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ENTERED
Office of Proceedings
March 31, 2023
Part of
Public Record

31 March 2023

Hon. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Snohomish County (WA) – Adverse Abandonment –
GNP RLY, Inc., in Snohomish County, WA, AB 1331

E-filing of Petition for Waiver

Fee Waiver Requested -- State or Local Government Entity

Dear Ms. Brown:

On behalf of Snohomish County (WA), enclosed for e-filing please find a Petition for Waiver relating to certain requirements governing abandonment applications. Waiver is sought so Snohomish County may pursue an adverse (third party) abandonment application against a line over which rail use has ceased in Snohomish County. Snohomish County not only is an underlying landowner, but also desires the property for trail use and railbanking. Granting of the requested waivers is customary in such circumstances. GNP RLY INC. is the currently licensed operator of the line.

Fee waiver request. Although Snohomish County in order to ensure expeditious treatment has tendered the \$2,300 filing fee charged for petitions for waiver of abandonment application requirements per 49 C.F.R. 1002.2(f)(24), the County hereby requests waiver of the fee and return of the payment.

FILED
March 31, 2023
SURFACE
TRANSPORTATION BOARD

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FEE RECEIVED
March 31, 2023
SURFACE
TRANSPORTATION BOARD

49 C.F.R. 1002.2(e)(1) provides generally that “filing fees are waived for an application, petition ... or other document that is filed by ... a state or local government entity.” Snohomish County is a political subdivision of the State of Washington. It is thus a “state or local government entity” and clearly qualifies for the requested exemption.

Moreover, Snohomish County does not fall into any exception from the applicable fee waiver rule: the County is not a quasi-governmental entity or government-subsidized transportation company. It is not “acting in the capacity of a carrier or shipper” and it does not “own or propose to own a carrier and is before the agency in its proprietary role.” Accord, Snohomish County – Pet. Declaratory Order, F.D. 35830, served March 5, 2015 (County not subject to common carrier regulation).

Snohomish County therefore requests waiver of fees for the filing of the enclosed Petition for Waiver.

Certificate of Service. By my signature below, I certify service by email attachment of the enclosed Petition for Waiver upon James Savage, Esq. at jsavagelaw@aim.com and by posting a copy in the US Mail, postage pre-paid first class, addressed to Mr. Savage at 22 Rockingham Court, Germantown, MD 20874 on 31 March 2023.

Respectfully submitted,



Charles H. Montange

c.montange@frontier.com

Counsel for Snohomish County

Encl. (Petition)

cc. w/encl., by email attachment to --

Sean Reay, Esq. (Civil Div., Snohomish County Prosecutor's Office)
at sean.reay@co.snohomish.wa.us

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Matthew Cohen (Stoel Rives) (for Woodinville)
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BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB 1331

Snohomish County, Washington

(A Political Subdivision of the State of Washington)

-- Adverse Abandonment Application --

GNP RLY, Inc.,

In Snohomish County, WA

PETITION FOR WAIVER AND EXEMPTION

(Verified)

By: Charles H. Montange

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Dated: March 31, 2023

Pursuant to 49 C.F.R. §§ 1117.1, 1152.24(e)(5) and 49 U.S.C. § 10502(a), Snohomish County (“County” or “SnoCo”), a legal subdivision of the State of Washington seeks waivers of specific Surface Transportation Board ("STB" or "Board") regulations, and exemptions from specific statutory provisions, in connection with the third party "adverse" abandonment application the County intends to file with the Board. The waivers and exemptions sought are customarily granted in similar contexts. E.g., Colorado Landowners – Adverse Abandonment – Great Western Railway of Colorado, LLC, AB 857 (Sub- no. 2), served Feb. 11, 2022 (and cases there cited). The proposed adverse application will involve a line of railroad (and more particularly, an exclusive freight rail easement over same) currently licensed to GNP RLY, Inc., on which rail use ceased more than 2-1/2 years ago. The line is further described as Milepost (“MP”) 38.25 at City of Snohomish to MP 26.38 (Snohomish/King County line), in Snohomish County, WA, a distance of approximately 11.9 miles.¹ Snohomish County not only owns underlying and abutting real estate interests but also desires to employ the property for alternative public purposes, including interim trail use and railbanking.

¹ A map showing the line is presented in Attachment 1.

Background

In the early 2000's, bridge work was completed allowing BNSF Railway ("BNSF") to transport fuselages into the Boeing plant at Renton from the south, rather than over the approximately 42 mile-long (counting the Redmond Spur) "Woodinville Subdivision" (also collectively called the "Eastside Corridor"). As a result, BNSF indicated that it intended to abandon the Eastside Corridor line and divest itself. The Puget Sound Regional Council issued a study in May 2007 recommending acquisition of the entire Eastside Corridor for public uses, including trail use and "railbanking."² The Port of Seattle and King County subsequently entered into a complex set of transactions that, subject to various STB authorizations, resulted in preservation of the 7.30-mile-long Redmond Spur and the 33.25-mile-long Woodinville Subdivision from MP 38.25 near City of Snohomish to MP 5.00 in Kenndale (near Renton). The bulk of the property was "railbanked."³ However, some shippers remained on the so-

² PSRC, BNSF Corridor Preservation Study: Final Report, May 2007.

³ In response to an inquiry from STB, BNSF, the Port, and King County supplied a summary of the transaction, basically describing the effort as broken into three parts: the "Railbanking Segments, Wilburton Segment and Freight Portion." See "Response of BNSF Railway Company, Port of Seattle and King County, WA, to request for Information" in Docket No. AB 6 (Sub-no. 465X), filed Sept. 18, 2008, at p.6. This document was also filed in F.D. 35128, AB 6 (Sub-no. 463X) and AB 6 (Sub-no. 464X). The "Freight Portion" of the overall transaction is germane here and the focus of the remainder of this background discussion.

called “Freight Portion” between MP 38.25 at City of Snohomish in Snohomish County and MP 23.80 at City of Woodinville in King County.

