

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 4, 2018
Part of
Public Record

STB Finance Docket No. 35692

**EASTSIDE COMMUNITY RAIL, LLC – ACQUISITION AND OPERATION
EXEMPTION – GNP RLY, INC
(Woodinville Subdivision, MP 23.8 to MP 38.25)**

STB Docket Finance Docket No. 35730

**BALLARD TERMINAL RAILROAD COMPANY, LLC – LEASE EXEMPTION –
EASTSIDE COMMUNITY RAIL, LLC
(Woodinville Subdivision, MP 23.8 to MP 38.25)**

**KING COUNTY, WASHINGTON –
REPLY TO REPLY FILED BY DOUGLAS ENGLE**

INTRODUCTION

This matter arises from two Petitions filed by Snohomish County, Washington seeking, in short, to revoke the exemption allowing Eastside Community Rail, LLC (“ECR”) to operate on the Freight Segment, the section of the Woodinville Subdivision between MP 23.8 in Woodinville and MP 38.25 in Snohomish, where the Freight Segment connects to the interstate rail system.¹ When ECR did not file a timely response to Snohomish County’s Petitions, Snohomish County filed a motion for default seeking the prompt termination of ECR’s operating authority. Subsequently, on August 14, 2018, Douglas Engle, who is not an attorney or licensed STB practitioner but purports to be representing ECR, filed an unsigned, unverified, and unfocused Reply on behalf of ECR. Although ostensibly aimed at preserving freight operations

¹ *Eastside Community Rail, LLC – Acquisition and Operating Exemption – GNP Rly, Inc.*, STB Docket No. FD 35692, Petition to Revoke (filed July 12, 2018) (Filing No. 246069); *Ballard Terminal Railroad Co., LLC – Lease and Operating Exemption – Eastside Community Rail LLC*, STB Docket No. FD 35730, Petition to Revoke (filed July 12, 2018) (Filing No. 246071) (collectively, the “Petitions”).

on the “Freight Segment” of the Woodinville Subdivision,² he paradoxically seeks the termination of the Operations and Maintenance Agreement that provides for those freight operations and devotes most of his attention to excursion rail plans and imagined future freight demand on the Redmond Spur, south of the Freight Segment.³

As the City of Woodinville and the County of Snohomish have pointed out, Mr. Engle’s position suffers from multiple fundamental problems and fails utterly to justify any of the relief he seeks. King County will not repeat those points or attempt to address in detail the many false statements in Mr. Engle’s filing. Rather, King County would like to address two specific points that relate directly to King County’s interests as trail sponsor on the Line because those points could have broader implications for King County and the national rail network beyond the particulars of the Petitions.

First, the Freight Segment is the primary connection between the Line and the interstate rail network link at Snohomish, Washington. Although the Line connects to the interstate rail network to the south as well, the northern connection on the Freight Segment is the simpler and more direct connection. As the Board addresses the merits of Snohomish County’s Petition (upon which King County takes no position) and Ballard Terminal Railroad Company, LLC’s (“BTR”) request to be relieved of its obligation to provide service, King County urges the Board to assure that any relief provides ample opportunity, through railbanking or otherwise, to avoid abandonment of the Freight Segment and preserve the current connection from the Line to the interstate rail system.

² Specifically, the “Freight Segment” is defined as the Woodinville Subdivision from Snohomish MP 38.25 to Woodinville MP 23.8. *See Eastside Community Rail, LLC – Acquisition and Operating Exemption – GNP Rly, Inc.*, STB Docket No. FD 35692, Woodinville Petition to Intervene at Exhibit A, (Filed August 1, 2018) (Filing No. 24612).

³ The “Line” is defined as the Woodinville Subdivision from MP 5.0 in Renton to MP 38.25 in Snohomish, and the Redmond Spur from MP 0.0 to MP 7.3, as described in greater detail below.

Second, given the repeated efforts of Mr. Engle to seek to disrupt interim trail use and related railbanking efforts on the Line, King County feels compelled to respond to Mr. Engle's misleading and incorrect statements regarding imagined future freight and excursion operations on the railbanked portions of the Line, including the Redmond Spur in particular. King County feels strongly that the Board should not appear, even indirectly or inadvertently, to give any credence to those statements lest Mr. Engle uses the Board's statement as the basis for future disruptive and unnecessary proceedings.

