

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF: :

GNP RAILWAY :

v. : Docket No.

FD 35407

KING COUNTY :

:

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Thursday,
May 12, 2011
Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 10:20 a.m.

BEFORE:

DANIEL R. ELLIOTT III Chairman
ANN D. BEGEMAN Vice Chairman
FRANCIS P. MULVEY Commissioner

APPEARANCES:

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P-R-O-C-E-E-D-I-N-G-S

(10:20 a.m.)

1
2
3 CHAIRMAN ELLIOTT: Good morning
4 again. The second case we'll hear today is
5 GNP Railway Inc., Acquisition and Operation
6 Exemption, Redmond Spur and Woodinville
7 Subdivision Docket Number, Finance Docket
8 Number 35407.

9 This case centers around the
10 proposal by GNP Railway to acquire the right
11 to restore rail service over two segments of
12 railroad right-of-way that are currently
13 reserved for recreational trail. GNP is asking
14 the Board to vacate the notice of interim
15 trail use it issued for these segments so the
16 carrier can serve freight customers.

17 King County Washington, the trail
18 sponsor in the City of Redmond, Washington,
19 opposed the request saying that GNP does not
20 own the right-of-way or have any other
21 contractual rights to it, and so is not in a
22 position to resume rail service.

1 In an effort to move things along,
2 counsel, were you here for the earlier
3 instructions in the prior case? If so, I'll
4 skip that.

5 Each side has been allotted 20
6 minutes. GNP will open and has requested 15
7 minutes on opening, King County and the City
8 of Redmond have requested ten minutes each for
9 a total of 20 minutes, and GNP has reserved
10 five minutes for rebuttal. If you wish to
11 make a change to reserve rebuttal time or your
12 allotted time, please advise us when you begin
13 your opening presentation.

14 We will now proceed. Counsel for
15 GNP, please step up to the podium, introduce
16 yourself, indicate if you wish to change your
17 time for rebuttal, and then begin.

18 MR. HEFFNER: Thank you. Chairman
19 Elliott and members of the Board, my name is
20 John Heffner, and I appear on behalf of GNP.
21 And, as you have indicated, I will speak for
22 15 minutes. My colleague, Jim Savage, will

1 handle the rebuttal for five, and we have two
2 representatives of GNP here today. On my left
3 is Tom Payne, who's the Chairman, and right
4 behind me over to the left we have Tom Jones.

5 This proceeding presents an issue
6 of first impression: that's whether the Board
7 must approve and authorize a request by an
8 authorized rail carrier to restore to active
9 common carrier rail service a line that has
10 been converted to trails' use under the
11 National Trails Act and the Board's
12 implementing regulations, where the
13 petitioning carrier does not own the right-of-
14 way or have the common carrier rights to
15 restart the service: what I call, "The restart
16 rights."

17 Now, just as a point of
18 clarification, the rail line in question
19 actually looks kind of like an upside down
20 wishbone. There is a segment that begins on
21 the very north, that's Snohomish, and it
22 proceeds south for about, I would say 15

1 miles, to a place called, "Woodinville."

2 And, at Woodinville there is a
3 junction. That segment is called, "The
4 freight segment," and GNP can and does operate
5 a typical shortline common carrier rail
6 freight service.

7 At Woodinville, the line splits.
8 There is a two-mile stub, which is one of the
9 two lines in question here. And, below that
10 two-mile segment, that is not relevant for the
11 purpose of our proceeding. The line does
12 continue south in a mixture of abandoned and
13 rail trail and at the very end active
14 railroading.

15 Then there's the Redmond's segment
16 that proceeds from Woodinville in kind of a
17 southeasterly direction for seven miles to the
18 City of Redmond. So, that's just for
19 clarification. So, what we're talking about
20 then is this little piece that's almost like
21 the the heel of your shoe, and then can affect
22 the sole of the shoe heading over to Redmond.

1 Now, both King County and Redmond
2 acknowledge that the lines are eligible for
3 reactivation as common carrier railroads, but
4 in their terms, this is not the time or the
5 circumstances. And, King County even goes so
6 far as to say that it would fulfill its
7 obligations as a rail trail sponsor and even
8 allow the reactivation of rail service in the
9 event a reasonable proposal is advanced to
10 restore rail service. That's right in the
11 January 7 reply at page two, but King County
12 does not specify a standard and does not even
13 have any experience for judging rail service
14 proposals.

15 They say, "Jump," but they don't
16 indicate how high. And, the person who is the
17 project manager for the City of Redmond,
18 excuse me, for King County says, "We don't do
19 rail."

20 As the Board ruled in an earlier
21 proceeding involving the King County
22 acquisition of the BNSF common carrier

1 obligation and restart rights, -- it was the
2 acquisition of BNSF's common carrier
3 obligation -- and forcefully reiterated more
4 recently in the City of Maplewood case, the
5 right to reactivate a railbanked line is not
6 an exclusive right and would not preclude any
7 other service provider from seeking Board
8 authorization to restore rail service over a
9 railbanked line if the county chose not to do
10 so.

11 Now, you must read, or you should
12 read, the King County case and the context in
13 which it happened. And, there was another
14 group, which I think was called, "All Aboard
15 Washington," that ran some sort of a tourist
16 service. And, they were very concerned that
17 there was kind of an inherent conflict if King
18 County had both the common carrier restart
19 rights and was also the rail trail sponsor or
20 provider.

21 COMMISSIONER MULVEY: Well, did we
22 get it wrong back in 2009 when we transferred

1 the, the rights to the trail sponsor? Was
2 that a mistake or should we have kept the
3 rights with the abandoning railroad as it's
4 normally done?

5 MR. HEFFNER: I don't have a
6 problem with the King County case if the Board
7 lives up to what it said in the decision.
8 And, the Board was very clear. The Board
9 said, "Regardless of the party's intentions,
10 a bonafide petitioner under appropriate
11 circumstances may request that the NITU be
12 vacated to permit a reactivation of the line
13 for continued service."

14 So, I think the Board was faced
15 with this apparent conflict raised by All
16 Aboard Washington and the Board dealt with it
17 in an appropriate fashion. So --

18 COMMISSIONER MULVEY: But as the,
19 the question of bonafide, what represents it?
20 Who constitutes a bonafide applicant? Under
21 what statutory provision would the Board have
22 the power to force the owner of a railbanked

1 rail line in this case, King County, to let
2 another party with no property rights on the
3 line to use its properties since we assigned
4 the property to King County?