As to that portion, the Port acquired all track and ties plus all BNSF’s real estate interests, but BNSF retained an “exclusive freight rail easement.” On this basis, STB ruled that the Port did not require an STB acquisition or operation license.⁴ GNP RLY, Inc., applied for, and obtained, STB authority to acquire BNSF’s retained exclusive freight rail easement.⁵ GNP RLY, Inc., subsequently entered into an operations and maintenance (“O&M”) agreement with the Port governing use of what were to become the Port’s track and ties in the “Freight Portion.” By deed recorded in Snohomish County on December 21, 2009, the Port duly acquired all BNSF interests in the Freight Portion, subject to BNSF’s retained exclusive freight rail easement.⁶ BNSF then transferred its retained exclusive freight rail easement to GNP by subsequent recorded deed.⁷ The parties then recorded notice of the O&M agreement between GNP and the Port.⁸

BNSF, the Port, and King County all agreed that the BNSF retained

⁴ Port of Seattle – Acq. Ex. – Certain Assets of BNSF, F.D. 35128, served Oct. 27, 2008 (dismissing request for acquisition authority on grounds none is needed).

⁵ GNP RLY, Inc. – Acq. & Op. Ex. – BNSF Railway, F.D. 35213, served Feb. 13, 2009.

⁶ Deed, BNSF to Port, recorded Dec. 21, 2009, SnoCo AF 200912210438.

⁷ Deed, BNSF to GNP, recorded Dec. 21, 2009, SnoCo AF 200912210439.

⁸ Memorandum of O&M, recorded Dec. 21, 2009, SnoCo AF 200912210440.

freight rail easement would be subject to a covenant, binding on all successors, and running with the land,⁹ governing disposition of the easement upon cessation of rail use. The covenant required (and still requires) any holder of the easement, upon cessation of rail use, either (i) voluntarily to seek abandonment authority and, upon request, to cooperate in railbanking the line, or (ii) to cooperate in an adverse abandonment proceeding and, upon request, railbanking. This covenant is referenced at unnumbered page 2 of the BNSF to Port deed (supra, note 5), and set forth at unnumbered pp. 15-16 of same. It is also found in the Seventh Amendment to the Purchase and Sale Agreement. The Seventh Amendment shows that the Port and King County paid BNSF substantial consideration for their property rights, including the covenant (over \$81 million); GNP RLY Inc. paid nothing.¹⁰

Pursuant to an STB declaratory order applying the “State of Maine”

⁹ 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).

¹⁰ The Seventh Amendment was dated and entered into on December 17, 2009 between Port, BNSF and King County. It expressly states at p. 2 that “the exclusive easement for freight rail purposes shall be subject” to the covenant and the covenant “shall run with the land.”

doctrine,¹¹ Snohomish County subsequently purchased the Port's interests in the Freight Portion within the borders of Snohomish County, stepping into the Port's shoes and assuming the Port's legal rights and obligations.

Meanwhile, GNP fell into involuntary bankruptcy. An entity known as Eastside Community Rail (ECR) purported to acquire the assets of GNP pursuant to this Board's authorization,¹² but due to misrepresentations,¹³ ECR's acquisition authority was revoked.¹⁴ As a result, GNP RLY, Inc., under new ownership (Kevin Kucera) is once again the licensee for the line. In the meantime, ECR has been adjudicated to hold no interest in the easement by the relevant state courts in Snohomish and King Counties.¹⁵

¹¹ Snohomish County – Pet. Declaratory Order, F.D. 35830, served March 5, 2015.

¹² Eastside Community Rail, LLC – Acq. & Op. Exemption – GNP RLY, Inc., F.D. 35692, served Nov. 23, 2012.

¹³ See Snohomish County v. STB, 954 F.3d 290 (D.C. Cir. 2020). ECR's principal, Douglas Engle verified to STB that ECR would acquire the easement from GNP, but Engle (as an officer of GNP) had previously sold the easement to his father and then-wife by recorded deed before GNP entered bankruptcy. Engle did not disclose the prior sale to STB, nor did any party seek required STB authorization for such sale and transfer, or other subsequent purported transfers.

¹⁴ Eastside Community Rail, LLC – Acq. & Op. Exemption – GNP RLY, Inc., F.D. 35692, served Dec. 23, 2020.

¹⁵ As to King County, see City of Woodinville v. Eastside Community Rail, 200 Wn.2d 1009, 2022 Wash. LEXIS 520*, Oct. 12, 2022, denying review of decision of the Court of Appeals reported at 22 Wn.App.2d 121, 510 P.2d 355 (April 27, 2022) (affirmed summary judgment in favor of GNP in title to easement in King County). As to Snohomish County, see Declaration of Sean Reay (Attachment 2), which presents the order granting summary judgment to GNP against Eastside Community Rail and Engle in Snohomish County, filed Jan. 26, 2023. Mr. Reay

These state determinations are now final and unappealable.

During the period ECR was in control, ECR intentionally and unilaterally allowed expiration and termination of the O&M agreement under which GNP/ECR had a state law right to use Port/SnoCo's ties and track. Neither GNP nor ECR negotiated a substitute agreement and any rail use of the property by GNP or ECR since the termination has been without right under state law. Neither has paid a user fee imposed by SnoCo, and neither is providing insurance for their use or occupancy of the County's property for rail purposes (or any purpose), with or without permission from the County.

On behalf of ECR, the entire Freight Portion was embargoed on or about August 1, 2020. There has been no use since. Ballard Terminal Railroad Company (BTRC), which leased the line from ECR pursuant to STB authority (also revoked along with ECR's authority¹⁶), has withdrawn all rail equipment necessary to provide service. Neither ECR nor GNP had (or have) any relevant equipment.

On March 18, 2022, GNP filed a two-year out-of-service abandonment proceeding pursuant to 49 C.F.R. 1152.29 for the Freight Portion in King

explains at p.2 para 7 that the appeal period has expired and there were no appeals so the "order is final and not subject to further reconsideration or appeal." See also Snohomish County's Response to Communications, filed in F.D. 35692, F.D. 35730, and AB 1316X on Feb. 27, 2023.

¹⁶ See note 14 supra.

