Snohomish County v. STB, supra, STB nonetheless acted as if they did, and stayed further proceedings in F.D. 35692/35730 pending the state court proceedings brought by Woodinville and GNP in King and Snohomish Counties.

ECR/BTRC embargoed the entire line effective August 1, 2020. Because STB revoked the ECR license (and that of BTRC) ab initio, GNP again became the licensee for the freight rail easement as of the service date of STB's revocation

⁹ SnoCo Reply and Request for Imposition of Civil Penalties in F.D. 35692, filed Nov. 9, 2021, at pp 1 et seq. & 9-13. ECR/Engle's suggestion that the easement, whoever owned it, had value is irrelevant because, as SnoCo pointed out in Reply, supra, parties by private contract cannot subvert STB regulation, no matter how much they claim to have paid to do so. In any event, by November of 2021, the line was non-operating, so its going concern value under STB case law was zero. As a raw easement without physical assets, its net liquidation value was likewise zero.

¹⁰ Id. pp. 6-9. SnoCo at no point sought any delay for more expenditures and litigation in state court.

decision in F.D. 35692/35730 (Dec. 22, 2020). GNP has provided no service on the line. In short, there has been no rail use of the easement for over 2-1/2 years at this point.¹¹ The line has thus been in economic limbo, just as the Board's failure to enforce its decisions revoking the ECR license and requiring reconveyancing has contributed to a kind of legal limbo. At this point, the unused line is no longer viable. Even if SnoCo made its portion available for free and without liability protection (as in effect SnoCo has been forced to do because of delays in STB proceedings), there is insufficient (if any) rail demand to pay rail operating costs and rehabilitation expenses. See p. 9 and note 19 infra.

Because the freight rail easement had not been used for at least two years, GNP filed a two-year out-of-service abandonment notice of exemption (49 C.F.R. 1152.50), docketed as AB 1316X, on March 18, 2022, but only for the segment in King County. Woodinville sought railbanking of that segment, GNP agreed, and those parties indicated they had entered into a contract for transfer of the property for same, subject to STB railbanking authorization. No shipper objected. Rather than issue an abandonment and railbanking authorization in accordance with its regulations and precedent, STB by decision served September 14, 2022, stayed that case pending GNP's state court litigation in Snohomish County, even though that

¹¹ See exhibit D (T. Teigen V.S.) to SnoCo's Sept. 29 comments in AB 1316X and Kucera Verification in ECR Notice of Exemption filed March 18, 2022.

litigation had nothing to do with the GNP line at issue in King County. In addition, STB repeatedly and erroneously claimed that the northern endpoint of the proposed abandonment/railbanking in AB 1316X (i.e., the Snohomish/King County line) was MP 26.58, rather than the factually correct MP 26.38.¹²

On September 23, GNP and Woodinville timely appealed the Director's decision to the entire Board arguing the stay was arbitrary and capricious. SnoCo intervened on September 29, 2022, filing comments in support of the GNP/Woodinville appeal. SnoCo also specifically moved to correct the erroneous statements in the Director's decision served September 14, 2022, that the northern terminus of the proposed abandonment/railbanking in AB 1316X was MP 26.58. SnoCo showed that the correct designation for the northern terminus was MP 26.38.¹³ No party has supported STB's ex parte decision staying the AB 1316X proceeding; no party has opposed the GNP/Woodinville appeal; and no party has opposed SnoCo's motion to correct.

¹² The Decision at p.1 claimed that GNP "confirmed that the correct milepost number of the Line's northern endpoint is 26.58" citing GNP Suppl. 1, April 11, 2022) but GNP's paper in fact says 26.38. The September 14 decision misstates the northern endpoint at p.1, first paragraph and second paragraph and p. 2, second full paragraph.

¹³ GNP stated the correct milepost was 26.38. See note 12, supra. Moreover, SnoCo owns the right of way over which the easement exists from the County line north to MP. 38.25. The Snohomish/King County line is at MP 26.38. See SnoCo Comments in AB 1316X filed Sept. 29, 2022, including Exhibit D (T. Teigen V.S.).