5 What's our statutory authority?

6 We have cases where we can do that, but it's
7 not an OFA situation nor is it a feeder line
8 situation. Those are the cases where we would
9 normally do that, so what's our authority to
10 do this?

11 MR. HEFFNER: Frankly, there is
12 kind of a vacuum so to speak. And, I agree
13 with you. It's ambiguous. And, in fact, so
14 I'm not sure what the authority is. On the
15 one hand, there's no authority for it. On the
16 other hand, there's nothing to say you can't
17 do it. It's a totally gray area, which I'm
18 sure is the reason why we're having this oral
19 argument today.

20 But, I would point out to you that
21 the rights and obligations that were conveyed
22 to King County, and the obligation to honor a

1 restart request go together. And, in fact, if
2 you look at the various agreements between the
3 parties, and you look at the King County
4 decision, that is that roughly 2009 decision,
5 you'll see that the Board understood that
6 these rights and obligations go together as a
7 package.

8 Now, I would mention that while
9 some -- one of the agreements, the agreement
10 between the Port of Seattle, and don't forget
11 that while King County has a nonexclusive
12 trail easement, and they have the restart
13 rights, they don't actually own the right-of-
14 way. There are several miles into Redmond
15 that are owned by the City of Redmond, but the
16 rest of the right-of-way is owned by King
17 County. Excuse me, I'm sorry, by the Port of
18 Seattle. And, when I use the term, "Port," I
19 mean, the Port of Seattle.

20 The agreement between the Port and
21 the GNP would on the surface limit GNP's
22 activities over what I'll call the "Railbanked

1 segments," to excursion service, not to common
2 carrier freight service. But there's nothing
3 in the agreement that would preclude GNP from
4 reactivating that as an active rail line.
5 And, in fact, there was a conversation between
6 Tom Payne and the lady who is the general
7 counsel for the Port where they had this very
8 conversation.

9 Suppose I want to reactivate.
10 And, basically, what she said is, "Go ahead
11 and do it. Go ahead and file." So, again,
12 it's kind of gray area, but the Board has to
13 operate in a fashion that spells out clear
14 policies for people, and that's kind of the
15 dilemma.

16 Now, there are two points --

17 CHAIRMAN ELLIOTT: Mr. Heffner, let
18 me ask you a question. I was reading through
19 the filing by King County, and I noticed on
20 page 19 of their confidential version, I don't
21 think I'm speaking about anything that's
22 confidential, that there is a limitation on

1 GNP to operate freight service. I mean, at
2 this point, if there is a limitation for GNP
3 to operate freight service on the lines at
4 issue, aren't we done?

5 MR. HEFFNER: We're not done
6 because GNP can always seek to reactivate.
7 They are limited. They are precluded so long
8 as it's in a rail trail status, but I don't
9 believe there's anything in that agreement
10 that says they can't file.

11 COMMISSIONER MULVEY: Don't you
12 have a contract with the City of Redmond that
13 prohibits your providing freight rail service?

14 MR. HEFFNER: I know that the
15 arrangement with the City of Redmond
16 contemplates an excursion service to mile
17 post, I believe, it's two and a half on the
18 seven-mile line.

19 COMMISSIONER MULVEY: So you
20 wouldn't think it would be a breach of the
21 contract if you were to try and introduce
22 freight rail service?

1 MR. HEFFNER: Again, in the context
2 of a reactivation, Commissioner Mulvey.

3 CHAIRMAN ELLIOTT: Would that be
4 more appropriate for a State Court question?

5 MR. HEFFNER: And, in fact, this
6 case poses a lot of contract questions,
7 contract interpretation questions that are
8 exactly appropriate for interpretation before
9 a State Court. I could not agree more with
10 you, Mr. Chairman.

11 There are two things that we do
12 agree with our adversaries on. They say that
13 the line can be restored to service at any
14 time, and we agree with that, but the question
15 is whether King County and Redmond should be
16 allowed to be the gatekeepers so to speak.

17 And, if they are, they really make
18 a potential mockery of what the whole rail
19 trail program is about, because it would
20 always be possible for the trail user, or
21 perhaps even the trail owner to put a stop to
22 the reactivation of rail service unless the

1 carrier desiring to reactivate had gotten that
2 right from the abandoning carrier or had
3 negotiated a contractual right with the rail
4 line, the right-of-way owner, or perhaps the
5 rail trial party.

6 Now, the second thing, which I
7 want to emphasize, and I really want to
8 emphasize, is the Board Acquisition and
9 Operation Authority is permissive. The Board
10 does not create property rights that don't
11 exist. They leave it to the parties to obtain
12 property rights.

13 And, we're perfectly happy to do
14 that. The Board authorizes operations and
15 that's all. Now, I just sort of throw out to
16 you the issue. Suppose that a shipper,
17 supposed that there was no GNP at all, no rail
18 road --

19 CHAIRMAN ELLIOTT: Well, let me ask
20 you about that, since you say whether or not
21 there's a GNP at all. Our understanding
22 through looking through some court documents

1 is that GNP presently is in involuntary
2 bankruptcy proceeding. Is that correct?

3 MR. HEFFNER: No, sir. And, my
4 colleague, Mr. Savage, will address this at
5 more length. GNP is the subject of an
6 involuntary bankruptcy filing a petition. It
7 has not been adjudicated a bankrupt as yet.
8 I anticipate there will be financing that will
9 come through within a matter of days.

10 And, if this happens, we will want
11 to make a supplemental submission with the
12 Board's permission. It will take it out of
13 bankruptcy, or excuse me, it will, it will
14 eliminate even the prospect of a bankruptcy.

15 The bankruptcy, now that you bring
16 it up, is an issue, was filed by three parties
17 initially at the instigation of a former
18 shareholder corporate officer director, who
19 incidentally has been terminated.

20 CHAIRMAN ELLIOTT: That individual
21 is no longer affiliated with the company.

22 MR. HEFFNER: Well, he's still a

1 shareholder, but he's no longer an officer.

