

SERVICE DATE – MAY 23, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1331

SNOHOMISH COUNTY—ADVERSE ABANDONMENT—
GNP RLY, INC., IN SNOHOMISH COUNTY, WASH.

Digest:¹ This decision grants exemptions from certain statutory provisions and waives certain regulatory requirements that normally apply when filing an application for abandonment authority but are either unnecessary here or would be difficult or impossible for Snohomish County to comply with should it file an application for adverse abandonment.

Decided: May 22, 2023

By petition filed on March 31, 2023, and corrected on April 3, 2023, Snohomish County (the County) seeks exemptions from certain statutory provisions and waivers of certain regulatory requirements regarding the filing of a third-party, or “adverse,” application for abandonment of an approximately 11.9-mile segment of a freight rail easement owned by GNP RLY, Inc. (GNP), and located between milepost 26.38 and milepost 38.25, in Snohomish County, Wash. (the Line or the Snohomish Segment of the Easement). The petition is unopposed. As discussed below, the Board will partially grant the County’s petition.

BACKGROUND

According to the County, in a series of transactions recorded on December 21, 2009, under the Board’s line of precedent in Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991), BNSF Railway Company sold the physical assets of a rail line between milepost 23.8 in Woodinville, Wash., and milepost 38.25 in Snohomish, Wash., to the Port of Seattle (the Port); GNP acquired a permanent freight rail easement for the entirety of that rail line (the Easement);² and GNP entered into an operations and maintenance agreement with the Port. (See Pet. 4 & nn.6-8); see

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The County states that the Easement is subject to a covenant, binding on all successors, requiring the holder of the Easement, upon cessation of rail service, either to seek voluntary abandonment authority and, upon request, to cooperate in railbanking the rail line pursuant to the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), or to cooperate in an adverse abandonment proceeding and, upon request, railbanking of the rail line. (Pet. 4-5.)

also Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served Oct. 27, 2008). According to the County, it later purchased the physical assets of the segment of the Snohomish Segment from the Port. (Pet. 5-6); see also Snohomish Cnty., Wash.—Pet. for Declaratory Order, FD 35830 (STB served Mar. 5, 2015).³

As explained further in a series of decisions served in Eastside Community Rail, LLC—Acquisition & Operation Exemption—GNP RLY, Inc., Docket Nos. FD 35692 et al.,⁴ in 2012, Eastside Community Rail, LLC (ECR), in Docket No. FD 35692, sought and received authority, via the Board’s expedited notice-of-exemption process, to acquire the Easement from GNP in a bankruptcy proceeding. In 2013, Ballard Terminal Railroad Co., L.L.C. (Ballard), in Docket No. FD 35730, sought and received authority, also via the Board’s notice-of-exemption process, to operate over the Easement pursuant to a lease with ECR. In 2018, the County filed a petition to revoke the exemptions as void ab initio claiming the notices contained materially false or misleading information. After the Board denied revocation, see generally 2018 Decision, FD 35692 et al., and on remand from the U.S. Court of Appeals for the District of Columbia Circuit, see Snohomish Cnty. v. STB, 954 F.3d 290 (D.C. Cir. 2020), the Board found that ECR’s verified notice was materially misleading because of the several attempts by a principal of both GNP and ECR, Douglas Engle, to transfer the Easement prior to and during bankruptcy proceedings without notifying the Board or seeking the required Board authority, 2020 Decision, FD 35692 et al., slip op. at 4-5. As a result, the Board vacated both ECR’s and Ballard’s exemptions as void ab initio. Id. at 7.

Thereafter, because it appeared that ECR and Engle had taken no action to return the Easement to GNP, the Board ordered ECR and Engle to take any action needed to constitute an effective conveyance of the Easement to GNP within 30 days. 2021 Decision, FD 35692 et al., slip op. at 5. In response to a petition seeking reconsideration of the 2021 Decision, the Board noted that two quiet title actions were pending in Washington state courts, each involving one of the Easement segments, and ruled that it would not decide the request to reopen⁵ until after the state court proceedings had been completed. 2022 Decision, FD 35692 et al., slip op. at 3-4.

³ The City of Woodinville (Woodinville) purchased the physical assets of the segment of the rail line between milepost 23.8 and milepost 26.38 in Woodinville, Wash. (the Woodinville Segment). See City of Woodinville, Wash.—Pet. for Declaratory Order, FD 35905 (STB served Oct. 7, 2015).

⁴ The Board served these decisions on December 13, 2018 (2018 Decision); May 17, 2019; December 22, 2020 (2020 Decision); September 29, 2021 (2021 Decision); March 8, 2022 (2022 Decision); and April 24, 2023 (2023 Decision).