The Board’s failure to resolve these cases is troubling in light of broader transaction between BNSF, the Port of Seattle, and King County aimed at preserving the so-called “Woodinville Subdivision,” a line of approximately 40 miles, from MP 38.25 through MP 23.8 but also inclusive of the so-called Redmond Spur and otherwise extending south to M.P. 5 in Renton.¹⁴ Local jurisdictions sought to preserve the entirety of the corridor, chiefly for trail and future transit purposes, under the federal railbanking statute (16 U.S.C. 1247(d)), after BNSF no longer needed it for transport of fuselages to the Boeing plant in Renton.¹⁵ The line south of MP 23.8 and the “Redmond spur” between Woodinville and Redmond are now railbanked and being developed as trails.

At the time the Port of Seattle acquired (pursuant to appropriate STB authorizations) the line, there were a handful of shippers in or north of Woodinville. When BNSF conveyed (inclusive of all physical assets such as track and ties) the northern segment (MP 38.25 to MP 23.8) to the Port, it therefore

¹⁴ At the request of STB, BNSF, the Port and King County filed a “Response” to the agency in F.D. 35128, AB 6 (Sub-No. 463X), AB 6 (Sub-no. 464X) and AB 6 (Sub-no. 465X) on Sept. 18, 2008, outlining the overall transaction and indicating how certain dockets related to implementation.

¹⁵ BNSF Corridor Preservation Study, Final Report, prepared for Puget Sound Regional Council, dated May 2007, pp. 64-65 (no rail traffic from Renton to Bellevue when a bridge project was completed allowing Boeing fuselages to be shipped by different routing). The Final Report may be downloaded from the following link: <https://www.railstotrails.org/resource-library/resources/bnsf-corridor-preservation-study/?author=HDR+Engineering%2C+Inc>

reserved an exclusive freight rail easement to provide continued rail service on that portion of the Woodinville Subdivision. (By so doing, the Port was not subject to common carrier obligations.¹⁶) Pursuant to its agreements with the Port, BNSF almost immediately conveyed the freight rail easement to GNP.¹⁷ Shortly after acquiring the freight rail easement for M.P. 38.25 to M.P. 23.8 from BNSF, GNP was forced into involuntary bankruptcy.¹⁸ Douglas Engle organized ECR to take over GNP's assets. However, as an officer of GNP he had previously and apparently secretly conveyed those assets to certain of his relatives.¹⁹ Based on Engle's misrepresentations, STB authorized ECR to acquire GNP's assets. Rail use under Engle continued to dwindle. ECR sent a letter to SnoCo in 2016 indicating that, as underscored by loss of business from Spectrum Glass, the line was non-viable (insufficient traffic), and would be abandoned absent substantial

¹⁶ Port of Seattle – Acq. Ex. – Certain Assets of BNSF Ry, F.D. 35128, Slip at 5, served Oct. 27, 2008 (dismissing request for acquisition authority on grounds none was needed under “State of Maine” line of cases).

¹⁷ The BNSF to Port deed (Exhibit 11 to Stowe Dec. in SnoCo's Petition to Revoke filed July 12, 2018, in F.D. 35692) as recorded in Snohomish County on Dec. 21, 2009, and the BNSF to GNP deed (Exhibit 1 to same) for the freight easement was recorded immediately thereafter, as indicated in the sequential recording numbers 226604 (Exhibit 11) and 226605 (Exhibit 1).

¹⁸ The involuntary bankruptcy proceeding commenced on Feb. 2, 2011. See SnoCo Petition to Revoke in F.D. 35692, filed July 18, 2018, Stowe Declaration para 4 (p. 26 of 449-page filing).

¹⁹ See Stowe Dec. para 4, supra, and related exhibits in SnoCo Pet. to Rev. in F.D. 35692, filed July 18, 2018.

government subsidies.²⁰ Engle/ECR allowed GNP's highly favorable operating and maintenance agreement with the Port (by then succeeded by SnoCo and Woodinville) to expire. Although this relieved ECR of an obligation to insure itself and SnoCo for ECR/BTRC's use of the freight rail easement, it also meant ECR no longer had any state law right to use the rails and ties. After an initial embargo due to a damaged bridge, the line was embargoed for a final time effective August 1, 2020, and BTRC (the only actual operator of the rail line) withdrew all rail equipment, validating ECR's 2016 prediction that the line was not viable. In all events, the line has had no traffic for over 2-1/2 years.²¹

This Board authorized SnoCo to step into the Port's shoes as owner of Port's real estate, track and ties in the line in Snohomish County;²² Woodinville stepped into the Port's shoes in the 2.58 miles (at issue in AB 1316X) in King County.²³

BNSF, the Port, and King County were apparently concerned that the railbanked lines south of MP 23.8 not be severed from the interstate network;

²⁰ See SnoCo Pet. to Revoke in F.D. 35692, filed July 12, 2018, Stowe Dec. para 12 (p. 31 of 449-page filing) and exhibit 17 thereto (letter dated 6 June 2016, at pp. 404-407 of 449-page filing).