2 CHAIRMAN ELLIOTT: What's his
3 percentage?

4 MR. HEFFNER: I believe it's 50
5 percent if I'm not mistaken.

6 CHAIRMAN ELLIOTT: So, doesn't that
7 almost make him a necessary party?

8 MR. HEFFNER: I don't know that
9 he's a necessary party of this proceeding.
10 He's been terminated in his role as an
11 officer, but --

12 CHAIRMAN ELLIOTT: Can the company
13 actually do this transaction without that
14 person's okay?

15 MR. HEFFNER: I believe it can, and
16 the reason is, while it is my understanding
17 that 4,000 shares of stock have been issued,
18 there are 10,000 that are authorized to be
19 issued, and there is, and Mr. Jones does wish
20 to purchase stock in the company. But I must
21 tell you of the three petitioning bankruptcy
22 creditors, one of them is only entitled to

1 compensation when the company gets its full
2 financing, so their claim is really a
3 contingent claim.

4 Of the other two who were
5 involved, neither of them has a written
6 contract that indicates or specifies their
7 right to compensation, and a couple of the
8 other creditors who have come into the picture
9 since then are family members of the
10 individual who was fired.

11 CHAIRMAN ELLIOTT: How would the
12 company make a determination of whether or not
13 to go forward? I mean, I assume there's some
14 type of corporate documents that set forth
15 procedures when there's dispute. What is the
16 procedure?

17 MR. HEFFNER: I'm sure there are.
18 I cannot because I do not handle their
19 corporate work. You can understand that I
20 cannot address that, but if it's something
21 that you wish us to address in a supplemental
22 filing, we'd be happy to do that.

1 COMMISSIONER MULVEY: You've
2 identified some shippers on the line and that
3 there are would-be shippers. Are these
4 shippers definitely going to ship or have they
5 just speculated that they might ship if indeed
6 service was restored?

7 MR. HEFFNER: I would like to say
8 they're definitely going to ship. I'm not
9 going to tell you that we have written
10 contracts or commitments of that level. They
11 have been past shippers on BNSF, and they
12 currently use motor carrier service and they
13 have expressed an interest in using rail
14 instead, so we anticipate they would.

15 In addition, I want to emphasize
16 in terms of what I'll call, "The book of
17 business." Most shortlines do not start out
18 with a full book of business on day one. And,
19 we're no different. And, in fact, the level
20 of freight on the freight easement has doubled
21 over the past year and my client advises it's
22 likely to double again over the next year.

1 Now, I just want to hit a couple
2 of things remaining. Suppose that a shipper
3 were to call up King County and say, "We've
4 got ten carloads of freight coming from
5 Idaho," what would happen? I realize that I'm
6 out of time, and if you wish, I can, either
7 Mr. Savage or I can address some of these
8 other questions --

9 COMMISSIONER MULVEY: I'd like to
10 ask you a question that might allow you to
11 complete the thought. Usually, very often,
12 we'll see a municipality who wants rail
13 service.

14 MR. HEFFNER: Yes, sir.

15 COMMISSIONER MULVEY: And, now
16 here's the situation where we have a trail, a
17 railbanked trail, there's a desire on the part
18 of this company to restore, reactivate
19 service. And, the county and the City of
20 Redmond are opposed to it.

21 What is the rationale? What do
22 you understand it to be, and I'll ask this

1 question also of the other parties, the
2 rationale for not wanting to restore rail
3 service at this point?

4 MR. HEFFNER: I think what
5 happened, Commissioner Mulvey, is that the,
6 the communities involved maybe didn't do their
7 due diligence. I think there might have been
8 an element that BNSF wanted to discourage some
9 of the shipping, so that depressed the levels
10 of traffic.

11 And, then there was a very
12 complicated financing arrangement where the
13 Port and other parties did a combination
14 purchase and receipt of a donation from BNSF.
15 And, my understanding is that some of the
16 financing may have fallen apart on the public
17 acquisition with the result that the Port was
18 then anxious to spin some segments off as
19 quickly as possible.

20 So that -- I'm getting a little
21 bit beyond my knowledge level, but that's what
22 I think really drove them to get rid of some

1 segments as quickly as possible, as kind of a
2 hot potato.

3 COMMISSIONER MULVEY: Thank you.

4 MR. HEFFNER: Thank you.

5 CHAIRMAN ELLIOTT: Next, we'll hear
6 from counsel for King County. Please step up,
7 introduce yourself for the record, and begin.

8 MR. SPITULNIK: Good morning, Mr.
9 Chairman, Madam Vice Chairman, and
10 Commissioner Mulvey. My name is Charles
11 Spitulnik, and I represent King County in this
12 proceeding. And, I'm joined this morning at
13 the counsel table by my colleague, Eric Pilsk.

14 The Board has asked the parties to
15 address one specific question, and the counsel
16 for GNP has raised a number of issues that I
17 will address in a moment as soon as I answer
18 the specific question that the Board asked.

19 The Board's question, as
20 Commissioner Mulvey indicated previously was,
21 under what circumstances should the Board
22 permit a carrier to permit the vacation of an

1 NITU, that is a Notice of Interim Trail Use,
2 when the petitioning carrier does not own or
3 have any other interests in the right-of-way?
4 And, King County's answer to that question
5 unequivocally is under no circumstances.

6 CHAIRMAN ELLIOTT: Before you get
7 into the nitty-gritty of that, just going back
8 to my earlier question to Mr. Heffner. After
9 reading through your submission regarding the
10 license prohibiting them GNP from providing
11 any freight service on the line. Is it the
12 party's position, King County's position, that
13 the licensee flat out would end this dispute?

14 MR. SPITULNIK: Yes.

15 CHAIRMAN ELLIOTT: Okay. It
16 appears to be a fairly unambiguous provision
17 that says, "Have no right to operate other
18 common carrier contract freight rail service
19 on the excursion Spur."

20 MR. SPITULNIK: It's rather
21 difficult to imagine a clearer statement of
22 the limitation on GNP's inability to operate

1 freight service on that line in the provision
2 that they agreed to in that agreement.

3 CHAIRMAN ELLIOTT: Thank you.

4 MR. SPITULNIK: And, one of the
5 points that Mr. Heffner referred to in his
6 opening comments was that there are a number
7 of issues like that one that would need to be
8 resolved in the State Court because as you
9 might suspect, we disagree with GNP's
10 interpretation of the agreement and might want
11 to take that to State Court.

12 And, the similar issue with
13 respect to property rights. All of those
14 things could be resolved in State Court. And,
15 those issues should be resolved before GNP
16 brings any matter to this Board asking for
17 reactivation of rail rights.

