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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35407
GNP RLY INC.
—ACQUISITION AND 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

THE CITY OF REDMOND'S COMMENTS IN OPPOSITION TO GNP RAILWAY PETITIONS FOR EXEMPTION AND TO VACATE NOTICES OF INTERIM TRAIL USE

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ORIGINAL

"The beautiful part of being a federal railway is the state has no jurisdiction over us."

Douglas Engle
Chief Financial Officer
GNP Rly, Inc.
February 3, 2010

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THE CITY OF REDMOND'S
COMMENTS IN OPPOSITION TO GNP RAILWAY PETITIONS FOR EXEMPTION AND TO VACATE NOTICES OF INTERIM TRAIL USE

On August 24, 2010 GNP Railway, Inc. (GNP) filed a petition for exemption from regulation under 49 U.S.C. § 10902 to acquire and restore rail service over 9.1 miles of railbanked right-of-way in King County, Washington.[1] The affected segments are a 7.3 mile spur line known as the "Redmond Spur," and 1.8 miles of a railbanked segment of the

[1] GNP Rly. Inc. Verified Petition for Exemption Pursuant to 49 U.S.C. § 10502, *GNP Rly., Inc.—Acquisition and Operation Exemption—Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407 (STB filed Aug. 24, 2010) ("GNP Petition for Exemption").

"Woodinville Subdivision."[2] GNP also filed a petition to vacate notices of interim trail use (NITUs) covering the two lines.[3] On September 15 the Board issued a notice requesting comments on GNP's petitions.[4]

The City of Redmond, Washington owns the southerly 3.9 miles of the Redmond Spur, between MP 3.4 and 7.3, subject to a trail easement held by King County. Redmond purchased its portion of the Spur from the Port of Seattle for $10 million, in a transaction that closed on June 30, 2010.[5]

Although GNP couches its petitions as a proposal to restore common carrier freight service, there is no demand for freight service on the Redmond Spur. When BNSF served its Notice of Exemption to abandon rail service on the Spur in September 2008,[6] no traffic had moved on the line in more than two years.[7] Although BNSF and the Board invited interested persons to file an Offer of Financial Assistance (OFA),[8] neither GNP nor anyone else filed an

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[2] Maps of the Woodinville Subdivision and the Redmond Spur are attached to Redmond's comments as Exhibits A and B.

[3] GNP Rly, Inc. Petition to Vacate Notice of Interim Trail Use Or Abandonment in *BNSF Railway Company—Abandonment Exemption—in King County, WA*, STB Docket No. AB-6 (Sub. No. 463X) and *BNSF Railway Company—Abandonment Exemption—in King County, WA*, STB Docket No. AB-6 (Sub. No. 465X) (STB filed Aug. 24, 2010).

[4] Notice of Exemption and Request for Comments, *GNP Rly, Inc.—Acquisition and Operation Exemption—Redmond Spur and Woodinville Subdivision*, 75 Fed. Reg. 57,327 (Sept. 20, 2010).

[5] Verified Statement of Carolyn J. Hope at ¶ 7 ("Hope Statement"). Carolyn Hope's Verified Statement is submitted as part of Redmond's comments.

[6] BNSF Notice of Exemption, *BNSF Railway Company—Abandonment Exemption—in King County, Washington*, STB Docket No. AB-6 (Sub. Nos. 463X) (STB filed Sept. 8, 2008) ("BNSF Abandonment Notice of Exemption").

[7] *Id.* at 4.

[8] *Id.* at 10–12 (affidavit of publication in the Seattle Times of BNSF Notice of Intent to Abandon); 73 Fed.Reg. 55899 (Sept. 26, 2008).

OFA. At the time GNP was deep in negotiations with BNSF and the Port of Seattle over GNP's proposal to provide freight service on an adjacent segment of the Woodinville Subdivision.[9] GNP skipped the OFA process because an OFA would have required GNP to produce evidence of its financial responsibility, and to compensate the owner of the Spur for the fair market value of the right of way. Two years later, in what it calls "an issue of first impression,"[10] GNP asks the Board to reactivate rail service with no showing of financial responsibility and without compensating the property owners for their property rights.

The Board should deny GNP's petitions for two independent reasons. First, GNP has neither plans nor prospects to restore freight service on the Redmond Spur. GNP's business plan is to establish an excursion train between Redmond and Snohomish, Washington. GNP's claims of eager freight shippers on the Redmond Spur crumble under even casual scrutiny. GNP's petition is a last ditch effort to invoke Board jurisdiction to preempt local regulation of its planned excursion train. *See* Section II.A of these comments *infra*.

