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June 8, 2011

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

By Electronic Filing

RE: STB Finance Docket No. 35407
GNP RLY, INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR AND WOODINVILLE SUBDIVISION

STB Docket No. AB-6 (SUB. NO. 463X)
BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY, WA

STB Docket No. AB-6 (SUB. NO. 465X)
BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY, WA

Dear Ms. Brown:

Petitioner GNP Rly, Inc. ("GNP") hereby requests leave to file the accompanying June 7, 2011 Order of the U.S. Bankruptcy Court for the Western District of Washington in re: GNP Rly, Inc. by way of post-hearing submittal.

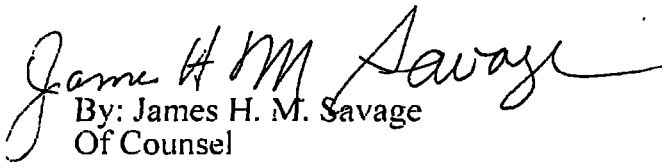
There were several questions raised by the Board regarding the status of the bankruptcy matter during oral argument, and the undersigned represented that the bankruptcy matter would most likely be concluded by May 25, 2011. It is now possible that the bankruptcy case will continue beyond June 15, 2011, although the

bankruptcy petition may be dismissed as a result of the "show cause" hearing set for that date. (See Order at Page 8.)

Given these circumstances, GNP Rly, Inc. submits that it would be appropriate for the Board hold these administrative proceedings in abeyance for 90 days from the date hereof in the interests of justice pursuant to 49 C.F.R. 1100.3 and 1117.1. Among other advantages, this would enable GNP to put in place replacement financing for the financing that was originally to have been provided by Wallace Properties pursuant to the December 14, 2010 Memorandum of Understanding (See GNP December 15, 2010 Reply Comments at Exhibit H).

We thank the Board for its time and consideration.

Respectfully submitted,
Law Offices of John D. Heffner, PLLC



By: James H. M. Savage
Of Counsel

Attorneys for GNP Rly. Inc.

Enc.
cc: All parties (w/enc.)

CERTIFICATE OF SERVICE

I. James H. M. Savage. hereby certify that a copy of GNP's June 8 2011 letter was served by first-class United States mail or electronic mail upon the following:

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James H. M. Savage

Dated: June 8, 2011

Entered on Docket June 7, 2011

BRIAN D. LYNCH
United States Bankruptcy Judge
1717 Pacific Ave, Suite 2155
Tacoma, WA 98402

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re: GNP RLY, INC., Debtor.	Case No. 11-40829 **ORDER DENYING IN PART AND GRANTING IN PART PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT and NOTICE OF PRETRIAL CONFERENCE**

THIS MATTER came before the Court on the motion for summary judgment filed by multiple creditors in this involuntary petition, seeking entry of an order of relief against GNP Rly, Inc. ("GNP") under chapter 11 of the Bankruptcy Code. [Docket No. 53]. The Court held an initial hearing on April 11, 2011, and continued the motion to a subsequent hearing, held on May 25, 2011. The Court took the matter under advisement. The Court has considered the arguments of counsel, reviewed all pleadings and documents on file, and considers itself apprised in the premises. This Order constitutes the Court's Findings of Facts and Conclusions of Law for purposes of Fed. R. Bankr. P. 7052. To the extent a finding of fact is a conclusion of law, or the converse, it is adopted as such.

1. Statement of Facts

   a. *History of GNP*

GNP was formed in November 2006 as Altac Terminals Washington, Inc. and subsequently changed its name to GNP Rly, Inc. GNP is a railroad company holding the rights to a freight easement on the rail line from Woodinville, WA to Snohomish, WA. It owns no other significant assets such as locomotives or railroad cars. The easement is presently used by Ballard Terminal Railroad Company, LLC ("BTRC"), through its subsidiary Eastside Freight Railroad, in partnership with GNP. BTRC

provides freight service for GNP using its own equipment. GNP and BTRC do not have a written contract for these services and they disagree as to how much money GNP owes BTRC. BTRC is one of the initial three petitioning creditors.