18 GNP has no property rights. If
19 they wish to try to force their way onto the
20 line, to try to force acquisition of their
21 property rights, that's a matter for State
22 Court, not for this Board.

1 As you all indicated previously,
2 there's no provision of the statute that
3 permits the Board in this context to award
4 property rights to a carrier that doesn't
5 already have them. This is not an OFA. This
6 is not an Amtrak case. This is not a
7 proceeding where the Board has the ability to
8 transfer property rights.

9 If GNP wants to get property
10 rights, there are mechanisms for them to get
11 them. And, with respect to the property
12 rights, King County is not the gatekeeper
13 notwithstanding counsel's representation and
14 description of us as the gatekeeper.

15 In this proceeding, and in this
16 transaction, the way the Board approved the
17 creation of the trail in this case, King
18 County has two roles. One is that we are in
19 fact the trail user. We have obligations as
20 the trail user that we've agreed to and our
21 statement of willingness to assume financial
22 responsibility.

1 And, in all of the documents that
2 we have filed and in all of the agreements
3 that we have reached, we have been very clear
4 that we have the obligations of trail user to
5 be responsible for the line to preserve it for
6 reactivation of freight service. That if
7 freight service is reactivated, then we have
8 to get out of the way. Our trail has to get
9 out of the way.

10 The agreements that we have with
11 King County, with the City of Redmond, with
12 Sound Transit, all make it very clear that
13 anybody who does anything on this property has
14 to understand that limitation with respect to
15 whatever may happen on the property. The
16 other role --

17 COMMISSIONER MULVEY: At what point
18 do you or City of Redmond or the Port of
19 Seattle or whoever has the property rights now
20 has a responsibility to reactivate service if
21 there's sufficient demand by shippers? And,
22 who would decide what level of demand would be

1 sufficient that would activate the common
2 carrier obligation to restore service?

3 MR. SPITULNIK: Well, the Board --
4 I was about to get to that. Thank you very
5 much, Commissioner Mulvey. Because the second
6 part of what happened when this trail was
7 created was that King County acquired the
8 reactivation right, but the Board was very
9 clear in the decision where it said that King
10 County was acquiring that there's a second way
11 that somebody can come in.

12 King County, as the holder of what
13 would have been BNSF's reactivation right
14 could if it wished to restart service on this
15 line just the same as any abandoning railroad
16 would be able to, but the Board was very clear
17 that in the event that a bonafide petitioner
18 comes along, those are the Board's words, in
19 the event a bonafide petitioner comes along
20 and seeks authorization to operate rail
21 service and gets authorization to operate rail
22 service then rail service can be reactivated.

1 And, the statute sets out the
2 standards for that. We have Section 10901,
3 Section 10902. The public convenience and
4 necessity standard would mandate that if
5 there's a ruling under that section that rail
6 service has to commence, it would be rather
7 difficult for the trail user not to honor that
8 finding, but that's not what we have here.

9 What we have in this case, we
10 don't have a request for independent new
11 service under or a new authorization under
12 Section 10901 or 10902. What GNP has done is
13 come to this Board and ask for a transfer of
14 our reactivation right.

15 On page two of their initial
16 pleading, they make it very clear that what
17 they're seeking is the acquisition of the
18 residual common carrier obligation. That's
19 what King County acquired. That's not what's
20 out there under Section 10902 for them to
21 acquire.

22 If they were to bring an

1 application under 10901 or 10902, depending on
2 whether they are in fact a rail carrier
3 providing transportation subject to the
4 jurisdiction of the Board, an allegation, an
5 assertion that they make and with which we are
6 certain that we agree. If they were to get
7 authorization under that then the county would
8 be hard pressed to look at that and say,
9 "Sorry, we're going to, we're going to..."

10 COMMISSIONER MULVEY: You would
11 retain property rights, but they would be the
12 operating railroad.

13 MR. SPITULNIK: We have no property
14 rights.

15 COMMISSIONER MULVEY: The --

16 MR. SPITULNIK: The City of Redmond
17 would have the property rights and the Port of
18 Seattle has property rights. And, I'm sure
19 that Mr. Cohen when he's here in a few minutes
20 will be eager to answer that question.

21 COMMISSIONER MULVEY: And, GNP
22 would have to contract with them.

1 MR. SPITULNIK: GNP would have to
2 find a way to get access to the property in
3 order to be able to conduct that, and that's
4 what this Board has consistently asked parties
5 who are seeking to reactivate abandoned rail
6 lines to do. And, that is to come to the
7 Board with a package of rights available.

8 That's what the Iowa Power case
9 stands for. The Board recently confirmed this
10 idea that when you come to the Board to
11 reactivate an abandoned rail line, in the Mare
12 Island case, when you come to the Board to
13 reactivate an abandoned rail line, you should
14 come with the property rights that you need in
15 order to be able to conduct the operation.

16 And, if you don't have the
17 property rights, then we'll ask you to just
18 what you, the Board, will wait, we'll ask the
19 parties to come back when they do have those
20 property rights so that they can then go
21 forward. And, Iowa Power makes it pretty
22 clear that a party that seeks to reactivate a

1 rail service, if it's somebody other than the
2 abandoning carrier, should have the regulatory
3 authority that they need, should be able to
4 restart service, and in the Iowa Power case
5 was also an indication that they should get
6 consent of the abandoning carrier.

7 In the Iowa Power case, the
8 abandoning carrier still held on to the
9 reactivation right. It hadn't transferred it
10 as has happened in this case.

11 With respect to, with respect to
12 the proposal that King, pardon me, that GNP is
13 making here, GNP has -- Mr. Heffner has
14 indicated that, and in response to questions
15 from this Board, has indicated that we, we
16 don't really have any idea about when it is,
17 what might be the right circumstances when we
18 would, when we would permit a rail carrier to
19 come back onto the property.

20 And, he makes much of the
21 testimony in Ms. Bissonette's deposition about
22 that we don't do rail. Well, remember the

1 timing of this transaction. Remember how this
2 transaction played out.

3 The parties spent a great deal of
4 time trying to figure out how to structure
5 this transaction in a way that was going to
6 solve everybody's, solve everybody's issues
7 and bring everybody to a point where BNSF
8 would be willing to abandon and relinquish the
9 lines in the way that it did. The parties
10 completed that.