⁵ As the petition seeking reconsideration was filed more than 20 days after the order it challenged, the Board treated it as a petition to reopen. See 2022 Decision, FD 35692 et al., slip op. at 2 n.4 (citing 49 C.F.R. §§ 1115.3(e), 1115.4).

In the recent 2023 Decision,⁶ the Board indicated that the Washington state courts have ruled that neither ECR nor Engle has any legal interest in either the Woodinville Segment of the Easement or the Snohomish Segment of the Easement and denied ECR and Engle's pending petition to reopen. 2023 Decision, FD 35692 et al., slip op. at 7. In the same decision, the Board removed from abeyance a notice of exemption in Docket No. AB 1316X, in which GNP sought authority to abandon the Woodinville Segment of the Easement, so that GNP and Woodinville could railbank that segment. Id. at 8-9.⁷

According to the County, it intends to file an application for adverse abandonment of the Snohomish Segment of the Easement so that segment can also be railbanked. (Pet. 12.) The County argues that GNP, by virtue of the covenant in the deed from BNSF to the Port, which created the Easement, is obligated to cooperate in an adverse abandonment proceeding and in railbanking the Snohomish Segment of the Easement. (Id.)

The Board will partially grant the County's petition for exemptions and waivers to the extent discussed below.

DISCUSSION AND CONCLUSIONS

An application to abandon a rail line is governed by 49 U.S.C. § 10903 and the Board's regulations governing abandonment applications at 49 C.F.R. part 1152 subparts B and C. In appropriate circumstances, however, such as the filing of a third-party (or "adverse") abandonment application, the Board has waived inapplicable and unneeded regulations and granted exemptions from statutory provisions upon request. See, e.g., Colo. Landowners—Adverse Aban.—Great W. Ry. of Colo. in Weld Cnty., Colo. (Colo. Landowners), AB 857 (Sub-No. 2), slip op. at 3 (STB served Feb. 11, 2022); Landowners—Adverse Aban.—Ind. Sw. Ry. in Posey & Vanderburgh Cntys., Ind. (Ind. Landowners), AB 1065 (Sub-No. 3), slip op. at 3 (STB served Apr. 7, 2021). The County requests waiver of the following regulations, and exemption from the following statutory provisions, as addressed below.

System Diagram Map. The County requests waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to the inclusion of the rail line subject to the abandonment request on the rail carrier's system diagram map (SDM) or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map. (Pet. 13-14.) The County also requests waiver of 49 C.F.R. §§ 1152.10 through 1152.14, which relate to SDM requirements, and the SDM requirements addressed in 49 C.F.R. § 1152.24(e)(1). (Id.)

The Board will grant the County's request to waive 49 C.F.R. § 1152.22(a)(5), 49 C.F.R. §§ 1152.10 through 1152.14, and the relevant portions of 49 C.F.R. § 1152.24(e)(1). Waiver of the SDM requirements is customary in adverse abandonment proceedings because the applicant

⁶ In addition to Docket Nos. FD 35692 and FD 35730, the 2023 Decision also embraced Docket No. AB 1316X.

⁷ Notice of the exemption authorizing the abandonment of the Woodinville Segment of the Easement was published in the Federal Register on April 28, 2023 (88 Fed. Reg. 26,375).

generally does not have access to the SDM. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 3; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 3. And, as explained in the exemption analysis below, the Board will exempt the County from the related requirements of 49 U.S.C. § 10903(c)(2).

Service of Notice on the Board. The County seeks waiver of 49 C.F.R. § 1152.20(a)(1),⁸ which requires service of the notice of intent on the Board by certified letter. (Pet. 15.) The Board will grant this request. See N. Coast R.R. Auth.—Adverse Discontinuance of Lease & Operating Auth.—N.W. Pac. Ry., in Humboldt, Trinity & Mendocino Cntys., Cal., AB 1313, slip op. at 4 (STB served Mar. 4, 2022).

Service of Notice on Significant Users. The County seeks waiver of the requirement under 49 C.F.R. § 1152.20(a)(2)(i) that it serve the notice of intent upon all significant users of the rail line on the ground that no shippers are using the Line. (Pet. 15.) Because the record indicates that no shippers are using the Line, the Board will grant this waiver request. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 3; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 3. Further, as explained in the exemption analysis below, the Board will exempt the County from the related requirements of 49 U.S.C. § 10903(a)(3)(D).

Service of Notice on Amtrak. The County asks for waiver of 49 C.F.R. § 1152.20(a)(2)(x), which requires that the notice of intent be served on the National Railroad Passenger Corporation (Amtrak). The County states that Amtrak does not operate on the Line. (Pet. 16.) The Board will grant this request. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 3-4; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 3.

