

41710  
EB

SERVICE DATE – LATE RELEASE JUNE 15, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35407

GNP RLY, INC.—ACQUISITION AND OPERATION EXEMPTION—REDMOND SPUR AND  
WOODINVILLE SUBDIVISION

Docket No. AB 6 (Sub No. 463X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN KING  
COUNTY, WASH.

Docket No. AB 6 (Sub No. 465X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN KING  
COUNTY, WASH.

Digest:<sup>1</sup> A railroad seeks Board authority to restart rail service over a line that is currently rail banked. Because the record raises serious concerns about the railroad's ability to provide freight service, the Board denies this request for authority.

Decided: June 15, 2011

On August 24, 2010, GNP Rly, Inc. (GNP), a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10902 to acquire the right to reactivate rail service over 2 segments of rail-banked railroad right-of-way (ROW) totaling 9.1 miles. The segments consist of: (1) a ROW extending from milepost 0.0, at Woodinville, Wash., to approximately milepost 7.30, at Redmond, Wash. (Redmond Spur); and (2) a ROW extending from milepost 23.8 to milepost 22.0, at or near Woodinville (Woodinville Subdivision). The Board had previously authorized these segments to be conditionally abandoned, subject to notices of interim trail use (NITUs), providing time for BNSF Railway Company (BNSF) and King County, a political subdivision of the State of Washington, to

---

<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, STB Ex Parte No. 696 (STB served Sept. 2, 2010).

negotiate an interim trail use/rail-banking agreement under 16 U.S.C. § 1247(d) (Trails Act).<sup>2</sup> Concurrent with its petition for exemption, GNP filed a petition to vacate the NITUs issued for these segments. In a notice served on September 15, 2010, and published in the Federal Register on September 20, 2010 (75 Fed. Reg. 57,327), the Board requested comments on GNP's request to reactivate rail service and partially vacate the NITUs. On May 12, 2011, the Board held an oral argument in which GNP, King County, and the City of Redmond (Redmond) participated.

GNP seeks to acquire the right to reactivate rail service over the rail-banked ROW, even though it has no property interest in the ROW, and the holder of the right to reactivate service, King County, as well as those with property interests in the ROW, object to GNP's reactivation proposal. As discussed below, GNP fails to persuade us that it is a "bona fide petitioner" to reactivate rail service. King County, Wash.—Acquis. Exemption—BNSF Ry., FD 35148 (STB served Sept. 18, 2009) (September 2009 Decision).

## BACKGROUND

The rail-banked segments at issue in these proceedings are part of a series of planned transactions involving BNSF, King County, the Port of Seattle (Port), and Redmond. After the Board authorized BNSF to abandon the 3 segments of rail line<sup>3</sup> subject to NITUs, BNSF entered into an agreement with King County for King County to serve as the trail sponsor. The Port, a municipal corporation of the State of Washington, acquired from BNSF the real estate associated with the segments.<sup>4</sup> King County then petitioned to acquire BNSF's "residual common carrier rights and obligations." In the September 2009 Decision, the Board granted King County's request to acquire BNSF's rights and obligations, including the right to reinstate rail service in the future. After these transactions were complete, Redmond purchased a portion of the Redmond Spur, extending between milepost 3.4 and milepost 7.3.

GNP's petition seeks to reinstate service over 9.1 miles of rail-banked ROW. GNP states that it currently provides rail freight service on contiguous track north of the Woodinville

---

<sup>2</sup> These segments were the subjects of abandonment proceedings and NITUs in BNSF Railway Company—Abandonment Exemption—in King County, Wash., AB 6 (Sub-No. 463X) and BNSF Railway Company—Abandonment Exemption—in King County, Wash., AB 6 (Sub-No. 465X).