11 And, at that time, the only rail
12 carrier that was in the picture that might
13 have some interest in operating anywhere close
14 to these line that were abandoned, that were
15 abandoned and subject to trail use, had signed
16 an agreement that would permit it to operate
17 only on the northern section on what Mr.
18 Heffner referred to as, "The freight segment."
19 And, indeed, that carrier had specifically
20 agreed that it would not try to do anything
21 further to the south.

22 So, is it the case that the county

1 at the time that Ms. Bissonette was disposed
2 to, did not have staff in place, did not have
3 a function in place to figure out how to do
4 rail? Of course. This is a relatively new
5 transaction for them and they're in the
6 process of trying to figure out how to manage
7 their responsibilities.

8 They're in the process of planning
9 and implementing, developing and implementing
10 the regional plan that, of which this
11 transaction is a part, and moving forward with
12 that. And, notwithstanding GNP's
13 characterization of the county as standing in
14 the way, the county is trying to figure out
15 how to address its obligations.

16 And, as I indicated before, when
17 the right carrier comes along and the Board
18 determines that such a carrier has satisfied
19 the statutory standards, the county will
20 satisfy its obligation.

21 CHAIRMAN ELLIOTT: Mr. Spitulnik,
22 could you move your mic up a little bit? I

1 think people are having some -- thanks.

2 MR. SPITULNIK: In the -- I see
3 that my time is almost up. And, I want to
4 confirm, I want to confirm that this
5 proceeding is not one in which GNP is simply
6 coming before the Board and asking for, for an
7 exercise of authority under Section 10901 or
8 10902 to independently begin operation.

9 It's asking for a transfer of our
10 reactivation right. It's also brought this
11 proceeding forward as an exemption proceeding.
12 And, this Board's precedent is very clear that
13 when a proceeding like this, when an
14 application is one that, engenders as much
15 controversy as this application has, an
16 exemption proceeding is not the appropriate
17 way to go forward. Rather, it should be
18 subject to a full application.

19 And, if this were to be subject
20 for a full application then the GNP would be
21 required to make the full showing that the
22 public convenience and necessity mandates the

1 re-institution of rail service over this line.

2 And, based on the facts that
3 you've heard today that have been developed in
4 this proceeding, now I want to keep talking,
5 that, I want people to hear me, based on the
6 facts that have been developed in this
7 proceeding and that have been presented in all
8 of our pleadings, it's not entirely clear that
9 GNP would even be able to make the showing
10 required under 10902. Thank you very much.

11 CHAIRMAN ELLIOTT: Thank you,
12 counsel.

13 We'll next hear from counsel for
14 the City of Redmond. Please step up,
15 introduce yourself for the record, and begin.

16 MR. COHEN: Mr. Chairman, Madam
17 Vice Chair, Commissioner Mulvey, I'm Matt
18 Cohen, and I'm here on behalf of the City of
19 Redmond Washington.

20 Redmond owns the southerly four
21 miles of the Redmond's Spur. The city
22 purchased that segment from the Port of

1 Seattle for \$10 million cash about a year ago.

2 The Board asked the, asked counsel
3 to address the circumstances under which the
4 Board will grant a carrier's request to vacate
5 a NITU -- I've never understood whether it's
6 a NITU or a CITU, but it'll be a NITU for me
7 today, when the carrier does not own or have
8 any other interest in the right-of-way.

9 I think the Board's own rules
10 address that, address that question. GNP
11 filed a petition under 49 U.S.C. 10902 to
12 acquire operating rights to the Redmond Spur.
13 The Board has some rules that implement the
14 requirements of 10902, and they require that
15 a carrier proposing to acquire an operating
16 interest in a shortline submit, and I'm
17 quoting, "A statement that an agreement has
18 been reached or details about when an
19 agreement will be reached."

20 GNP addressed this requirement in
21 its petitions to the Board. It says it's been
22 talking with King County representatives,

1 however, the parties have not yet reached an
2 agreement. That statement was true last
3 summer when GNP filed its petitions. It's
4 true today.

5 But, and so that's interesting,
6 but the requirement is actually a requirement
7 of your rules. It's a facial requirement when
8 you file an application under 10902 to have a
9 statement that an agreement has been reached.

10 The requirement has substantive
11 roots. It's really the Board saying to an
12 entity it wants to acquire an operating
13 interest in a rail line. Come in here and
14 show us that you have the ability to occupy
15 the line, to provide service on the line.
16 Show us a property right. Show us a
17 contractual right. GNP has not satisfied that
18 requirement and that omission in and of itself
19 I think is dispositive of their application.

20 There's another huge legal problem
21 with GNP's petition here in our view. And,
22 that is if you granted their petitions, you

1 would really eviscerate the Board's OFA
2 authority.

3 And, the fact, the way in which
4 this transaction unfolded is more powerful in
5 showing that than any arguments I could make.
6 In September of 2008, the BNSF filed a Notice
7 of Exemption to abandon service on the
8 Woodinville subdivision and the Redmond Spur.

9 That same month, the Board
10 published notice of the intended abandonment
11 and invited expressions of interest to file an
12 OFA. At that time, GNP was negotiating hard
13 with the Port of Seattle for access to the
14 Redmond Spur.

15 They weren't seeking the ability
16 to provide freight service. They were seeking
17 the ability to provide excursion service. But
18 one can presume that they were well aware of
19 the abandonment application. In fact, the
20 record is replete with statements by them that
21 indicate they knew what was, they knew what
22 BNSF was proposing to do, and yet they did not

1 file any expression of interest to do an OFA,
2 neither did anyone else.

3 And, that's not surprising because
4 there was no freight service on the line.
5 There hadn't been for a few years. And, there
6 was no prospect for making money carrying
7 freight on the Redmond Spur.

8 So, the Board issued a NITU order,
9 and it took, it took the NSF about a year to
10 negotiate a purchase and sale agreement with
11 the Port of Seattle, but the property was
12 transferred to the Port in December 2009,
13 transferred railbanked rights-of-way for \$81
14 million. King County became the interim trail
15 manager at that time.

16 So, hardly is the ink dry on that
17 purchase and sale agreement when GNP comes
18 into the Board with its current petitions and
19 says, "Why don't you allow us to assume the
20 operating responsibility on the Redmond Spur
21 without paying anything?"