GNP is currently insolvent. In 2010, it had, approximately, gross revenue of $120,000, gross profit of $37,000, operating expenses in excess of $706,000, and a net loss of $694,300. It is indebted to more than thirty trade creditors for more than $500,000, the majority of whom are more than ninety days past due. In addition to trade debt, GNP is indebted to multiple other individuals and entities, many of which are the petitioning creditors in this case. Among these creditors is Marketing Philharmonic, LLC, ("MP") owned and managed by Kathy Cox. MP, in addition to BTRC, is also one of the three initial petitioning creditors.[1]

As of January 1, 2011, the principals, sole directors, and officers of GNP were Thomas Payne ("Payne") and Douglas Engle ("Engle"), each of whom own fifty percent of the company. Payne was Chairman and Chief Operating Officer and Engle was Treasurer and Chief Financial Officer. The record shows that Payne and Engle have an acrimonious relationship. Each accuses the other of corporate malfeasance, unauthorized corporate activity on behalf of GNP, and poor business judgment. Moreover, GNP argues that Engle has, though his associates, friends and family, orchestrated the filing of this involuntary petition as a high-stakes gambit to seize control of GNP.

On January 25, 2011, Engle sent Payne a letter stating that "due to the lack of financial integrity GNP cannot be financed." The letter noted that GNP could not obtain a review of its financials by a professional accountant because of Payne's "actions," and that unless Engle signed off on the financials "GNP will not pass any investment due diligence." Engle presented two options: (1) bankruptcy or (2) re-launching GNP as a new entity named Eastside Community Rail, LLC.[2] Engle

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[1] The third initial petitioning creditor is San Clemente Technical Co. ("San Clemente"). Together, BTRC, MP and San Clemente are referred to in this Order as the "Initial Petitioning Creditors."

[2] Eastside Community Rail, LLC is the name of a limited liability company established by Engle on February 2, 2011, the same day this involuntary petition was filed. Engle is the sole member and manager of Eastside Community Rail.

was to become Chairman, CEO, and majority shareholder of the new company, and Payne would become a contractor or Vice-President and hold a "non-office board position."

At the reconvened board meeting on January 26, 2011, Engle presented Payne and Jones with a document entitled "Bankruptcy Options," and reiterated that he saw no other option than bankruptcy or to give him a majority stake in the new company and for him to assume the roles of CEO and chairman. Rather than acceding to Engle's demands, Payne fired him; Engle questions whether Payne was within his rights to terminate him. Shortly after his termination, Engle met with attorney James Dickmeyer to assess the prospects for an involuntary petition against GNP.[3] He referred other creditors to Dickmeyer and to Kathy Cox and Bryon Cole. He provided potential joining creditors with GNP financial information and business records and actively solicited their participation in this case.

b. The Involuntary Bankruptcy Petition

The initial petition for involuntary bankruptcy was filed on February 2, 2011 by BTRC, Marketing Philharmonic, and San Clemente. On February 9, 2011, Earl Engle,[4] Northwest Signal Maintenance, LLC ("NW Signal"), and Kroschel Accounting Services, LLC joined the involuntary petition.[5] Dickmeyer represents, or at one point in time has represented, these six entities in this petition. On February 11, 2011, the creditors moved for summary judgment for the first time, requesting an order of relief against GNP under chapter 11 of the Code [Docket No. 11], which motion was subsequently stricken.

To date, GNP has not filed an answer to the involuntary petition. However, as demonstrated below, it strenuously objects to entry of an order for relief under chapter 11 on the grounds that (1)

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[3] Dickmeyer is Engle's personal chapter 13 bankruptcy attorney. Engle is currently a chapter 13 debtor before another judge in the Bankruptcy Court for the Western District of Washington.

[4] Earl Engle is Engle's father.

[5] Before the case is dismissed or an order of relief entered, a creditor holding an unsecured, noncontingent claim "may join in the petition with the same effect as if such joining creditor were a petitioning creditor under [section 303(b)]." 11 U.S.C. § 303(c).

there are insufficient eligible creditors to file the involuntary petition under section 303(b), and (2) the creditors are guilty of bad faith in filing the petition.