County, namely the segment from MP 26.38 (Snohomish/King County line) to end of line at MP 23.80 at City of Woodinville.¹⁷ GNP and Woodinville made clear that they would railbank this portion of the line. This Board nonetheless suspended all action in that proceeding pending state court proceedings to resolve a title dispute between ECR and GNP. See GNP RLY, Inc. – Ab. Ex. – in King County, AB 1316X, served Sept. 14, 2022. But the state court proceedings are all now concluded and final, with the relevant courts determining that ECR has no interest in the easement in King County or Snohomish County.¹⁸ Since no party sought a stay and since the grounds articulated by STB for any stay no longer exist, the stay will be lifted.

Snohomish County, however, notes that STB erroneously claims that the northern endpoint of the abandonment (*i.e.*, the Snohomish/King County line) is MP 26.58. On September 29, 2022, Snohomish County moved in AB 1316X that STB correct its decisions in this regard, for the actual County line is at MP 26.38. Snohomish County’s motion is unopposed. STB has not yet made the correction, but in light of federal rail policy stated

¹⁷ There was some confusion in the early pleadings in AB 1316 and in STB’s decisions about whether MP 26.58 or MP 26.38 is the Snohomish/King County Line. Both GNP/Woodinville and Snohomish County have clarified that the County Line is MP 26.38 to the nearest hundredth of a mile.

¹⁸ See note 15 supra.

in 49 U.S.C. 10101(15), the agency will presumably now expeditiously do so since the correction is non-controversial, factually necessary and arises from an error by the agency.

Under STB’s “stranded segment” doctrine, the agency will not knowingly authorize abandonment of a segment of line if that strands another segment of line. This doctrine was recently extended to apply to stranding of railbanked segments of line.¹⁹

The stranded segment doctrine does not preclude this proceeding, and certainly does not preclude this petition for waiver. It does not preclude this proceeding because Snohomish County intends to railbank the subject matter of its projected adverse abandonment proceeding (MP 38.25 to 26.38) in full accord with the railbanking covenant set forth in the BNSF to Port deed. While MP 26.38 to MP 23.80 (in Woodinville) is still nominally active rail, GNP RLY has already filed an abandonment proceeding for that segment. Since STB dismisses adverse abandonments for segments for which a carrier files for its own abandonment authority,²⁰ Snohomish

¹⁹ See GNP RLY, Inc. – Ab. Ex. – in King County, AB 1316X, served April 11, 2022, slip at p. 1 (second para).

²⁰ E.g., City of St. Petersburg, Fla. – Adverse Abandonment – CSX Transportation, AB 1289, served Jan. 3, 2020 (dismissing petition for waivers for adverse abandonment as moot in light of 49 C.F.R. 1152.50 abandonment authority subsequently sought by actual carrier).

County has no need for extending its adverse abandonment application to cover that segment. The stranded segment doctrine is inapplicable here, because Snohomish County is not stranding any segment for which further abandonment authorization proceedings may be required. Moreover, by the time STB acts on this petition for waiver, it should have authorized abandonment of the MP 26.38 to MP 23.80 segment, per its regulations. In sum, since GNP has sought abandonment and railbanking authority in AB 1316X for MP 26.38 to MP 23.80, no adverse abandonment proceeding need be filed for that portion of the line. In addition, the adverse abandonment proceeding anticipated by Snohomish County will not result in a stranded segment anywhere south of MP 26.38 because Snohomish County intends to railbank the line and GNP RLY is obligated by the covenant in the BNSF to Port deed to cooperate.

Because GNP is contractually committed to railbank the Freight Portion in King County with Woodinville, there is no real possibility of GNP withdrawing its notice of exemption in AB 1316X. If for some lawful reason STB nonetheless denies GNP's uncontested notice of exemption to abandon and railbank the line south of MP 26.38, Snohomish County will withdraw this petition for waiver and substitute a petition covering the entire line. There is therefore no reason to delay proceeding with this petition for

waiver. By the time it is granted, the agency should have authorized railbanking in AB 1316X.

Snohomish County is prepared to show in a projected adverse abandonment proceeding that rail use of a portion of the MP 38.25 to MP 26.38 segment ceased over a decade ago, and over the remainder of the line over 2-1/2 years ago; that the cost to rehabilitate the line is prohibitive in the sense of being uneconomic given either historical or reasonably expected demand; that rail operation would require hefty subsidies; and that the County is not willing to support any further rail subsidies. The County is also prepared to show that GNP's state law rights to use the track and tie have expired and that GNP is purporting to occupy the track and tie without any agreement or property right at state law. Snohomish County is further prepared to show that it purchased the line with funds anticipating at least some park uses (e.g., rail with trail, or -- if rail use ceased -- then trail and railbanking), and wishes now to develop a trail (an extension of the Centennial Trail from City of Snohomish to Woodinville) on its property. GNP, notwithstanding failure to use the line for rail purposes, has not sought its own abandonment authority for Snohomish County's share of the Freight Portion, nor has GNP cooperated in siting a trail with rail on the property. GNP's inaction (*e.g.*, failure to include the Snohomish County portion in AB

1316X, failure to address rail with trail) amounts to holding the property hostage, presumably for payment of hold-up or nuisance value purposes rather than *bona fide* rail or property purposes. Adverse abandonment is not only the appropriate remedy in such circumstances, but also the remedy provided in the relevant purchase and sale documents and deeds between BNSF, the Port and King County implementing the transactions authorized by STB.

In particular, the applicable agreement between BNSF, the Port, and King County -- which is binding on their successors (including GNP and Snohomish County) -- specifically provides for invocation of the adverse abandonment remedy by the Port and its successors if faced by cessation of service by BNSF or its successors. That covenant requires BNSF or its successors (GNP, ECR, or any other claimant) to cooperate in the adverse abandonment proceeding and in railbanking the property, if requested. In short, GNP is now legally obligated to cooperate in this proceeding and to railbank the property upon request by Snohomish County. In other words, GNP violates the covenant to the extent it holds the line hostage. The County appropriately seeks waivers so it may file an adverse abandonment application to permit the County as underlying landowner the use it desires for the property, on which all rail use has ceased and as provided in the

railbanking covenant.