22 If they had filed an OFA, they

1 would have had to make a showing of their
2 financial responsibility and they would have
3 been, had to have been willing to pay fair
4 market value for the line. If you allow them
5 to skip over the statutory procedure
6 established by Congress that enables a third
7 party to come in and save a failing rail line
8 at the time of abandonment and then wait until
9 those proceedings are over and somebody has
10 paid \$80 million for the line and then come in
11 and do what they're proposing to do here,
12 what's left of your OFA authority? Why would
13 anyone ever invoke those procedures if you can
14 do what GNP is proposing to do now?

15 GNP says it's a state law issue.
16 We know that, we know that we need to obtain
17 property rights on the Redmond Spur, but that
18 shouldn't be the Board's concern. That's an
19 issue for the State Courts.

20 But, it's not a state law issue
21 where a carrier files a facially incomplete
22 application. The showing that they have that

1 right to access the right-of-way is one of
2 your 10902 requirements.

3 It's also a Board issue when a
4 carrier invokes STB authority to accomplish
5 purposes other than providing interstate rail
6 freight service. We think that's what's
7 happening here.

8 GNP's goals are to run an
9 excursion train from downtown Redmond to the
10 City of Snohomish, and ultimately to force
11 Sound Transit to buy them out when Sound
12 Transit does its East Link light rail system
13 when it comes to Redmond.

14 You don't have to look very far to
15 find the evidentiary basis for those
16 contentions. Start with that contract that
17 several of you asked about. The contract
18 forbids GNP from carrying freight on the
19 Redmond's Spur.

20 GNP negotiated that contract with
21 an eye to their business plan for this right-
22 of-way. They knew very well when they entered

1 into it what it said and they accepted that
2 provision. If you're planning to run freight,
3 you're not going to sign a contract that says
4 you can't.

5 And, that contract is very
6 consistent with the representations that GNP
7 made to the Port of Seattle when they were
8 seeking authority to acquire interest in the
9 Woodinville subdivision and the Redmond Spur.
10 GNP said, "You can't make money hauling
11 freight on this right-of-way. Excursion
12 service is what we want. Eighty percent of
13 our revenues are going to come from
14 excursion."

15 And, when the Port declined to
16 grant them those rights, GNP said, "Well, then
17 we're going to have to change the economic
18 terms of the deal. Instead of paying you \$1
19 million up front, we'll pay you \$10,000 up
20 front."

21 And, for various reasons that are
22 outside the scope of this proceeding, the Port

1 went along with that. And, the final
2 agreement forbids GNP from running freight on
3 the Redmond Spur.

4 So, GNP next went to the Redmond
5 City Council and painted a lovely picture of
6 an excursion service from downtown Redmond up
7 to Snohomish. They were going to call it,
8 "The Tasting Train." And, they were going to
9 run cruise ship passengers from Redmond up to
10 Snohomish, and they'd all have a wonderful
11 time.

12 And, they might all have a
13 wonderful time, but Redmond had other
14 priorities for this right-of-way and declined
15 that invitation. And so, the next thing GNP
16 files its, its petition seeking to invoke your
17 authority to reestablish freight service.

18 COMMISSIONER MULVEY: You said
19 Redmond had other plans for the right-of-way.
20 What are those plans?

21 MR. COHEN: Well, the short-term
22 plans are a trail and a storm water trunk line

1 to be installed this summer unless the Board
2 enjoins them from doing so.

3 COMMISSIONER MULVEY: Is the storm
4 water trunk line incompatible with the, with
5 the railbanked line or can they both be done
6 in --

7 MR. COHEN: The storm water trunk
8 line was engineered and engineered very
9 consciously to permit re-institution of rail
10 service in the future if that demand
11 materializes. So, it will go under a section
12 of the right-of-way, but it requires the
13 salvage of seven tenths of a mile of the
14 right-of-way in order to install the line, you
15 know, 12 feet underground, but it was
16 engineered to permit restoration of rail
17 service if that, if that demand materialized.

18 In the long-term, that same mile
19 of the Redmond Spur running through downtown
20 Redmond is the last mile of the East Link
21 light rail system that Sound Transit is trying
22 to build out to Redmond from downtown Seattle.

1 COMMISSIONER MULVEY: There's some
2 issue about whether or not the construction
3 season will pass if the Board delays this.
4 We're familiar with construction seasons and
5 I'm familiar with the Seattle area. It's
6 raining most of the time. Is the construction
7 season really going to end in October or can
8 the work actually be done even later because
9 you don't get a lot of, in this area, a lot of
10 snow and very cold weather?

11 MR. COHEN: You never know when the
12 rain is going to start in the Pacific
13 Northwest, but the Washington Department of
14 Fish and Wildlife just says, "We don't allow
15 construction except during that summer
16 window."

17 COMMISSIONER MULVEY: Okay. Thank
18 you.

19 MR. COHEN: So, that's when it can
20 happen.

21 COMMISSIONER MULVEY: Okay. Thank
22 you.

1 MR. COHEN: Thank you very much.

2 CHAIRMAN ELLIOTT: Thank you, Mr.
3 Cohen.

4 Mr. Savage, I believe, you have
5 five minutes on rebuttal.

6 MR. SAVAGE: Mr. Chairman, Redmond
7 had failed to do environmental due diligence
8 in connection with this supposedly essential
9 trunk line. In fact, it was not until after
10 we filed our motion to strike their April 13
11 filing that they even made initial contact
12 with either of the environmental agencies that
13 they were required to do by this Board when it
14 entered the King County trail use decision,
15 the decision allowing King County to become
16 the trail user.

17 CHAIRMAN ELLIOTT: Mr. Savage, do
18 you know anything more about this bankruptcy
19 proceeding, and I guess the status of GNP,
20 with respect to this 50 percent ownership that
21 appears to be not with us today?

22 MR. SAVAGE: Yes and yes.

1 CHAIRMAN ELLIOTT: Can you explain
2 exactly where we are? Has GNP done everything
3 they need to as a corporation to go ahead with
4 this transaction that they're proposing?

5 MR. SAVAGE: Yes. GNP has done
6 their due diligence. First of all, with
7 regard to the bankruptcy, the involuntary
8 bankruptcy petition was filed by some
9 creditors pursuant to the bankruptcy court's
10 process. The parties are in negotiations.
11 It's a two-step negotiation.

12 The first negotiation is GNP and
13 its potential financiers. There are flights
14 of financiers lined up one after the other for
15 the right to fund this process. We are at a
16 point in time where that has not been
17 finalized.