In the meantime, new creditors joined the involuntary petition, creditors who had joined the petition sought to "withdraw" their joinder, and two even sought to "rescind" their withdrawal and thus re-join the petition. San Clemente, an Initial Petitioning Creditor, purported to withdraw on March 14, 2011. Dale Bickenbach joined on February 15, 2011, but purported to withdraw on March 3, 2011. Kroschel Accounting Service purported to withdraw on March 1, 2011. Osmose Holdings, Inc. joined on March 4, 2011, but purported to withdraw on March 10, 2011. Joanne Engle also joined on March 14, 2011.[6] Earl Engle sought to withdraw on February 28, 2011, but thereafter filed a "Notice of Recission of Withdrawal of Joinder" on March 14, 2011. The same is true for Northwest Signal Maintenance, which sought to withdraw on March 8, 2011 and also filed a Notice of Rescission of Withdrawal of Joinder on March 14, 2011.[7]

On March 14, 2011, several petitioning creditors (BTRC, MP, NW Signal, Joanne Engle and Earl Engle) filed a second summary judgment motion, which is the subject of this Order. [Docket No. 53]. They argue that there is no genuine issue of material fact that GNP is not generally paying its debts as they become due, and that the Court should enter an order for relief against GNP pursuant to section 303(h).

GNP responded by arguing that Douglas Engle, as a disgruntled former officer of GNP acting in concert with his friends and family members, has orchestrated a bad faith filing in an effort to wrest control of the company away from Payne. [Docket No. 76]. GNP argues that Engle has also acted in

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[6] Joanne Engle is Engle's wife.

[7] These creditors purported to effectuate their withdrawal by filing a form entitled "Withdrawal of Joinder" and to re-join by filing a "Notice of Recission of Withdrawal of Joinder." It is unclear whether this is sufficient to remove a creditor from an involuntary petition, or to permit them to get back in. There appears to be nothing in the Code or Rules that addresses the procedure by which a creditor may withdraw from, or rejoin, an involuntary petition. It should probably be done by motion. See, e.g., In re Vortex Fishing Systems, Inc., 277 F.3d 1057, 1064 (9th Cir. 2002) (noting with approval that a bankruptcy court had granted a petitioning creditor's motion to withdraw). In any event, the Court reserves for another time the question of whether these withdrawals, or recissions of withdrawal, were effective and/or binding in this case.

bad faith by introducing other creditors to Dickmeyer, by providing confidential financial and corporate information to potential joining creditors, and by soliciting other creditors to join the petition. GNP further argues the petition was filed in bad faith because the Initial Petitioning Creditors' claims are disputed as to liability or amount, and that the "bar-to-joinder" doctrine prohibits the joinder of subsequent creditors to "cure" the filing where the initial petition is filed in bad faith. See, e.g., Basin Elec. Power Corp. v. Midwest Processing Co., 769 F.2d 483, 487 (8th Cir. 1985).

The petitioning creditors replied, [Docket No. 92], arguing that there are more than three petitioning creditors for purposes of section 303(b) and that GNP's response completely failed to address the company's insolvency and inability to pay its debts as they come due. They argue that it was Payne's "own actions that led to the utter loss by GNP creditors of confidence in Mr. Payne's ability to get them paid," and that Engle was motivated to effectuate a pre-petition change in GNP management by a desire to get creditors paid. They also argue that Engle's alleged bad faith cannot be imputed to the petitioning creditors and that whether the petition was filed in bad faith depends on their own aims and intentions, not his.

2. Conclusions of Law

Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is "no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are those "that might affect the outcome of the suit under the governing law." Id. The moving party bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, it is entitled to summary judgment if the nonmoving party fails to provide facts showing that there is a genuine issue for trial. Id. at 324.

a. GNP is not paying its debts as they become due.

The Court concludes there is no genuine issue of material fact that GNP is not paying its debts as they become due for purposes of section 303(h). Indeed, GNP has admitted at oral argument that

it is not paying its bills. Thus, the petitioning creditors' summary judgment motion is GRANTED as to this issue; an order for relief is appropriate, provided there are sufficient good-faith petitioning creditors holding enough unsecured debt.

b. It is unclear whether this involuntary petition was filed in good faith.

Section 303(b) contains no explicit requirement that an involuntary petition be filed in good faith and the filing of an involuntary petition is accompanied by a presumption of good faith. In re Mi La Sul, 380 B.R. 546, 557 (Bankr. C.D. Cal. 2007). However, because section 303(i) refers to bad faith filings, bankruptcy courts generally agree that involuntary petitions must be filed in good faith. The Ninth Circuit BAP has adopted an objective standard that assesses what a reasonable person in the creditor's position would have done. See Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370 B.R. 236 (9th Cir. BAP 2007); see also Jaffe v. Wavelength, Inc. (In re Wavelength, Inc.), 61 B.R. 614 (9th Cir. BAP 1986). Whether a party acted in bad faith is a question of fact. Id.