ARGUMENT

I. Any Relief Ordered by the Board Should Avoid Abandonment of the Freight Segment to Preserve the Direct Connection from Three Railbanked Segments of the Line to the Interstate Freight Rail Network.

King County is the interim trail user for three adjoining railbanked segments of the Line, including two railbanked segments that directly connect to the interstate freight system through the "Freight Segment" at issue here. *See Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY, Inc., City of Woodinville Petition to Intervene*, Docket No. FD 35692 (Filed Aug. 1, 2018) (Filing No. 246152), at Exhibit A (map of the Woodinville Subdivision, illustrating railbanked and active freight segments of the line) ("Woodinville Petition to Intervene"). In 2008, the Board authorized railbanking of the Line from (MP) 5.0 to MP 10.6 and from MP 11.25 to 23.8 on the main line between Renton and Woodinville, and from MP 0.0 to MP 7.3 on the "Redmond Spur" between Woodinville and Redmond. *See id.*; see also *BNSF Ry. C. – Abandonment Exemption – In King County, WA*, STB Docket Nos. AB-6 (Sub-No. 463X) and AB-6 (Sub-No. 464X) (Service Date October 27, 2008); and Docket No. AB-6 (Sub-No. 465X) (Service Date November 28, 2008) (Board decisions approving Notices of Interim Trail Use ("NITUs") for three segments of the Line).

In addition, King County is the interim trail user for the railbanked portions of the Woodinville Subdivision and for the northerly 3.4 miles of the Redmond Spur; the City of Redmond is the interim trail user on the Redmond Spur from MP 3.4 to MP 7.3. See NITUs, *supra*; see also *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 463X) (Service Date May 3, 2013) (issuing replacement NITU for portion of the Spur in the City of Redmond from MP 3.4 to MP 7.3). Prior to that, the Board had authorized railbanking from MP 7.3 to MP 19.75 of the Redmond Spur, and King County remains the interim trail user for most of that portion of the Spur, on which the County's East Lake Sammamish Trail has been constructed.⁴ *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 380X) (Service Date September 18, 1998) (STB order issuing NITU for above portion of the Spur). King County also acquired BNSF's reactivation right for the portions of the line railbanked in STB Docket No. AB-6 Sub-Nos. 463X, -464X, and -465X. See *King County, WA – Acquisition Exemption – BNSF Ry. Co.*, STB F.D. No. 35148 (Service Date September 18, 2009) (granting King County's petition for exemption under 49. U.S.C. § 10502 to acquire BNSF's right to reinstate rail service in three segments of the Line).

As is plain from a map of the Line, the Freight Segment provides a direct, and currently active, connection to the interstate rail system for the Redmond Spur, the East Lake Sammamish Trail, and the northerly portion of the Line.⁵ See Woodinville Petition to Intervene at Exhibit A.

⁴ In 2000, the Board issued a replacement NITU authorizing the City of Issaquah as the interim trail user for the southerly 1.55 miles of the Redmond Spur from MP 18.5 to MP 19.75. See *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 380X) (Service Date April 5, 2000).

⁵ There is also a southern connection to the interstate rail system from MP 5.0 southwesterly to BNSF's Black River Junction in Tukwila, via the southerly railbanked segment of the main line and connecting through the County's fee ownership of a fully abandoned segment of the former BNSF line (MP 10.6 – MP 11.25). King County's public multipurpose trail easement, King County Recording No. 20091218001538 at Section 3.6, commits to make that segment available in the in event of reactivation. This contiguity of property interests is sufficient to satisfy railbanking. *BNSF Ry. Co. -- Abandonment Exemption -- In Klickitat County, WA*, Docket No. AB-6 (Sub-No.

While King County presently expresses no position on the issues raised in the Petitions, King County respectfully asks that the Board's deliberations and decisions on those issues take into account the Freight Segment's importance to the railbanked segments of the Line. If the Freight Segment were to be fully abandoned (rather than remaining in freight service or being railbanked as the Petitions contemplate), then the Line (including the railbanked Redmond Spur, the East Lake Sammamish Trail, and the northerly railbanked segment of the Line) would lose their most direct and obvious connection to the interstate freight rail system, with potential negative implications for any freight-rail easements in the Line. *See, e.g., Preseault v. I.C.C.*, 494 U.S. 1, 8, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) (“[M]any railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.”)