Service of Notice on Labor Organizations. The County seeks waiver of 49 C.F.R. § 1152.20(a)(2)(xii), which requires that the notice of intent be served on the headquarters of all duly certified labor organizations that represent employees of the affected rail line. The County states that there are no such labor organizations, for there are no employees. (Pet. 16.) The Board will grant this request. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 4; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4.

Posting of Notice at Agency Stations or Terminals. The County seeks waiver of 49 C.F.R. § 1152.20(a)(3), which requires posting of the notice of intent at each agency station or terminal on the line to be abandoned. According to the County, there are no agency stations at which the notice of intent could be posted. (Pet. 16.) The Board will grant this request. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 4; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4. Further, as explained in the exemption analysis below, the Board will exempt the County from the related requirements at 49 U.S.C. § 10903(a)(3)(B).

⁸ The petition refers to 49 C.F.R. § 1150.20(a)(1) rather than 49 C.F.R. § 1152.20(a)(1). Given the context—seeking waiver of the requirement to serve the notice of intent on the Board by certified letter—the Board will interpret the petition as seeking waiver of 49 C.F.R. § 1152.20(a)(1).

Availability of Application for Public Inspection. The County seeks partial waiver of the requirements of 49 C.F.R. § 1152.24(c) as they relate to making the adverse abandonment application available for public inspection at each agency station or terminal on the line to be abandoned on the ground that there are no agency stations on the Line. (Pet. 16.) The Board will grant this request. See Minn. Commercial Ry.—Adverse Discontinuance—in Ramsey Cnty., Minn., AB 882 et al., slip op. at 3 (STB served Jan. 21, 2005).

Labor Protection Text. The County seeks waiver of the requirement that the notices it provides pursuant to 49 C.F.R. § 1152.21 and 49 C.F.R. § 1152.22(i) contain text referring to the mandatory imposition of labor protective conditions. According to the County, “[w]hen issuing abandonment or discontinuance authority for rail lines that constitute a carrier’s entire system, the Board does not generally impose labor protection.” (Pet. 17 (citing S.D.—Adverse Discontinuance of Operating Auth.—Napa-Platte Reg’l R.R. Auth., AB 1253 (STB served May 31, 2017))).) The County argues that, given GNP’s notice of exemption to abandon the Woodinville Segment of the Easement in Docket No. AB 1316X, the Line at issue in this proceeding constitutes the entirety of GNP’s remaining system. (Pet. 17-18.) In addition, the County notes that because the Line has been embargoed since 2020, GNP in effect has never operated the Line and has no rail employees. (Id. at 18.)

The Board will deny the request because the agency’s policy of not imposing labor protection in entire-system abandonments does not apply in this proceeding. The Line does not constitute GNP’s entire system, as GNP also owns the Woodinville Segment of the Easement, which, although GNP has been authorized to abandon in Docket No. AB 1316X, remains part of the interstate rail network and subject to the Board’s jurisdiction since the abandonment has not been consummated. See, e.g., Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) (consummation of abandonment terminates the agency’s jurisdiction).

Therefore, instead of the paragraph beginning with “[t]he Line constitutes GNP’s entire remaining rail system . . .,” which is included in both the proposed modified notice of intent and modified Federal Register notice, the County must include the following statement: “The interest of railroad employees, if there are any employees, will be protected by the conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).”

Notice of Intent. The County requests waiver of the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21.⁹ The County states that the modified notice provided in Attachment 3 to its petition uses the form and substance of the prescribed notice of intent but removes material not necessary for this proceeding. (Pet. 17; see also id., Attach. 3.)

⁹ The County mentions 49 C.F.R. § 1152.20(a)(4), which pertains to publishing the notice of intent in a newspaper of general circulation, with its request for waiver of the prescribed form of the notice of intent. However, because the County does not specifically request waiver of the publication rule, the Board is not granting a waiver of 49 C.F.R. § 1152.20(a)(4).

The Board has approved changes to the form of the notice of intent in other adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 4; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4. Here, with the inclusion of the labor protection language described above, the Board finds that the notice included with the County's petition as Attachment 3 is acceptable with the following modifications.

First, the docket title must be amended to "Snohomish County—Adverse Abandonment—GNP RLY, Inc., in Snohomish County, Wash." Second, the language "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 ½ years ago," and "There is no reasonable prospect for the resumption of rail service in the foreseeable future" must be amended to "The County claims 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," "The County claims rail use ceased on this Line over 2 ½ years ago," and "The County claims there is no reasonable prospect for the resumption of rail service in the foreseeable future." See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 4-5 (requiring similar modifications); Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4 (same).