18 Once that is finalized, and it
19 shall be finalized by May 25, which is the
20 date set down by the bankruptcy court for the
21 finalization of GNP funding. GNP will meet
22 with the creditors and will work out a plan

1 for paying them presumably 100 cents on the
2 dollar, which will result in the dismissal of
3 the bankruptcy proceeding.

4 With regard to the corporate
5 ownership of GNP, Mr. Engle was speaking in
6 two capacities. Number one, he is a
7 shareholder, and number two, he was a
8 corporate officer. He is no longer a
9 corporate officer.

10 I would state that as a matter of
11 common sense, Mr. Engle's shareholdings would
12 be worth zero if GNP were to be adjudged a
13 bankrupt, which they have not as of yet been
14 so adjudged. And that it was, is in Mr.
15 Engle's interests, as it is in the interests
16 of the other shareholders, for GNP to go
17 forward.

18 And, under the very specific
19 railroad bankruptcy provisions, there is no
20 possibility of Mr. Engle benefitting as a
21 current shareholder of GNP by the implosion of
22 GNP.

1 CHAIRMAN ELLIOTT: So, at the
2 present time, Mr. Engle is not onboard. Is
3 that what you're saying?

4 MR. SAVAGE: Mr. Engle -- Mr. Engle
5 is allowed under the terms of GNP's corporate
6 provisions to participate in the decision
7 approving the financing. Should he choose not
8 to participate or to oppose the financing then
9 he would lose his entire investment, so he has
10 not, to this point --

11 CHAIRMAN ELLIOTT: What is that
12 investment? Do you know?

13 MR. SAVAGE: I believe it's, it's
14 in the six figure range. And, there are also
15 family members who have, his family members,
16 have also invested additional monies, so it's
17 not an insubstantial amount of money that is
18 in the process of being worked through.

19 COMMISSIONER MULVEY: Maybe this is
20 a money issue. If the Board were to prevent
21 GNP from reactivating rail service on this
22 line, how would GNP compensate the owner of

1 the property for its use? How would you
2 compensate the Port of Seattle or the City of
3 Redmond?

4 The monies that were talked about
5 here, the millions of dollars, you're not
6 filing an OFA, and that's another concern. Is
7 this an attempt at getting around the Board's
8 OFA process and requirements? We do require
9 that people filing an OFA are financially
10 viable and we do look at that very, very
11 carefully to make sure that an OFA filing is
12 from a legitimate file.

13 Can you address both of those: why
14 it's not an end run around our OFA process and
15 how you would determine compensation? Should
16 the Board be determining what the compensation
17 should be?

18 MR. SAVAGE: No. GNP has a
19 compensation arrangement in place with the
20 Port for the freight easement. The Port is
21 the owner of the first 3.4 miles of the
22 Redmond Spur. Should we be granted operating

1 authority, which this Board can grant under
2 10502, the Prairie Central decision, even in
3 the absence of our showing of a present
4 ability to consummate the transaction.

5 GNP expects that it would enter
6 into a similar arrangement with the Port with
7 regard to the balance of the line, some of
8 which trackage it already operates various --
9 it has already various rights to operate on.

10 With regard to Redmond, we're not
11 sure. And, Redmond was not disclosed as an
12 owner of the property to us until after this
13 proceeding had already begun. And, I
14 appreciate their stepping forward, but they
15 present issues which are of a different,
16 different nature.

17 And, we have some ideas on how to
18 satisfy their interests as well, which we'd be
19 happy to share with the Board should you wish
20 to extend me the time or perhaps through
21 further submission after this hearing.

22 VICE CHAIRMAN BEGEMAN: Just remind

1 the Board what the terms are with respect to
2 the contract not to provide freight service
3 when you entered into it, how long that
4 contract goes for.

5 MR. SAVAGE: The contract with the
6 Port of Seattle, I believe, is for ten years.
7 Mr. Payne --

8 VICE CHAIRMAN BEGEMAN: And, when
9 was it? Remind me when it was entered --

10 MR. SAVAGE: December 2009. And --

11 VICE CHAIRMAN BEGEMAN: You filed
12 with the Board just last August?

13 MR. SAVAGE: 2010. And, under the
14 --

15 VICE CHAIRMAN BEGEMAN: So, eight
16 months later.

17 MR. SAVAGE: Right, but I would --
18 I know we're going into issues of state law,
19 but --

20 VICE CHAIRMAN BEGEMAN: It's
21 actually, if you're not going -- true, but my
22 question is if the company at the time, the

1 carrier envisioned in December 2009 that it
2 wasn't providing freight service for ten
3 years.

4 MR. SAVAGE: It was --

5 VICE CHAIRMAN BEGEMAN: Only eight
6 months -- you filed -- I'm just kind of trying
7 to understand what's going on.

8 MR. SAVAGE: I can -- yes. I will
9 explain. The contract with the Port of
10 Seattle was made subject to the multipurpose
11 easement. And, the multipurpose easement
12 requires the county to cooperate in the
13 restoration of freight service, so there are
14 provisions that giveth and provisions that
15 taketh within the same document, hence, the
16 State Court dilemma that needs to be resolved.

17 VICE CHAIRMAN BEGEMAN: I don't
18 find that to be very clear. I'm sorry.

19 MR. SAVAGE: The public
20 multipurpose easement is in the record and it
21 does require the county to cooperate with the
22 party seeking to reactivate freight service,

1 which happens, in this case, to be GNP.

2 COMMISSIONER MULVEY: Well, it's
3 still at issue though. The question is why
4 you signed an agreement that said, "You can't
5 or you would not operate freight service over
6 this line," and then fairly shortly afterward,
7 and recognizing that that was a longer term
8 interest if you're going to reactivate the
9 line for freight service and you're going to
10 have to be carrying -- why did you sign it to
11 begin with? I just don't quite understand why
12 you would have gone ahead and signed it when
13 it clearly was opposed to your purpose.

14 MR. SAVAGE: Once the line was up
15 and running, business opportunities arose for
16 GNP that also contemplated additional business
17 on the contiguous branch down the Redmond
18 Spur. And, the Board does have letters of
19 interest from various parties on the Spur.