Abandonment appears remote in light of the relief sought in the Petitions, and the apparently unanimous positions of Snohomish County, the City of Woodinville, and Ballard Terminal Railroad, as well as Doug Engle, opposing abandonment.⁶ As the Board knows, however, the railbanked portions of the Line have been, and continue to be, the subject of intense litigation by adjacent landowners, the City of Sammamish, and others including Mr. Engle.⁷

346X) (Service Date June 8, 2005) (railbanking on one segment will not be revoked where there is no evidence of intent to terminate trail use or otherwise extinguish property rights that are necessary to reestablish rail link to the interstate rail system).

⁶ *See generally* Petitions; Answer of Ballard Terminal Railroad Company, Filing No. 245180 (August 7, 2018); Reply of Doug Engle on behalf of Eastside Community Rail-, Filing No. 46219 (August 14, 2018); *see also* City of Woodinville Reply In Support of Snohomish County for A Default Order, Filing No. 246255 (August 23, 2018); Reply to Douglas Engle on Behalf of Snohomish County, Filing No. 246279 (August 30, 2018).

⁷ *See, e.g., Hornish v. King Cty.*, 182 F. Supp. 3d 1124 (W.D. Wash. 2016), *aff'd*, -- F.3d. --, 2018 WL 3673151 (9th Cir. Aug 3, 2018); *Kaseburg v. Port of Seattle*, 2016 WL 4440959, at *5 (W.D. Wash. 2016), *aff'd*, -- Fed Appx. --, 2018 WL 3687555 (9th Cir. Aug. 3, 2018); *C.M. Bailie, LLC, et al., v. King County*, No. 17-2-11448-31 (Snohomish Cty. Sup. Ct. 2017); *Ioppolo v. Port of Seattle*, No. C15—358-JCC (2015 WL 5315936) (W.D. Wash. Sept. 11, 2015); *Neighbors v. King Cty.*, No. C15-970 MJP (W.D. Wash. June 26, 2015); *Jie Ao and Xin Zhou—Petition for Declaratory Order*, STB F.D. No. 35539 (Service Date June 6, 2012); *Ao-Zhou v. BNSF Ry Co.*, No. 09-2-44773-0

Care in this proceeding to assure that there is adequate opportunity to prevent the abandonment of the Freight Segment would likely forestall future wasteful litigation. More fundamentally, such a result would fulfil the purpose of the Trails Act to preserve railroad right of way for future rail use. *See, e.g., Preseault*, 494 U.S. 1, at pp.5, 8 (“the National Trails System Act Amendments of 1983 ... [are] the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails ... By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law.”) (citations omitted; ellipses, bracketed material added). Accordingly, King County strongly desires that the issues raised in the Petitions should be resolved in a manner that will avoid full abandonment of the Freight Segment.

II. Mr. Engle’s Reply Misrepresents the Limited Freight Operating Privileges Available on the Railbanked Redmond Spur.

King County will not attempt to address all of the inaccuracies and misleading statements in Mr. Engle’s Reply, the most important of which have been addressed in other filings submitted by the City of Woodinville and Snohomish County in these proceedings. As the interim trail user, reactivation right holder, and owner of the relevant portion of the railbanked Redmond Spur, however, King County would like to respond briefly to several misstatements