WAIVER and EXEMPTION REQUESTS

The Board’s regulations require that abandonment and discontinuance applications conform to the requirements set forth at 49 C.F.R. Part 1152, Subpart C. However, the Board has routinely “waive[d] inapplicable and unneeded regulations” in adverse discontinuance cases and in adverse abandonment cases, and has routinely “grant[ed] exemptions appropriate from statutory provisions” in these cases.²¹ Snohomish County’s waiver and exemption requests conform to those previously granted by the Board.

A. Waiver Requests

1. System Diagram Map (“SDM”) Rules. SnoCo requests the Board waive the following SDM-related rules: 49 C.F.R. 1152.10-14,²² 49 C.F.R. 1152.22(a)(5),²³

²¹ E.g., Town of N. Judson, Ind. – Adverse Discontinuance of Serv. – in Laporte, Porter & Starke Counties, Ind., AB 1232, slip op. at 2, served July 27, 2015; Lake County, OR – Adverse Disc. – Modoc Railway, et al., AB 1035, served June 15, 2009.

²² These rules relate to filing, amending, and providing public notice of, a carrier’s SDM, and establish a two-month waiting period between the filing of an amendment to the SDM and the filing of an adverse discontinuance application involving the line subject to the SDM amendment.

²³ This rule requires that applications for discontinuance include an attestation referencing the inclusion of the involved rail line on the carrier’s SDM or narrative, the date on which the line was first listed for discontinuance, and a copy of the line description that accompanies the carrier’s SDM.

and 49 C.F.R. 1152.24(e)(1).²⁴ These rules are intended to provide the public with advance notice in cases where service over the involved line is being discontinued. The waiver is appropriate because, as in other adverse abandonment contexts generally, SnoCo has no access to GNP's SDM. E.g., Colorado Landowners, supra, AB 857 (Sub- no. 2), slip at 3 (and cases there cited). Moreover, the line in question was embargoed in 2020, and has not been operated since, so there is no disruption of service and literally no actual service for over 2-1/2 years. See Lake County, OR, supra, AB 1035, slip. op. at 3.

2. Line Attributes Rules. SnoCo requests waivers of 49 C.F.R. 1152.22(b), (c), (d), and (e). These regulations require an applicant seeking abandonment authority to include in its application information regarding the condition of the involved rail properties, service performed, attributable revenue and cost data, and rural and community impact. That information is not typically available to adverse abandonment applicants, and has not been required of them. See, e.g., Colorado Landowners, slip at 5 (and decisions cited). In addition, this proceeding in some ways is analogous to a termination of operating authority – GNP's immediate predecessor (ECR) terminated the O&M Agreement authorizing the easement holder to use the County's track and ties. Neither GNP nor ECR has entered into a

²⁴ This rule provides for rejection of applications that apply to lines which are not published on the carrier's SDM.

replacement lease or agreement. SnoCo as owner of the underlying asset is now seeking to terminate GNP's operating authority, and information on physical condition is not germane in the circumstances. Lake County, OR, supra, AB 1035, slip op. at 4. In addition, the information sought in section 1152.22(b)-(e) is not relevant for a line that has been subject to a prior embargo and lack of service for over 2-1/2 years. That is, there has been no service provided, and thus no rail revenue, and no rural or community impact where there has been no service.

3. Filing, Notice and Posting Requirements. SnoCo requests that the Board partially waive the following filing, notice and posting requirements:

(a) SnoCo seeks partial waiver of certain filing and notice requirements of 49 C.F.R. 1152.20(a)(1) and (2) as follows:

(i) SnoCo seeks waiver of the requirement that it serve its Notice of Intent on the Board by certified letter as set forth in 49 C.F.R. 1150.20(a)(1). The Board's procedures since the covid epidemic have adapted to electronic filing of pleadings and notices. E-filing of the Notice of Intent should be sufficient (and more expeditious).

(ii) SnoCo seeks waiver of 49 C.F.R. 1152.20(a)(2)(i) that requires notice of intent to abandon be sent to significant users of the line on the ground that no shippers are using the line. See Colorado Landowners, slip at 3.

(iii) SnoCo seeks waiver of 49 C.F.R. 1152.20(a)(2)(x) that requires notice to the National Railroad Passenger Corporation (“Amtrak”). Amtrak does not operate on this line. See Colorado Landowners, slip at 3-4.

(iv) SnoCo seeks waiver of 49 C.F.R. 1152.20(a)(2)(xii), requiring service on all duly qualified labor organizations representing employees of the affected rail line. There are no such labor organizations, for there are no employees. See Colorado Landowners, slip at 4.

(b) SnoCo seeks a waiver of certain filing and posting requirements in 49 C.F.R. 1152.20(a)(3). These pertain to posting its notice of intent at each agency station and terminal on the line, or through which business for the line is conducted. There are no agency stations on the line at which notice of intent could be posted, and in any event, this line was embargoed in 2020, and since this time there has been no business conducted on or for the line out of any station or terminal. See Colorado Landowners, slip at 4. In any event, posting requirements are designed for instances in which carriers are seeking voluntary discontinuance/abandonment, which is not the case here. See South Dakota, supra, AB 1253, slip at 4.

(c) SnoCo seeks a partial waiver of certain posting requirements in 49 C.F.R. 1152.24(c) relating to posting at agency stations and terminals for the same reasons set forth immediately above. Accord, South Dakota, supra.

(d) SnoCo seeks a limited waiver of the newspaper publication rule set forth at 49 C.F.R. 1152.20(a)(4) and 49 C.F.R. 1152.21. Specifically, SnoCo requests that it be permitted to utilize the notice of intent set forth in Attachment 3 in its newspaper notices and other notices. The Attachment 3 notice uses the form and substance of the notice of intent found at 49 C.F.R. 1152.21 but removes material not necessary for this proceeding. See South Dakota, supra, AB 1253, slip op. at 4-5.

(e) SnoCo seeks a limited waiver to modify the draft Federal Register notice form, set forth at 49 C.F.R. 1152.22(i), that an applicant must submit to the Board along with its adverse discontinuance application. Specifically, SnoCo requests that it be permitted to employ the draft Federal Register notice form set forth in Attachment 4. The notice in Attachment 4 uses the form and substance of the draft Federal Register notice set forth in section 1152.22(i) but removes material not necessary for this proceeding. Accord, South Dakota, supra, slip op. at 5.