<sup>3</sup> All freight service on the ROW at issue ceased in 2006. In 2008, BNSF sought abandonment authority under the streamlined class exemption for so-called "out-of-service" lines—lines on which no traffic has originated or terminated for at least 2 years. Neither GNP nor any other carrier filed an offer of financial assistance (pursuant to 49 U.S.C. § 10904) to purchase the line segments for continued rail service at that time.

<sup>4</sup> The Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served June 20, 2008).

Subdivision from milepost 23.8, in Woodinville, to milepost 38.25, in Snohomish (freight segment).<sup>5</sup> GNP acquired an easement from BNSF allowing it to operate over the freight segment and to provide passenger excursion service. 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 precludes GNP from operating freight service over that portion of the Redmond Spur.<sup>6</sup>

In opposition to GNP's petition, the Board received comments or letters from King County, Redmond, the Port, BNSF, Rails to Trails Conservancy, and Central Puget Sound Regional Transit Authority (Sound Transit). These commenters argue that GNP lacks the property or contract right to operate over the ROW and provide rail freight service. GNP argues that demand for freight service has subsequently developed on the segments and that the following shippers have requested freight service prospectively: Drywall Distributors; Buildings Specialties; Woodinville Lumber, Inc.; Steeler, Inc.; and UniSea. In support of GNP's petition, the Board also received filings from the following interested persons: Washington State Wine Commission; Master Builders Association of King and Snohomish Counties; Ernest F. Wilson; Waste Management, Inc.; Marketing Philharmonic; Issaquah Valley Trolley; and Eastside Rail Now. These commenters generally assert that reinstating rail service would increase economic stability and development as well as protect the environment.

In a February 7, 2011 filing, GNP informed the Board that 3 parties who are not involved in these proceedings had filed a petition to place GNP in involuntary bankruptcy.<sup>7</sup> On February 15, 2011, Redmond, King County, and Central Puget Sound Regional Transit Authority (collectively, Regional Governments) filed a response, including a copy of the bankruptcy petition and declarations in support of that petition by Byron Cole, the General Manager of Ballard Terminal Railroad Company, and Douglas Engle, a current 50-percent shareholder and former CFO of GNP. On March 22, 2011, Redmond also submitted the declaration of Thomas Payne, the Chairman, CEO, and COO of GNP, which was filed in the bankruptcy proceeding.<sup>8</sup>

---

<sup>5</sup> GNP's Petition for Exemption 3, 5, Aug. 24, 2010; see GNP Rly Inc.—Acquis. and Operation Exemption—BNSF Ry., FD 35213 (STB served Feb. 13, 2009).

<sup>6</sup> King County and Redmond included copies of the License Agreement in their comments. King County's Comments, Exhibit 18; Redmond's Comments, Exhibit E.

<sup>7</sup> In its filing, GNP requested that we hold these proceedings in abeyance. By decision served March 15, 2011, the Board denied GNP's request.

<sup>8</sup> Redmond's March 22, 2011 filing was in response to GNP's motions for protective orders. By decision served April 7, 2011, the Board issued a protective order.

On April 13, 2011, Redmond filed a letter stating that it intends to construct a stormwater trunk line along the north edge of the rail-banked corridor from milepost 6.2 to milepost 7.3, which runs through downtown Redmond. Redmond states that the construction of the trunk line will require removal of track and ties and that it intends to begin construction on July 1, 2011. Redmond further states that, consistent with the rail-banking requirements of the Trails Act, the trunk line has been designed to allow potential reactivation of rail service on the Redmond Spur. On April 28, 2011, GNP filed a motion to strike or reject Redmond's April 13 letter or in the alternative for leave to reply. GNP argues that Redmond is prohibited from removing rail assets from a rail-banked line and that it must comply with the environmental conditions imposed by the Board.<sup>9</sup> GNP further argues that, if Redmond proceeds with removing the track, such action would irreparably harm GNP's ability to offer freight service. GNP requests that the Board issue an order enjoining Redmond from removing any rail trackage or infrastructure.