KNT (King Cty. Sup. Ct. April 22, 2011); *Beres v. United States*, 97 Fed. Cl. 757 (Fed. Cl. 2011); *Sammamish v. King Cty. Dep’t of Nat. Resources and Parks*, No. SHB 15-012c (Shoreline Hr’gs Bd.); *In re SSDP issued to King Cty. Parks and Recreation*, No. SSDP2014-00171 (Sammamish Hr’g Examiner); *Hoek v. BNSF*, No. 05-2-32670-1 SEA (King Cty. Sup. Ct.); *Friends of East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260 (W.D. Wash. 2005); *King County v. Rasmussen*, 299 F.3d 1007 (9th Cir. Wash. 2002); *Ray v. King County*, 120 Wn. App. 564 (2004); *Citizens for Safe & Legal Trails v. King Cty.*, 118 Wash. App. 1048 (2003) (unpublished); *Redmond-Issaquah RR Preservation Ass’n v. S.T.B.*, 223 F.3d 1057 (9th Cir. 2000) (describing the “highly contentious matter” that is the “disposition of the Redmond-Issaquah [railroad] line”); *The Land Conservancy of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Ry. Co.*, STB Finance Docket No. 33389; *The Land Conservancy of Seattle and King County – Abandonment Exemption – in King County, WA*, STB Docket No. AB-508X; *The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – in King County, WA*, STB Docket No. AB-6 (Sub-No. 380X) (served May 13, 1998); *Tagas v. King Cty.*, No. 02-2-17632-1 (King Cty. Sup. Ct.); *Kuruganti v. King Cty.*, No. 99-2-22804-9 SEA (King Cty. Sup. Ct.); *McNabb v. BNSF*, No. 98-2-06305-0 SEA (King Cty. Sup. Ct.); *Morel v. King Cty.*, No. 98-2-26048-3 (King Cty. Sup. Ct.); *Goldsmith v. BNSF*, No. 96-2-24980-7 SEA (King Cty. Sup. Ct.).

regarding the potential for freight operations on the Redmond Spur in order to prevent future misunderstandings.

First, at page 15 of his Reply, Mr. Engle makes representations about the possibility of freight service to Matheus Lumber, Salt Works, and a possible future warehouse facility located on or near the Redmond Spur. However, Mr. Engle fails to acknowledge the fact that neither GNP, ECR, BTR, nor any other railroad has an existing property right to provide freight rail service on the Redmond Spur.

Although Mr. Engle focuses on the Operating and Maintenance Agreement that governs railroad operations on the Freight Segment, Engle Reply at 12, 15, that agreement does not apply to the Redmond Spur; rather the License Agreement governs the rights of GNP and its successors on the Redmond Spur. *GNP Rly, Inc.*, F.D. 35407 at pp.2-3; *see also* Petitions, Stowe Dec. at Exhibits 14, 16 (copies of agreements).⁸ The License Agreement expressly **prohibits** GNP or ECR from conducting rail operations on the Redmond Spur:

TPO is prohibited from using the Excursion Spur at any time for the purpose of setting out or picking up rail cars . . . TPO shall have the right to utilize the Excursion Spur between milepost 0.0 and 1.0 for all head and tail operations necessary for TPO's Rail Freight Service under the O & M Agreement, but shall have no right to operate other common carrier or contract freight rail service on the Excursion Spur.

License Agreement, Stowe Dec. Ex. 16 at pp.4-5, Sections 2.2 and 2.8 (ellipsis added). As the Board itself held:

Pursuant to a Railroad Right of Way License between the Port and GNP (License Agreement), GNP contracted for the right to provide passenger excursion service over a specific portion of the Redmond Spur from milepost 0.0 to milepost 2.5. But that agreement, which GNP executed in December 2009, only 8 months prior to filing the instant petition to acquire and reactivate, expressly

⁸ ECR acquired both the License and the O&M Agreement when it bought GNP's assets out of bankruptcy. See Petitions, Stowe Dec. Ex. 5 (Asset Purchase Agreement dated September 5, 2012); *see also Ballard Terminal Railroad Co. L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731 et al., at p.3 Note 4 (Service Date December 30, 2014) (noting ECR's bankruptcy acquisition of GNP assets).

precludes GNP from operating freight service over that portion of the Redmond Spur.

GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville

Subdivision, F.D. 35407 et al., at 2-3 (Service Date June 15, 2011) (“*GNP Rly, Inc.*”) (Board decision denying GNP’s petition to reactivate rail service on the Spur and a short section of the main line) (emphasis added). *See also Id.* at 6 (same).⁹ Accordingly, neither ECR nor Mr. Engle (nor BTR nor GNP) have any property right or authority to conduct freight operations of any kind anywhere on the Redmond Spur, other than the allowed head and tail operations, and so none of them can provide freight service to any of the putative shippers identified by Mr. Engle.