(f) SnoCo seeks a waiver of the requirement that the notices it provides pursuant to 49 C.F.R. 1152.21 and 1152.22(i) contain text referring to mandatory imposition of labor protective conditions. “When issuing abandonment or discontinuance authority for rail lines that constitute a carrier’s entire system, the Board does not generally impose protection.” South Dakota, supra, AB 1253, slip op. at 5, citing cases. Given GNP’s uncontested 1152.50 abandonment proceeding

for MP 26.38 to MP 23.8, the line at issue here is the entirety of GNP's system. Moreover, due to the 2020 embargo, GNP in effect has never operated the line and has no rail employees.

4. Offers of Financial Assistance. SnoCo requests a waiver of the regulations set forth at 49 C.F.R. 1152.27. These regulations relate to OFA's to continue rail service. The Board customarily waives the OFA remedy in the context of adverse abandonments because an OFA basically nullifies, and is inconsistent with, the rationale for granting an adverse abandonment in the first place. E.g., Colorado Landowners, supra, slip at 7. In addition, this line was embargoed in 2020 and has had no rail operations since that time by GNP or any other carrier. Moreover, GNP lacks any agreement for use of the County's track and ties (as previously noted ECR/Engle terminated the O&M Agreement and ECR and GNP never attempted to negotiate a replacement), and the Board generally does not authorize operations by an acquiring carrier that lacks sufficient state law property interests or contractual arrangements to operate a railroad. Accord, South Dakota, supra, AB 1253, slip at 6.

B. Exemption Requests

SnoCo seeks exemption from the following statutory provisions corresponding to Board regulations cited above: 49 U.S.C. 10903(c)(2) (SDMs); 49 U.S.C.

10903(a)(3)(B) (posting); 49 U.S.C. 10903(a)(3)(D) (significant users), and 49 U.S.C. 10904 (OFA's).

The Board should grant these related exemptions because full compliance with Subtitle IV of Title 49 is not necessary here to carry out the rail transportation policy ("RTP") set forth in 49 U.S.C. 10101. Instead, granting the requested exemptions would provide SnoCo with a reasonable opportunity to demonstrate that there is no overriding public need for GNP's continued holding of common carrier operating rights over SnoCo's property. Accord, South Dakota, supra, AB 1253, slip at 7; North Judson, supra, AB 1232, slip op. at 6. "Exemptions would promote the RTP by eliminating unnecessary procedures and thus expediting the Board's decision in this case (10101(2)) and foster sound economic conditions in transportation (10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which ...exemption [is sought] is not necessary to protect shippers from an abuse of market power as [GNP] is not providing service to any shippers on the line [and there has been no service for at least 2-1/2 years]." South Dakota, supra, slip at 7. See also Colorado Landowners, supra, slip at 3 [49 U.S.C. 10903(c)(2) and 10903(a)(3)(D)], 4 [49 U.S.C. 10903(a)(3)(B)], and 7 [49 U.S.C. 10904].

Conclusion

For the reasons stated, the requested waivers and exemptions should be granted.

Respectfully submitted,
/s/ Charles H. Montange
Charles H. Montange
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206-546-1936
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Attorney for Snohomish County

Dated: 31 March 2023

Attachment 1: Map

Attachment 2: Declaration of Sean Reay, Dep. Pros. Atty, Civil Div.,
Snohomish County Prosecuting Attorney's Office

Attachment 3: Requested form for Notice of Intent

Attachment 4: Requested form for Federal Register notice

Verification

I, Thomas Stowe, am the Lead Review Appraiser for the Snohomish County Department of Public Works. I have extensively examined relevant land title documents, judicial decisions, and agency decisions with respect to the rail line between approximate MP 38.25 near City of Snohomish and the Snohomish/King County line at approximate MP 23.38 (accurate to two decimal points) and have previously supplied Verified Statements in support of Snohomish County filings in related proceedings (e.g., FD 35692) since 2018. I verify under penalties of perjury that the statements in the foregoing Petition for Waiver are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to supply this Verification for filing.

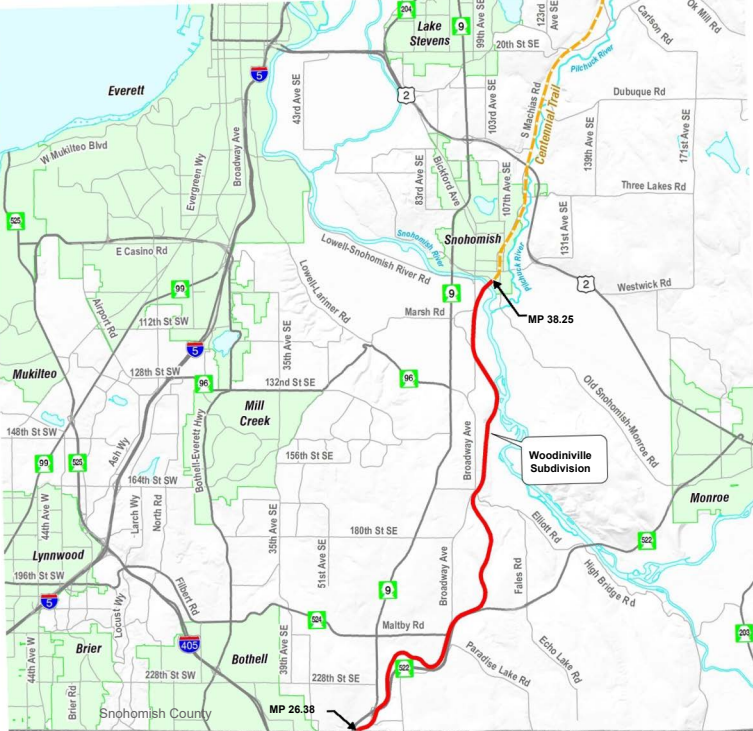
A handwritten signature in black ink that reads "T.P. Stowe". The signature is written in a cursive style with a large, stylized "T" and "P".