²¹ See Verification by K. Kucera to Notice of Exemption filed March 18, 2022 in AB 1316X (no rail use for prior two years); T. Teigen V.S., Exhibit 4 to Snohomish County's comments filed Sept. 29, 2022 in AB 1316X, at p.3 (BTRC embargoed the line effective August 1, 2020).

²² Snohomish County – Pet. Dec. Order, F.D. 35830, served March 5, 2015.

²³ City of Woodinville – Pet. Dec. Order, F.D. 35905, served Oct. 7, 2015, recon granted in part, Oct. 7, 2016,

under applicable precedent, severance might jeopardize STB’s jurisdiction to maintain railbanking of all or portions of the southern portions as well as the Redmond spur. This in turn would compromise the substantial investment (in excess of \$81 million) made by the Port and King County for the northern portion of the preservation project and call into question any tax deductions claimed by BNSF for the southern portion. BNSF, the Port and King County therefore provided that in the event that BNSF (or any successor to BNSF as owner of the freight rail easement) ever sought abandonment authority for the easement, then BNSF (or its successor) must railbank its easement if requested by a successor to the Port. In addition, BNSF, the Port, and King County agreed that if rail use ceased and BNSF/BNSF’s successor failed to seek abandonment authority, then BNSF/BNSF’s successor must cooperate in an adverse (third-party) abandonment proceeding²⁴ and agree to railbanking in that proceeding. This agreement is manifest not only in relevant contract documents, but also in a covenant expressly “running with the land” and binding on all successors²⁵ as set forth in the deed

²⁴ See Consolidated Rail Corp. v. ICC, 29 F.3d 707, 709 (D.C. Cir. 1994) (adverse abandonment proceeding).

²⁵ In real property, a covenant is a binding promise relating to real property created in a conveyance or other instrument providing that something is done, will be done, or will not be done. A covenant binding on successors is said to “run with the land.” See, e.g., Hollis v. Garwall, Inc., 137 Wn2d 683, 690, 974 P.3d 836, 841 (1999). The BNSF to Port deed specifically provides that the railbanking covenant binds the parties and successors and runs with the land on its first

from BNSF to the Port as recorded in Snohomish County.²⁶ The covenant, which the deed expressly specifies is binding on all successors and “runs with the land,” provides as follows:

“If the holder of the reserved freight easement or its successor, assignee or designee or other entity carrying out common carrier freight service on the Property (each an "Abandonment Applicant") elects to seek authority from the Surface Transportation Board or any successor agency to abandon or discontinue its freight common carrier obligation over some or all of the Property, then such Abandonment Applicant shall consent to a request by any or each of County, the Port, the Central Puget Sound Regional Transit Authority or the successor or designee of any of them (each a "Trail Use Applicant") for the implementation of interim trail use in accordance with Section 8(d) of the National Trails System Act, codified at 16 U.S.C. 1247(d), and 49 C.F.R. 1152.29, as such provisions may be amended or interpreted by binding judicial or administrative authority ("Railbanking Laws"), provided the Trail Use Applicant meets all requirements of the Railbanking Laws, including that the Trail Use Applicant agrees to a trail use agreement as required by the Railbanking Laws. The Abandonment Applicant shall cooperate with any or each Trail Use Applicant in any application for authority to implement interim trail use over all or any portion of the Property on which the Abandonment Applicant seeks authority to abandon or discontinue its freight common carrier obligation. If the holder of the reserved freight easement or its successor, assignee or designee or other entity carrying out common carrier freight service on the Property ceases operations but fails within a reasonable period of time to (a) seek abandonment authority, and (b) respond to inquiries from any potential Trail Use Applicant as to the status of its operations, any Trail Use Applicant may

operative page. E.g., p. 297 of 449 in Exhibit 11 to Stowe Dec. attached to SnoCo’s Petition to Revoke in F.D. 35692.