Matheus Lumber is located on the Redmond Spur south of milepost 1.0. Verified Statement of Robert Nunnenkamp, at ¶ 6, attached as Exhibit 1 (Nunnenkamp Dec.). Matheus Lumber is not a “former customer” on the Spur, because neither GNP nor ECR nor BTR have ever served Matheus Lumber on the Spur and they never had any privilege or right to do so under the License.¹⁰ Similarly, Mr. Engle’s remarks concerning an alleged new distribution center that may be under construction even further south are irrelevant (and wholly speculative). *See Engle Reply* at p. 15; compare License Agreement Sections 2.2 and 2.8. The reason, again, is that neither Mr. Engle, ECR, nor BTR has any right to conduct freight operations anywhere on the Redmond Spur other than the allowed head and tail operations up to MP 1.0.

⁹ There, the Board noted that “just 8 months before filing the instant petition, GNP entered into the License Agreement with the Port, which on its face appears to prohibit it from providing freight service on the ROW on which it now seeks to reactivate service.” At footnote 6 the Board identified the relevant provision as Section 2.8 of the License. *Id.* *See Stowe Dec. Ex. 16* at p. 5.

¹⁰ While Salt Works is located along the Redmond Spur north of MP 1.0, there is no rail siding, industrial track, or other rail equipment serving Salt Works’ facility. Nunnenkamp Dec. at ¶ 7. As the Board found in its 2011 decision, the lack of such facilities and Mr. Engle’s lack of financial wherewithal to provide such facilities further undercuts any suggestion that Mr. Engle’s imagined plans can be considered real. *See GNP Rly, Inc.* at p.6 note 16 (observing lack of rail sidings and crossings needed to serve various putative shippers; noting that GNP or shippers would have needed to build switches and industrial track before shippers could receive service).

Finally, the Board long ago determined that GNP, which Mr. Engle supported, lacked the financial and other capability to conduct freight operations on the Redmond Spur. *GNP Rly., Inc.* at 6. Nothing in Mr. Engle's Reply suggests that he has overcome those financial and physical limitations. If anything, Mr. Engle's rambling Reply, particularly when read together with the statements of BTR, further demonstrates that Mr. Engle lacks the financial wherewithal to provide continuing freight service on the Freight Segment itself, much less to develop new freight service on any railbanked part of the Line.

III. ECR's Ability to Operate Excursion Rail on the Redmond Spur Has Been Contractually Terminated.

Mr. Engle also makes numerous references to his concept for an excursion rail business on the Line. *See, e.g.*, Engle Reply at 4, 6, and 16-17. While wholly intrastate passenger rail operations typically are not of direct interest to the Board,¹¹ King County hereby confirms for the record that the limited excursion rail privileges granted by the License Agreement were explicitly terminated by letter dated June 10, 2015. Exhibit 2 to Nunnenkamp Dec. (June 10, 2015 termination letter). The License Agreement initially authorized excursion rail privileges on the Redmond Spur to MP 2.5 but it required those operations to begin within 2 years—by December 18, 2011. ECR had no other rights to operate excursion service on the Line. Nunnenkamp Dec. at ¶¶ 8-9; Stowe Dec. Ex. 16 at pp.4, 6 (License Agreement Section 2, Section 6.3). In 2015, after allowing far more than the required 2 years, King County terminated the excursion rail license in accordance with License Section 6.3. Nunnenkamp Dec. Ex. 2 (June 10, 2015 termination letter). As a result, neither ECR nor Mr. Engle nor any other person or

¹¹ See *Fun Trains, Inc. – Operation Exemption – Lines of CSX Transportation, Inc., and Florida Dep't of Transportation*, F.D. No. 33472 (Service Date March 5, 1998) (granting motion to dismiss exemption proceeding for lack of jurisdiction over wholly intrastate, privately funded excursion passenger train).

entity presently has any right or privilege to undertake excursion rail on the Redmond Spur or anywhere else on any railbanked portion of Line.

Respectfully submitted,

A handwritten signature in blue ink, reading "Allison I. Fultz/CAS", is written over a horizontal line.

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Dated: September 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing
REPLY OF KING COUNTY, WASHINGTON TO REPLY SUBMITTED BY
DOUGLAS ENGLE, upon the following parties of record in this proceeding by
electronic mail and first-class mail with postage prepaid and properly addressed:

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Allison I. Fultz

Dated: September 4, 2018