Third, the language "Protests must contain that party's entire case in opposition (case in chief) including the following: (a) Protestant's name, address and business" must be amended to "Protests must contain that party's entire case in opposition (case in chief) including the following: (1) Protestant's name, address and business." Fourth, in line with the Board's above discussion of labor protection, the list of what a commenting party or protestant may provide in a statement of position and evidence must include "Recommended provisions for the protection of the interests of employees." Fifth, the language "Every comment or protest shall be filed with the Board with a certificate of service" should appear only once.

Finally, the language "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" must be amended to "Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 C.F.R. part 1152."

Accordingly, the Board will grant the County's request, subject to these changes.

Line Attributes. The County seeks waivers of 49 C.F.R. § 1152.22(b)-(e), which require that abandonment applications include information regarding the condition of properties, service provided, revenue and cost data, and the rural and community impact of abandonment. (Pet. 14-15.) Because the information required by 49 C.F.R. § 1152.22(b)-(e) is not typically available to adverse abandonment applicants, or has otherwise not been required of them, the Board will grant these waivers. See Hartwell First United Methodist Church—Adverse Aban. &

Discontinuance—Hartwell R.R., in Hart Cnty., Ga., AB 1242, slip op. at 4 (STB served Aug. 30, 2016).

Federal Register Notice. The County requests waiver of the requirements of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice and proposes to use the alternative language set forth in Attachment 4 to the petition. (Pet. 17; see also id., Attach. 4.) The County states that the modified notice provided in Attachment 4 to its petition uses the form and substance of the prescribed Federal Register notice but removes material not necessary for this proceeding. (Pet. 17.)

The Board has approved changes to the form of the Federal Register notice in other adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). See Alloy Prop. Co.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1258, slip op. at 4 (STB served Aug. 16, 2017). Here, in addition to the inclusion of the labor protection text described above, the Board finds that the notice included with the County’s petition as Attachment 4 is acceptable with the following modifications. First, as with the notice of intent, the docket title must be amended to “Snohomish County—Adverse Abandonment—GNP RLY, Inc., in Snohomish County, Wash.” Second, in line with the Board’s above discussion of labor protection, the list of the information a commenting party or protestant may provide with comments or protests must include recommended provisions for the protection of the interests of employees. Finally, the statement “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” must be amended to “Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 C.F.R. part 1152.” Accordingly, the Board will grant the County’s request, subject to these changes.

Offers of Financial Assistance. The County asks for waiver of 49 C.F.R. § 1152.27, which governs offers of financial assistance (OFAs) to continue rail service. (Pet. 18.) The Board will grant this request. The effect of granting an adverse abandonment is that the Board’s jurisdiction is withdrawn, thus permitting state, local, or other federal law to apply where there is no overriding federal interest in interstate commerce. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 7; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 5. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its jurisdiction in this adverse abandonment proceeding, it would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board regulation under the OFA provisions of § 10904. See Colo. Landowners, AB 857 (Sub-No. 2), slip op. at 7; Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 5-6. Further, as explained in the exemption analysis below, the Board will exempt the County from the related requirements at 49 U.S.C. § 10904.

Exemption Criteria. As indicated, the County seeks exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 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) (notice to shippers); and 49 U.S.C. § 10904 (OFAs). The Board will grant these exemptions

because the application of these provisions is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. These exemptions would promote the RTP by eliminating unnecessary procedures and thus would expedite regulatory decisions (§ 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 the Board is granting exemptions is not necessary to protect shippers from an abuse of market power, because, as previously stated, the record indicates that no shippers are using the Line.

Trail Use. According to the County, it plans to railbank the Line pursuant to the Trails Act once the Line is authorized for abandonment and, the County argues, GNP is obligated to cooperate with the County's efforts. (See Pet. 11-12.) The Board notes that the issue of whether interim trail use/railbanking pursuant to the Trails Act can and should apply in cases where adverse abandonment authority has been granted appears to have not been completely resolved, see Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo., AB 1014, slip op. at 5 (STB served Oct. 18, 2007) (citing Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286) (STB served Oct. 26, 2006)), but the Board has on occasion allowed a rail line to be railbanked pursuant to the Trails Act in an adverse abandonment proceeding, see, e.g., Stewartstown R.R.—Adverse Aban.—in York Cnty., Pa., AB 1071, slip op. at 18 (STB served Nov. 16, 2012), vacated, (STB served Nov. 14, 2013); Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., N.Y., AB 167 (Sub-No. 1094)A et al., slip op. at 8 (STB served June 13, 2005). Accordingly, to the extent the County seeks to railbank the Line pursuant to the Trails Act, it must address in its application for adverse abandonment why the Line is eligible for interim trail use/railbanking under the Trails Act.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent discussed above.
2. This decision is effective on its service date.

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