Thomas P. Stowe

3/31/2023

Attachment 1

Map



King County

Attachment 2

Declaration of Sean Reay,
Deputy Prosecuting Attorney, Civil Division
Snohomish County Prosecuting Attorney's Office

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BEFORE THE SURFACE TRANSPORTATION BOARD

SNOHOMISH COUNTY --

ADVERSE ABANDONMENT APPL. --
GNP RLY INC
in SNOHOMISH COUNTY, WA

No. AB 1331

DECLARATION OF SEAN REAY
REGARDING STATE SUPERIOR
COURT LAWSUIT

13 I, SEAN REAY, declare under penalty of perjury that the following is true and
14 correct:

15 1. I am over the age of eighteen years; a citizen of the United States; and
16 otherwise competent to testify. This declaration is based upon my personal knowledge,
17 except where otherwise indicated.

18 2. I am a Deputy Prosecuting Attorney in the Civil Division of the Snohomish
19 County Prosecuting Attorney's Office. I am an attorney of record for Snohomish County
20 (also "County") in the case *GNP RLY, INC., et al. v. Snohomish County, et al.*, Snohomish
21 County Superior Court cause no. 21-2-03931-31, a lawsuit filed by Plaintiffs GNP and
22 Northwest Signal Maintenance in Washington State.
23

24 3. On January 26, 2023, the Snohomish County Superior Court granted GNP's
25 motion for summary judgment against defendants Douglas Engle, Eastside Community Rail,
26

1 and other associated defendants aligned in interest with Mr. Engle and ECR. The court's
2 granting of the motion determined that Mr. Engle, ECR, and associated defendants had no
3 interest in the freight rail easement at issue in the quiet title suit, and dismissed Mr. Engle,
4 ECR, and associated defendants from the suit. A true and correct copy of the order granting
5 GNP's motion for summary judgment is attached as Exhibit A.

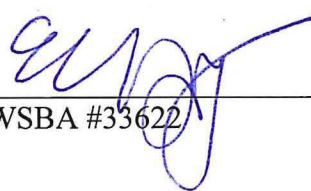
6 4. Although litigation regarding claims between the County and the plaintiffs
7 remains pending in Snohomish County Superior Court, this does not impact the finality of
8 summary judgment and dismissal against Douglas Engle, Eastside Community Rail, and
9 associated defendants aligned with them, as explained below.
10

11 5. First, under Washington State Court Civil Rule 59, Mr. Engle and ECR (and
12 associated defendants) had 10 days within which to seek the reconsideration of the court's
13 order granting summary judgment. I was not served with a motion seeking reconsideration
14 of the order. I also have reviewed the superior court docket and determined no such motion
15 was filed.
16

17 6. Under Washington State Rule of Appellate Procedure 5.2, Mr. Engle and ECR
18 (and associated defendants) had 30 days within which to appeal the court's order granting
19 summary judgment. I was not served with a notice of appeal regarding the order. I also have
20 reviewed the superior court docket and determined no such notice of appeal was filed. I have
21 also searched case information available electronically via the Washington State Courts
22 "Washington Acords Appellate Court System" and have not located an appeal.
23

24 7. In view of the above, under the applicable Washington State Court Rules, the
25 order attached as Exhibit A is final and not subject to further reconsideration or appeal.
26

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3 Executed in Everett, WA, this 29 th day of March, 2023.
4

5 By: 
6

7 Sean Reay, WSBA #33622
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EXHIBIT A

FILED

2023 JAN 26 PM 4:46

21-2-03931-31
ORGSJ 81
Order Granting Summary Judgment
13847841



HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

GNP'RLY, INC., et al,

Plaintiff/Petitioner,

vs.

SNOHOMISH COUNTY, et al.,

Defendant/Respondent.

No. 21-2-03931-31

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF GNP'S MOTION FOR
SUMMARY JUDGMENT RE:
NAMED DEFENDANT'S EXCEPT
SNOHOMISH COUNTY

This matter came before the Court on Plaintiff GNP's Motion for Summary Judgment adjudging that Defendants Douglas Engle, Eastside Community Rail, LLC, Earl Engle, Joanne Skievaski, Telegraph Hill Investments, LLC, and Ballard Terminal Railroad Company, LLC, do not have any legal interest in or title to the exclusive freight rail easement that is subject of this suit.

The Court considered the pleadings filed in this action, including the following:

1. Plaintiff's Motion for Summary Judgment;
2. Declaration of David Rossmiller in Support of Plaintiff's Motion for Summary Judgment (including attached exhibits);
3. Declaration of Joanne Skievaski;
4. Snohomish County's Response to Plaintiff's Motion for Summary Judgment;

5. Declaration of Sean Reay in Support of Snohomish County's Response to Plaintiff's Motion for Summary Judgment (including attached exhibits);

~~6. Response of Douglas Engle, ECR, Earle Engle, Joann Skievaski, Telegraph Hill Investments, or Ballard Terminal Rail Corporation, if any;~~
AND Declaration of Sean Reay to correct errors

6. Reply in Support of Plaintiff's Motion for Summary Judgment;

7. Declaration of David Rossmiller in support of Reply

8. Defendant Douglas Engle, ECR, Earle Engle, Joann Skievaski, Telegraph Hill Investments
Based on the pleadings and the exhibits provided therewith, the oral arguments of

counsel for Plaintiffs and the County, and the papers on record in this cause, the Court finds:

1. The Court has previously ordered that it is taken as established for purposes of this action that defendants Eastside Community Rail, LLC ("ECR") and Douglas Engle each possesses no legal interest in the exclusive freight rail easement (also "Easement") and are barred from presenting contrary evidence. Orders and rulings of the federal Surface Transportation Board ("STB") have similarly stripped ECR and Douglas Engle of legal authorization to own or operate under the Easement. Each of the above is an independently sufficient basis for summary judgment. There is no genuine issue of material fact as to ECR's and Douglas Engle's lack of legal interest in the Easement.

2. The Court has previously ordered that defendant Earl Engle is in default. The same orders and rulings of the STB stripping ECR and Douglas Engle of legal authorization to own or operate under the Easement apply to Earl Engle. Each of the above is an independently sufficient basis for summary judgment. There is no genuine issue of material fact as to his lack of legal interest in the Easement.

Ⓢ Because of the Plaintiff and County's agreement to enter this order, the Court did not hear oral argument.