The Court concludes that the petitioning creditors have not met their burden of showing the absence of a genuine issue of material fact, *i.e.* that this involuntary petition was filed in good faith. Indeed, GNP has provided sufficient evidence to show there is a genuine factual dispute whether this petition was filed in good faith.[8] The issue is not whether Doug Engle acted in good faith, as he is not a petitioning creditor, but rather whether the petitioning creditors themselves are acting in good faith. Accordingly, the Motion for Summary Judgment is DENIED and the Court will hold an evidentiary hearing into the good faith of all petitioning creditors.

c. *The Court declines to apply the bar-to-joinder doctrine*

GNP argues that there are insufficient petitioning creditors to file this involuntary case and also that, due to the Initial Petitioning Creditors' bad faith, the bar-to-joinder doctrine precludes creditors from joining pursuant to section 303(c). See, e.g., Basin Elec. Power Corp. v. Midwest Processing Co.,

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[8] At trial, the burden will be on GNP to demonstrate by a preponderance of the evidence that this petition was not filed in good faith. See, e.g., In re E.S. Professional Servs. Inc., 335 B.R. 221, 226 (Bankr. S.D. Fla. 2005). However, for summary judgment purposes, the petitioning creditors have the burden of showing the absence of a genuine issue of material fact regarding good faith. Celotex, 477 U.S. at 323.

769 F.2d 483, 487 (8th Cir. 1985) (dismissing involuntary petition where two creditors joined in a bad faith petition filed by a single creditor) Circuit courts have split on the question of whether a petition filed in bad faith must be dismissed if properly petitioning creditors join in. Fetner v. Haggerty, 99 F.3d 1180, 1181 (D.C. Cir. 1996) (holding that dismissal is not necessary due to the bad faith of the initial petitioner if there are sufficient valid petitioners); but see Basin Elec. Power Corp., *supra*. There is no controlling Ninth Circuit precedent. This Court is persuaded by the analysis in In re Kidwell, 158 B.R. 203 (Bankr. E.D. Cal. 1993), in which the bankruptcy court concluded that there were adequate tools for a court to deal with "the problem of a petitioner who lacks good faith without simultaneously punishing innocent creditors by depriving them of their statutory right to join in the petition." Id. at 219. This case is an example of the problem anticipated in Kidwell:

> Its mere existence diverts the attention of litigants and courts from the merits of the central question of whether there should be a bankruptcy case. It invites diversionary tactics, increases administrative expenses that are paid ahead of creditors, and leaves festering an unpredictable appellate issue.

Kidwell, 158 B.R. at 219. Hence, the Court concludes that if the Initial Petitioning Creditors are found to have exhibited bad faith, the Court will not apply the bar-to-joinder doctrine to preclude other, good-faith creditors from joining the petition.

d. *Number of Petitioning Creditors and Amount of Debt*

Section 303(b) provides that the only entities that may file an involuntary petition are those with claims that (1) are not contingent as to liability and (2) are not subject to a bona fide dispute as to liability or amount. These claims must aggregate at least $14,425 of unsecured debt and an involuntary filing must be made by three or more entities, unless the putative debtor has fewer than twelve eligible creditors. 11 U.S.C. § 303(b). The burden is on the petitioning creditor to make out a *prima facie* case that there is no bona fide dispute as to liability or amount. Vortex Fishing, 277 F.3d at 1066. Here, it is undisputed that GNP is indebted to at least twelve entities, so three or more eligible creditors are required. However, the Court declines at this stage to rule on whether the section 303(b)

requirements are satisfied in this case with respect to the petitioning creditors, pending the hearing on the petitioners' good faith.

3. Notice of Pretrial Conference

A pretrial conference to select a date for the evidentiary hearing into the creditors' good faith is scheduled for **June 15, 2011 at 8:45 a.m.** in Courtroom I, 1717 Pacific Avenue, Tacoma, WA. The parties may appear by telephone and should contact Mary Snarski, Courtroom Deputy, at 253-882-3961 to make arrangements to appear by phone. The Court will also set a joinder deadline and a deadline for GNP to file an Answer.

It is so ORDERED.

// End of Order //

Brian D. Lynch
United States Bankruptcy Judge
(Dates as of Entered on Docket date above)