On May 5, 2011, King County submitted a reply, stating that it supports Redmond's project and does not believe that the project will interfere with ongoing rail banking. King County notes that GNP still lacks any property right to use the Redmond Spur for proposed freight service and that the Board's practice is not to regulate construction activities that take place on a rail-banked ROW. On May 6, 2011, Redmond also submitted a reply to GNP's April 28 filing. Redmond states that it is complying with state and Federal environmental regulations, and that GNP does not satisfy the criteria for an injunction.<sup>10</sup>

On June 8, 2011, GNP, King County, and Redmond—the latter 2 filing jointly—submitted an order from the bankruptcy court denying in part and granting in part the petitioning creditors' motion for summary judgment and noticing a pretrial conference to schedule an evidentiary hearing (June 7 Order).<sup>11</sup> GNP states that the bankruptcy case may continue beyond the evidentiary hearing and requests that we hold these proceedings in abeyance for 90 days. On June 14, 2011, King County filed a response on behalf of itself, Redmond, Sound Transit, and the Port, opposing GNP's abeyance request.

#### PRELIMINARY MATTERS

First, we will address GNP's requests that we reject Redmond's April 13, 2011 filing or enjoin King County and/or Redmond from removing any rail trackage or infrastructure from the Redmond Spur. We will accept all of the recent filings of Redmond, GNP, and King County

---

<sup>9</sup> See BNSF Ry.—Aband. Exemption—in King County, Wash., AB 6 (Sub-No. 463X) (STB served Oct. 27, 2008 and Apr. 6, 2009).

<sup>10</sup> Redmond's May 6, 2011 filing also clarifies that it intends to salvage 0.7 miles of track, instead of 1.1 miles, which Redmond referenced in its April 13, 2011 letter.

<sup>11</sup> In re GNP Rly, Inc., Case No. 11-40829-BDL (W.D. Wash.)

because they provide a more complete record, clarify the arguments, and will not prejudice any party or unduly prolong this proceeding.

The Trails Act does not prohibit a trail sponsor from removing track or making changes to the ROW, so long as the property remains available for reactivation of rail service. See 49 C.F.R. § 1152.29(a)(3); 1152.29(d)(1); Georgia Great Southern Division-Aband. & Discon. Of Service, 6 S.T.B. 902, 907 (2003) (Georgia Great Southern). Here, although GNP has complained about the possible removal of track, it has failed to show that the stormwater trunk line would be inconsistent with rail banking and potential reactivation of rail service. Accordingly, GNP's argument against the planned construction of the stormwater trunk line is without merit and its request for an injunction will be denied.

Second, GNP requests that we hold these proceedings in abeyance for 90 days. GNP states that the bankruptcy proceeding may continue past the evidentiary hearing and asserts that additional time would enable GNP to arrange for alternative financing. We are denying GNP's request for similar reasons as those stated in the Board's March 15, 2011 decision denying GNP's previous request to hold these proceedings in abeyance: GNP does not offer a clear timeframe or any indication that it would be able to resolve its insolvency issues within the requested amount of time. Moreover, the evidentiary hearing in the bankruptcy case is now focused on whether the petitioners there acted in good faith. Even a favorable resolution for GNP on that issue would not change GNP's underlying insolvency problem.

#### DISCUSSION AND CONCLUSIONS

Under the Trails Act, we "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. § 1247(d); Citizens Against Rails to Trails v. STB, 267 F. 3d 1144, 1149-50 (D.C. Cir. 2001). We have stated that the right to reactivate a rail-banked line is not an exclusive right. See, e.g., Georgia Great Southern; Iowa Power-Const. Exempt.-Council Bluffs, Iowa, 8 I.C.C.2d 858, 866-67 (1990); September 2009 Decision. While Trails Act precedent does not address the specific circumstances of this case, we indicated in our September 2009 Decision granting King County's petition to acquire the reactivation right that a bona fide petitioner, under appropriate circumstances, could request that the NITUs be vacated to permit reactivation of the line segments for continued rail service in the future.