²⁶ The covenant is set forth inter alia at unnumbered pp. 50-51 in Snohomish County’s Comments filed Sept. 29, 2022 in AB 1316X (contained in Exhibit C-- BNSF to Port deed as recorded in Snohomish County). A copy of the deed is also exhibit 11 (esp. 297 et seq of 449) to the Stowe Dec. attached to SnoCo’s Petition to Revoke in F.D. 35692.

elect to seek authority from the Surface Transportation Board or any successor agency for a third- party abandonment and interim trail use over some or all of the Property on which operations have ceased. The holder of the freight easement or its successor, assignee or designee or other entity carrying out common carrier freight service on the Property shall not oppose any such action by a Trail Use Applicant if the holder has ceased operations.”

In light of cessation of rail service on the line for over 2-1/2 years, that covenant is now applicable.

Argument

A. The Stays Must Be Lifted

Through its stays issued in F.D. 35692/35730 and AB 1316X, STB has expressed its concern that a state court resolve ownership of the entire easement from M.P. 38.25 (City of Snohomish) to MP 23.8 (Woodinville). This rationale is no longer viable because -- as GNP pointed out in F.D.35692/35730 and as both GNP and Woodinville indicated in AB 1316X -- Engle/ECR have been adjudicated to have no title to the easement in either the Snohomish County or King County portions of the line.

In any event, STB’s unilateral action in putting all the proceedings in abeyance is and continues to be arbitrary and capricious and otherwise contrary to law for a variety of reasons.

First, the D.C. Circuit in Snohomish County v. STB, supra, indicated that if Eastside Community Rail’s (“ECR’s”) rail acquisition and operating license was

based on misrepresentations or misleading information – as STB admits it was – then STB must revoke the license and provide relief, not force parties to litigate over state law title disputes first. Yet STB has effectively failed to enforce its own regulations and pushed the parties back into state court contrary to the letter and spirit of the Court of Appeals’ decision.

Federal rail policy indicates that STB is supposed “to encourage honest and efficient management of railroads.” 49 U.S.C. 10101(9). Forcing parties into months or years of costly title and/or fraud litigation in state courts or federal bankruptcy courts due to clear misrepresentations made to STB in its licensing processes hardly squares with a policy “to encourage honest and efficient management of railroads.” Instead, it encourages grifters to seek to get away with misrepresentations and, if caught, to demand pay-outs from victims to avoid prolonged and costly litigation.

Second, the delay ordered by STB misses the point that in the circumstances of this case it is now irrelevant who owns the easement. No one is using the easement for rail purposes; rail use ceased over two years ago. Under the circumstances, any owner of, or claimant to, the easement is subject to a binding covenant expressly running with the land (set forth inter alia in the deed from BNSF to the Port of Seattle creating the easement in the first place) that provides that in the event of cessation of rail use, the owner of the easement must cooperate in an adverse (third

party) abandonment proceeding. Moreover, upon request of any successor to the Port of Seattle (e.g., SnoCo in Snohomish County), the owner of the easement must agree to railbanking. In sum, it does not matter who owns the easement once rail use ceases -- because the owner (as successor to BNSF) must cooperate in an adverse abandonment proceeding and railbank the property with relevant successors to the Port.

It is irrefutable that rail use of this easement has been in jeopardy since at least 2016²⁷ and ceased completely over 2-1/2 years ago.²⁸ After so much delay, confusion, and lack of any rail service, both Woodinville and SnoCo wish to proceed with railbanking. Waiting for a state court to address ownership issues is and has been a needless distraction given the covenant.

Third, federal rail transportation policy calls for “expeditious handling and resolution of all proceedings required or permitted to be brought under this [rail] part.” 49 U.S.C. 10101(15). See also 49 U.S.C. 10101(7) (reduce barriers to exit). The STB abeyances and stays have arbitrarily delayed F.D. 35692/35730 for almost eleven months to date, and similarly delayed AB 1316X by over five months to date. Since STB has signaled in AB 1316X, F.D. 35692 and F.D. 35730 that the agency will not progress proceedings dealing with MP 38.25 to MP 23.8

²⁷ See p. 9 and note 19 supra.