*Investments
OR
Ballard
Terminal
Rail Corp.
Did NOT
file any
response
opposition
to plaintiff's
motion.*

1 3. The Court has previously ordered that Defendant Joanne Skievaski is in
2 default. Further, Joanne Skievaski has executed a declaration disclaiming any interest in
3 the Easement. The same orders and rulings of the STB stripping ECR and Douglas Engle
4 of legal authorization to own or operate under the Easement apply to Joanne Skievaski.
5 Each of the above is an independently sufficient basis for summary judgment. There is no
6 genuine issue of material fact as to her lack of legal interest in the Easement.
7

8 4. The Court has previously ordered that Defendant Telegraph Hill
9 Investments, LLC is in default. The same orders and rulings of the STB stripping ECR and
10 Douglas Engle of legal authorization to own or operate under the Easement apply to
11 Telegraph Hill Investments, LLC. Each of the above is an independently sufficient basis
12 for summary judgment. There is no genuine issue of material fact as to Telegraph Hill
13 Investments, LLC's lack of legal interest in the Easement.
14

15 5. Ballard Terminal Railroad Company, LLC has executed a declaration
16 disclaiming any interest in the Easement. The same orders and rulings of the STB stripping
17 ECR and Douglas Engle of legal authorization to own or operate under the Easement apply
18 to Ballard Terminal Rail Company (as explicitly recognized in a separate ruling of the STB
19 regarding BTRC). Each of the above is an independently sufficient basis for summary
20 judgment. There is no genuine issue of material fact as to their lack of legal interest in the
21 Easement.
22

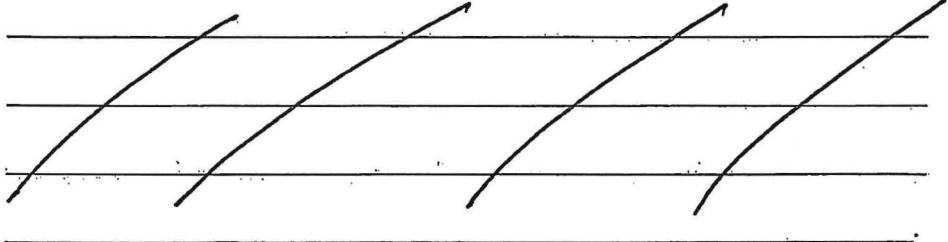
23 6. That judgment should be entered against ECR and Douglas Engle in favor
24 of GNP in the amount of at least \$86,000.00 reflecting GNP's actual reasonable attorney's
25 fees and costs incurred in relation to its successful motion to compel discovery responses,
26

1 and in relation to its successful motion for contempt order and the instant summary
2 judgment motion.

3 7. Plaintiff GNP's Motion seeks no relief as to defendant and counter-claimant
4 plaintiff Snohomish County, and the Court does not make any finding regarding any
5 interest in the exclusive freight rail easement as between the County and Plaintiffs, such
6 claims and interests as between Plaintiffs and the County remaining to be adjudicated;
7

8 Based upon the above findings, IT IS HEREBY ORDERED:

- 9 1. The Court grants summary judgment pursuant to CR 56 that
10 defendants Douglas Engle; Eastside Community Rail, LLC; Telegraph Hill
11 Investments, LLC; Ballard Terminal Railroad Company, LLC; Joanne
12 Skievaski; and Earl Engle do not own or otherwise possess any legal interest in
13 the exclusive freight rail easement that is subject of this suit.
14
15 2. The Court does not make any determination with respect to the rights in the
16 Easement as to and between Plaintiffs and Snohomish County.
17
18 3. Judgment is entered against ECR and Douglas Engle in favor of GNP in the
19 amount of at least \$86,000.00.

20 4. 

1 DATED this 26th day of January, 2023.

2
3 
4 THE HON. KAREN D. MOORE

5
6 PRESENTED BY:

7
8 By: _____
9 Sean D. Reay, WSBA #33622
10 Deputy Prosecuting Attorney
11 Attorney for Defendant Snohomish County

12 By: _____
13 Elizabeth Hebel, WSBA #56708
14 Attorney for Plaintiff GNP
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Attachment 3

Requested Form for Notice of Intent

Proposed Notice of Intent

STB Docket No. AB 1331

Snohomish County, Washington (a political subdivision of the State of Washington) – Adverse Abandonment of Acquisition and Operation Authority – GNP RLY, Inc., in Snohomish County, WA

Snohomish County (“Applicant”), a political subdivision of the State of Washington, gives notice that on or about [to be supplied], 2023, it intends to file with the Surface Transportation Board (“STB” or “Board”), Washington, D.C., 20423, an Application for Adverse Abandonment of a line of railroad that extends from Milepost (MP) 38.25 at City of Snohomish to MP 26.38 (Snohomish/King County line), which traverses through United States Postal ZIP Codes (ZIP Codes) 98296, 98072, and 98290, a total distance of approximately 11.9 miles, in Snohomish County, WA (hereinafter “Line”). There are no stations on the Line.

The reason for the proposed abandonment is to obtain a determination that public convenience and necessity require and permit abandonment of the federal interest/common carrier obligation in the Line. The Port of Seattle originally acquired all of the interests of BNSF Railway in the Line, inclusive of track and ties, except for BNSF’s retained exclusive freight rail easement. The Port subsequently conveyed its interests to Applicant. BNSF conveyed its exclusive freight rail easement to GNP RLY, Inc. The easement is subject to a covenant running with the land that requires GNP (or any other successor to BNSF) to

cooperate in an adverse abandonment proceeding brought by the Port (or any successor to the Port, such as Applicant) and also to agree to interim trail use and railbanking upon request. Rail use ceased on this Line over 2-1/2 years ago. There is no reasonable prospect for resumption of rail use in the foreseeable future. Applicant as successor to the Port owns underlying real estate interests, and track and ties, and wishes access to its property to implement trail use and other compatible public uses on its property.

The line may contain federally granted rights-of-way. Any documentation in Applicant's possession will be made available promptly to those requesting it. The Line constitutes GNP's entire remaining rail system. Therefore, as discussed in the Board's [to be supplied] decision, the Board will not impose labor protective conditions in this proceeding if it grants Applicant's adverse abandonment application in this proceeding. Applicant also states that GNP has no railroad employees.