Here, GNP has failed to show that it is a bona fide petitioner. In the June 7 Order of the bankruptcy court, the court found that GNP is insolvent and is not paying its debts as they become due. While a final ruling has not been made in the bankruptcy proceeding, we consider the finding of GNP's insolvency dispositive of its financial inability to reactivate rail service over the ROW.

The June 7 Order and evidence in the record demonstrate that GNP currently does not have the necessary financial resources to provide freight rail service over the rail-banked segments. According to the June 7 Order, GNP had a net loss of \$694,300 in 2010 and is indebted to more than 30 trade creditors for more than \$500,000. Douglas Engle, a current 50-

percent shareholder of GNP and the former CFO, after being fired as an officer by Thomas Payne, submitted a declaration in support of the bankruptcy petition, arguing that GNP has no cash or assets needed to fund track repairs and maintenance. The Investor-GNP Memorandum of Understanding (MOU) between GNP and Wallace Properties Development Company LLC, which GNP submitted as evidence of its financial responsibility, appears to be no longer in effect.<sup>12</sup> GNP states that it is now seeking replacement financing for the original financing by Wallace Properties,<sup>13</sup> but it provides nothing to suggest that such financing is likely now or in the foreseeable future.

Nor has GNP submitted any information to the Board or the bankruptcy court to refute the evidence of its financial instability. Payne's response to the bankruptcy petition did not state that Engle's financial assessment was incorrect or that GNP is in fact solvent, but asserted only that Engle filed the bankruptcy petition in bad faith in an attempt to take over GNP, an issue with no real bearing on our proceeding.<sup>14</sup> Even if GNP were to prevail in the bankruptcy court on this issue, it would do nothing to discredit the evidence that GNP is insolvent.

Based on the evidence that GNP is insolvent, we cannot find that GNP is a bona fide petitioner able to reactivate freight rail service. Moreover, there are factors in addition to the bankruptcy court's insolvency finding that also weigh against a conclusion that GNP is a bona fide petitioner. First, 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.<sup>15</sup> Second, a number of the shippers that GNP indicates it would serve on the reactivated line presently do not have the facilities necessary to receive shipments by rail.<sup>16</sup> GNP has not shown how it would overcome the physical and financial obstacles to providing freight service to these customers. Thus, there would remain significant questions about GNP's bona fides, even if GNP's insolvency were resolved.

---

<sup>12</sup> The MOU was redesignated as a public document pursuant to the Board's April 7, 2011 decision and protective order.

<sup>13</sup> GNP's June 8, 2011 filing.

<sup>14</sup> Declaration of Thomas Payne 10, Feb. 11, 2011. The June 7 Order scheduled an evidentiary hearing to be held in the bankruptcy proceeding to determine whether the petitioning creditors acted in good faith.

<sup>15</sup> License Agreement § 2.8.

<sup>16</sup> For example, there is no rail siding available to serve Drywall Distributors and the crossing that would connect the spur to Unisea's plant has been removed. Further, Steeler's facility cannot access the Redmond Spur and is surrounded by private property. It thus appears that either GNP or the prospective shippers would need to build switches and industrial track (and in some cases, acquire additional property) before these shippers could receive service.

Given our findings above, we do not need to reach the issue of whether the petition satisfies the requirements for an exemption from 49 U.S.C. § 10902 or if that standard even applies here. Accordingly, we are denying GNP's petition for exemption to acquire the right to reactivate rail service over the rail-banked ROW and its petition to vacate the NITUs pertaining to those segments.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. GNP's petition for exemption and its petition to vacate the NITUs are denied.
2. GNP's request to enjoin the construction planned by King County and /or Redmond is denied.
3. GNP's request to hold the petition in abeyance is denied.
4. This decision is effective on July 15, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.