²⁸ E.g., sources cited in note 20, supra.

absent state court title litigation (notwithstanding the D.C. Circuit’s rulings in Snohomish County v. STB, supra), SnoCo has been unable to move forward with an adverse or third-party abandonment proceeding for the City of Snohomish (MP 38.25) to Snohomish/King County line (MP 26.38) segment of the easement, as otherwise permitted under the ICC Termination Act.²⁹ Such a proceeding is necessary to clear any and all claimants to the easement from the corridor, and finally to obtain a railbanking order for it, for the benefit of the entire Woodinville Subdivision and as anticipated by the railbanking covenant. The delays have also resulted in burdensome litigation expenses and exposed SnoCo to uninsured risks and mis-use or abuse of taxpayer assets (track and ties) without compensation.³⁰

B. Correction of Erroneous Milepost in Decision served Sept. 14, 2022

In the decision served September 14, 2022 in AB 1316X, the Board through the Director of the Office of Proceedings stated that the northern terminus for GNP’s proposed abandonment was MP 26.58, claiming that GNP’s April 19, 2022

²⁹ An adverse abandonment is a two-step procedure in which a third party (such as SnoCo) first petitions STB for certain standard modifications or exemptions from regulatory requirements applicable to abandonment applications, and upon receipt of such modifications and exemptions, undertakes the various pre-filing notifications and upon completion files an application for abandonment with the Board.

³⁰ E.g., Verified Statement of T. Teigen, exhibit 4 to Snohomish County’s comments filed Sept. 29, 2022, at pp. 2-4 (discusses some of the adverse impacts on County).

“Supplement” filed in AB 1316X so stated. To the contrary, this is what GNP stated at p. 2 of its April 19, 2022, Supplement: “GNP’s Notice of Exemption erroneously described the northern endpoint of the Line as MP 26.58. As the Board correctly notes, the map in Exhibit B and the combined environmental/historic report describe the northern endpoint as MP 26.38. The latter description is accurate, and GNP apologizes for the typographical error. The rail line north of MP 26.38 remains in active service.”³¹ The plain meaning of GNP’s explanation is MP 26.38 is accurate; MP 26.58 is erroneous. For further argument, see SnoCo’s Comment and unopposed motion to correct filed Sept. 29, 2022 in AB 1316X.

Although all of the property at issue in AB 1316X is in King County and south of MP 26.38, the STB Director decision arbitrarily and erroneously included a 0.2-mile segment of the line in Snohomish County extending north to MP 26.58. Until STB corrects its mistake, SnoCo is inhibited from initiating an adverse abandonment proceeding for MP 26.38 to MP 38.25 (all in Snohomish County). This should be resolved forthwith so Snohomish County can file appropriate papers for abandonment/railbanking authorizations for the line from the entirety of

³¹ The line north of MP 26.38 is in “active service” only in the sense that it remains subject, like the line south of MP 26.38 (as far as MP 23.8), to an active common carrier obligation. There is no actual service over it. The point SnoCo understands GNP to be making is that neither GNP nor an adverse party has sought an abandonment authorization for the line north of MP 26.38, yet.

the line (easement) in Snohomish County. Prompt action is consistent with federal rail policy embodied in 49 C.F.R. 10101(15).

Conclusion

There is no justification for a continued stay of F.D. 35692/35730. The issue on the table once the stay is lifted is whether ECR/Engle have supplied grounds for reopening of those proceedings. Engle/ECR in essence argued only material error, and failed to show any. At this point, they clearly cannot show material error; indeed, the Engle/ECR petition to reopen is moot because all the relevant state courts have held that Engle/ECR have no interest in the easement, so ECR/Engle have nothing to reconvey, nothing for which compensation is necessary, and nothing on which to base an ECR filing seeking acquisition or operation authority. If ECR/Engle are ruled out of the picture (as they now should and must be determined by STB), then SnoCo's pending motion (unaddressed by STB) for civil penalties is moot as well.

Similarly, there is no justification for a continued stay in AB 1316X. The Board should facilitate a NITU in that proceeding.

STB must also acknowledge that the correct northern endpoint for the abandonment/railbanking in AB 1316X is MP 26.38, which is the Snohomish/King County line.

These outcomes will facilitate Snohomish County in filing for adverse abandonment/railbanking authority for the freight rail easement between MP 26.38 to MP 38.25, should GNP fail promptly to file a section 1152.50 “notice of exemption” for abandonment/railbanking of that easement (as it has already done for the Woodinville portion of the easement in AB 1316X).

Certificate of Service

By my signature below, I certify service by email attachment on February 27, 2023, upon all parties of record by electronic mail including the following addressees: matthew.cohen@stoel.com, jsavagelaw@aim.com, dengle76@comcast.net, tom@twilcoxlaw.com, cspitulnik@kaplankirsch.com, jami@tclg-law.com, josh@browerlawps.com, dick156@earthlink.net as provided on the docket sheets published on the STB website for AB 1316X, F.D. 35692 and F.D. 35730.

Respectfully submitted,
s/Charles H. Montange

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