The application will include Applicant's entire case for abandonment. The application, when filed, can be viewed on the Board's webpage, www.stb.gov, or a copy can be secured from Applicant's counsel, whose name and address appear below. Any interested person, after the application is filed on or about [to be supplied], 2023, may file with the STB written comments concerning the proposed abandonment or protests to it. These filings are due 45 days from the date of filing

of the application. All interested persons should be aware that following any abandonment of rail service, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (49 C.F.R. 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (49 C.F.R. 1152.29 of the Board's rules) must be filed within 45 days after the application is filed.

Persons who may oppose the adverse abandonment but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the following: (a) Protestant's name, address and business, (2) A statement describing protestant's interest in the proceeding including: (i) A description of protestant's use of the Line; (ii) If protestant does not use the Line, information concerning the group or public interest it represents; and (iii) If protestant's interest is limited to retention of service over a portion of the Line, a description of the portion of the Line subject to protestant's interest (with milepost designations if available) and evidence showing that the applicant can operate the portion of the Line profitably,

including an appropriate return on its investment for those operations. (3) Specific reasons why protestant opposes the application including information regarding protestant's reliance on the involved service [this information must be supported by affidavits of persons with personal knowledge of the fact(s)]. (4) Any rebuttal of material submitted by Applicant.

In addition, a commenting party or a protestant may provide a statement of position and evidence regarding:

- (i) Environmental impact;
- (ii) Impact on rural and community development;
- (iii) Suitability of the property for other public purposes pursuant to 49 U.S.C. 10905; and
- (iv) Prospective use of the right-of-way for interim trail use and railbanking under 16 U.S.C. 1247(d) and 49 C.F.R. 1152.29.

Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed abandonment should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to 49 C.F.R. 1152.25.

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB-1331, and must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001, no later than 45 days after the date Applicant intends to file its application. Interested persons may file a written comment or protest with the Board to become a party to this abandonment proceeding. A copy of each written comment or protest must be served on the representative of the Applicant (Charles H. Montange, Law Offices of Charles H. Montange, 426 NW 162nd St., Seattle, WA 98177, (206) 546-1936, email: c.montange@frontier.com.) Every comment or protest shall be filed with the Board with a certificate of service. Every comment or protest shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the abandonment proceeding. 49 C.F.R. 1104.12(a).

Pursuant to STB's order in this proceeding served [to be supplied], 2023, this Board has exempted this proceeding from the provisions of 49 U.S.C. 10904 (OFA's).

Persons seeking further information concerning discontinuance procedures may contact the Surface Transportation Board or refer to the full abandonment and discontinuance regulations at 49 C.F.R. Part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Office of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Office of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

Attachment 4

Requested Form for Federal Register Notice

Proposed Federal Register Notice

STB Docket No. AB 1331

Snohomish County, Washington (a political subdivision of the State of Washington) – Adverse Abandonment of Acquisition and Operation Authority – GNP RLY, Inc., in Snohomish County, WA

On [to be supplied], Snohomish County (“Applicant”), a political subdivision of the State of Washington, filed an application under 49 U.S.C. 10903 asking the Surface Transportation Board (“Board”) to authorize the third-party, or “adverse,” abandonment of acquisition and operating authority held by GNP RLY, Inc.

(“GNP”), over approximately 11.9 miles of rail line extending from Milepost 38.25 at City of Snohomish to MP 26.38 at the Snohomish County/King County line (hereinafter the “Line”). The Line is situated in Snohomish County, Washington, and traverses U.S. Postal Zip Codes 98296, 98072, and 98290.

The line may contain federally granted rights-of-way. Any documentation in Applicant’s possession will be made available promptly to those requesting it. The application can be viewed on the Board’s webpage, www.stb.gov, or a copy can be obtained from Applicant’s counsel, whose name and address appear below. The Applicant’s entire case for abandonment (case in chief) was filed with the application.

The Line constitutes GNP’s entire remaining rail system. Therefore, as discussed in the Board’s [to be supplied] decision, the Board will not impose labor

protective conditions in this proceeding if it grants Applicant's adverse abandonment application in this proceeding. Applicant also states that GNP has no railroad employees.

In a decision served in this proceeding on [to be supplied], the Board granted a petition filed by Applicant for exemptions from several statutory provisions and for waivers of certain Board regulations governing rail line abandonments. In particular, the Board has exempted this proceeding from the offer of financial assistance ("OFA") requirements at 49 U.S.C. 10904 and waived its OFA regulations at 49 C.F.R. 1152.27.

Any interested person may file written comments concerning the proposed adverse abandonment or protests (including protestant's entire opposition case) within 45 days after the application is filed. All interested persons should be aware that following any abandonment of rail service, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (49 C.F.R. 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (49 C.F.R. 1152.29 of the Board's rules) must be filed within 45 days after the application is filed. Persons who may oppose the adverse abandonment but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence should file comments. Persons interested

only in seeking public use or trail use conditions should also file comments.

Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest.

In addition, a commenting party or a protestant may provide:

- (i) A request for a public use condition under 49 U.S.C. 10905; and
- (ii) A statement pertaining to prospective use of the right-of-way for interim trail use and railbanking under 16 U.S.C. 1247(d) and 49 C.F.R. 1152.29.

Parties seeking information concerning filing of protests should refer to 49 C.F.R. 1152.25.

Written comments and protests, including all requests for public use and trail use conditions, must indicate the proceeding designation STB No. AB- 1331 and should be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001, no later than 45 days after the date Applicant files its application. Interested persons may file a written comment or protest with the Board to become a party to this abandonment proceeding. A copy of each written comment or protest must be served on the representative of the Applicant (Charles H. Montange, Law Offices of Charles H. Montange, 426 NW 162nd St., Seattle, WA 98177, (206) 546-1936, email: c.montange@frontier.com). Every comment or protest shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152,

every document filed with the Board must be served on all parties to the abandonment proceeding. 49 C.F.R. 1104.12(a).

Persons seeking further information concerning discontinuance procedures may contact the Surface Transportation Board or refer to the full discontinuance regulations at 49 C.F.R. Part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Office of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Office of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.