20 COMMISSIONER MULVEY: So all those
21 occurred or developed after you had already
22 signed that --

1 MR. SAVAGE: That's correct,
2 Commissioner.

3 VICE CHAIRMAN BEGEMAN: Has there
4 been any contact with Seattle or those that
5 you entered the contract with to try to undo
6 the contract?

7 MR. SAVAGE: Well, we had sought a
8 meeting with the stakeholders under the
9 Board's auspices under a mediation or
10 negotiation format supervised by the Board,
11 and I believe that Seattle had, or excuse me,
12 that King County had agreed to participate in
13 that meeting, but then the bankruptcy petition
14 arose and put a stop for the present on those
15 discussions. But we would like to renew,
16 resume them as soon as the bankruptcy is
17 behind us.

18 COMMISSIONER MULVEY: To a large
19 degree, the idea of the rails-to-trails
20 program was to preserve the rights-of-way for
21 the reactivation of rail service. And, I
22 think the focus really was on freight,

1 although, we have approved it to be used for
2 passenger services as well.

3 But, the other speaker suggested
4 that what you want to do is run this cruise
5 ship train to the Port and, I guess, a wine
6 train or whatever. Would it be possible for
7 the Board to or, do you feel the Board has the
8 authority, to limit reactivation of the line
9 to carry freight only? That it would have to
10 carry freight service and could not just be
11 reactivated for the purpose of carrying these
12 tour and charter trains?

13 MR. SAVAGE: Yes. And, cutting
14 through the fog of war, we have a plan that
15 would keep freight trains out of downtown
16 Redmond that we are anxious to present to them
17 if we can get beyond the, the stalemate that
18 we are at right now.

19 COMMISSIONER MULVEY: But we could
20 condition the authority on carrying freight,
21 i.e. freight service must be provided, not
22 just passenger service.

1 MR. SAVAGE: Passengers are
2 actually, are something that the community
3 does not oppose in principal. After all, they
4 are doing the study of their own with regard
5 to providing trolley service up the line from
6 Redmond towards our Woodinville --

7 COMMISSIONER MULVEY: Sound
8 service.

9 MR. SAVAGE: And, it's -- well,
10 that's in addition. This is a Redmond-
11 specific trolley study that was commissioned
12 by the town in the recent months.

13 In addition to that, Sound Transit
14 wants to get to Redmond by a back door that
15 kind of essentially sets up an end-to-end
16 operation where our line or the Spur ends in
17 Redmond, Sound Transit builds out from
18 Bellevue and connects to Redmond from the
19 southeast.

20 So, all of these proposed uses are
21 compatible. We don't think that it's the
22 excursion business that detracts or causes

1 Redmond to have these concerns about our
2 operation because they know that the wineries
3 on the Spur are tourist destinations. There
4 have been attempts to operate tourist trains
5 on the line before.

6 And, we think that our proposal
7 doesn't do violence to any of Redmond's
8 interests. We thought, and perhaps we believe
9 correctly, that they don't want freight trains
10 downtown. We can keep the freight trains west
11 of the river that's separates the Spur from
12 downtown should we be granted authority to do
13 so by the Board.

14 VICE CHAIRMAN BEGEMAN: Would you
15 mind repeating? I think you said that prior
16 to the bankruptcy issue that you had hoped to
17 mediate or negotiate. Could you just clarify
18 what you said?

19 MR. SAVAGE: We had contacted the
20 STB with a suggestion that the parties conduct
21 or have a meeting, I guess, mediated to some
22 extent, I don't know whether formally or

1 informally, by the Board's Office of Public
2 Assistance. The Board had approved that and
3 I believe the other parties had not opposed
4 it.

5 And, in fact, I think we had one
6 letter, and I believe it was from Mr.
7 Spitulnik's client indicating that they
8 consented to it. Then the bankruptcy happened
9 then we were stopped in our tracks and that
10 meeting has not taken place.

11 And, we, we'd actually asked for a
12 stay of this proceeding to get the bankruptcy
13 resolved, but, in any event, it will be one
14 way or the other by May 25.

15 VICE CHAIRMAN BEGEMAN: Prior to
16 your filing last year with the Board, had
17 there been any efforts to have conversations
18 with King County or the Port or Redmond? I
19 think you said actually you didn't know
20 Redmond was participating, but -- or did you
21 just sort of surprise everyone -- I mean, to
22 discuss the issue of the property rights,

1 which is a pretty big deal?

2 MR. SAVAGE: Yes, that subject came
3 up. The negotiations were ongoing between GNP
4 and I believe Tay Yoshitani of Port of
5 Seattle. He was spearheading those
6 discussions. And, I believe King County was
7 also a party to them.

8 VICE CHAIRMAN BEGEMAN: So there
9 have been -- there were discussions?

10 MR. SAVAGE: Up until the point of
11 filing then they took affront to our filing
12 and there was kind of cold war --

13 VICE CHAIRMAN BEGEMAN: Could you
14 sort of describe the extent -- I mean, were
15 there countless meetings? Was there one phone
16 call? What effort had gone on?

17 MR. SAVAGE: Multiple meeting,
18 multiple meetings and there is an email. We
19 have exchanged emails with the other parties,
20 copies of the files reflecting the results of
21 those meetings. We did not attach them to the
22 record, but we have them in our files as do

1 the other side, does the other side.

2 VICE CHAIRMAN BEGEMAN: Could you
3 just kind of share what maybe the time line
4 duration was?

5 MR. SAVAGE: I believe that the
6 position of the Port was that they needed more
7 time to study the ramifications and
8 implications of it. All of which we didn't
9 really understand because we already had an
10 agreement with them for the freight segment,
11 and this was just an accessory use so to speak
12 to use a land use term to extend our franchise
13 a few miles down the track.

14 So, we didn't know why they needed
15 so much time. And, we decided to accelerate
16 the process by filing. They took affront to
17 that and we didn't talk for several months,
18 hence my suggestion that we have the informal
19 meetings using the Board's Office of Public
20 Assistance as a facilitator to get those
21 started again.

22 CHAIRMAN ELLIOTT: Thank you very

1 much, counsel. Thank you all counsel for your
2 thoughtful arguments. We'll take the matter
3 under advisement. And, the meeting of the
4 Board is now adjourned. Thank you.

5 (Whereupon, the above-entitled
6 matter concluded at 11:16 a.m.)

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This is to certify that the foregoing transcript

In the matter of: GNP Railway v King County

Before: STB

Date: 05-12-11

Place: Washington, DC

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