Second, GNP's petition omits information required by the Board's acquisition regulations. A Class III carrier proposing to acquire a rail line must include in its application "a statement that an agreement has been reached or details about when an agreement will be reached."[11] GNP urges the Board to ignore this requirement in a case involving the acquisition of a railbanked right of way, but the Board's rules and caselaw do not support GNP's plea. GNP seeks authority under Section 10902 to purchase a rail line. That is why the Board's rules

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[9] *See* Letter of July 7, 2008 from Tom Payne to John Creighton, Ex. C to Redmond's Comments (lobbying for selection of GNP as the third party operator to provide freight service on the Woodinville Subdivision).

[10] GNP Petition for Exemption at 6.

[11] 49 CFR 1150.43(c).

require a showing that an agreement has been reached, and why GNP's attempt to expropriate Redmond's property rights must be rejected. *See* Section II.B of these comments *infra*.

I. STATEMENT OF FACTS

The Redmond Spur is a 7.3 mile railbanked right-of-way that runs north to south from a junction with the Woodinville Subdivision in Woodinville, Washington to downtown Redmond, Washington.[12] Beyond the Redmond terminus the line runs another 12 miles south as a railbanked trail, terminating in Issaquah, Washington.[13]

In 2003 BNSF analyzed the future business prospects for the Redmond Spur.[14] BNSF concluded that the line should be abandoned when the last shipper, Building Specialties, stopped shipping by rail.[15] The Redmond Spur was targeted for abandonment because freight volumes were low relative to the cost of providing service, and because the area featured high real estate values.[16]

In 2006 BNSF moved three rail cars for Building Specialties. The last freight movement on the Redmond Spur was the pick-up of an empty car from Building Specialties on March 21, 2006.[17]

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[12] Hope Statement at ¶ 2; *see also* maps attached as Exhibits A and B to Redmond's Comments.

[13] Hope Statement at ¶ 2.

[14] Verified Statement of Susan Odom ("Odom Statement") at ¶ 6. Susan Odom's Verified Statement is Ex. 35 to King County's Comments.

[15] *Id.*.

[16] *Id.*.

[17] *Id.*

On September 8, 2008 BNSF filed a Notice of Exemption to abandon service.[18] BNSF also petitioned the Board for exemption from the OFA provisions of 49 U.S.C. 10904.[19] The Board denied that request as moot, because no one had filed notice of intent to file an OFA.[20] Nor did anyone file comments opposing the abandonment.

Also in September 2008 King County filed a request for a NITU[21] and a petition for exemption to acquire BNSF's right to reinstate rail service on the Redmond Spur.[22] With BNSF's support the Board issued a NITU on October 27, 2008.[23] The Board then granted King County's petition, commenting that the County's request would not expose shippers to abuse of market power because "we have found that there are no current prospects for future rail traffic."[24] The Board had previously approved the Port of Seattle's plan to acquire BNSF's property rights in the Redmond Spur and the Woodinville Subdivision.[25]

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[18] BNSF Abandonment Notice of Exemption, *supra* note 6, at 4.

[19] BNSF Petition for Exemption from 49 U.S.C. § 10904, *BNSF Railway Company—Abandonment Exemption—in King County, Washington*, STB Docket No. AB-6 (Sub. Nos. 463X) (STB filed Sept. 8, 2008).

[20] *BNSF Railway Company—Abandonment Exemption—in King County, WA*, STB Docket No. AB-6 (Sub.No. 463X), slip op. at 1 n.1 (STB served Oct. 27, 2008) ("*Redmond Spur NITU Order*").

[21] Request of King County, Washington for Interim Trail Use Pursuant to 49 C.F.R. § 1152.29, *BNSF Railway Company—Abandonment Exemption—in King County, Washington*, STB Docket No. AB-6 (Sub. No. 463X) (STB filed Sept. 18, 2008).

[22] King County, Washington—Verified Petition for Exemption from 49 U.S.C. § 10901, *King County, WA—Acquisition Exemption—BNSF Railway Company*, STB Finance Docket No. 35148 (STB filed Sept. 22, 2008).

[23] *Redmond Spur NITU Order*, *supra* note 20, at 2.

[24] *King County, WA—Acquisition Exemption—BNSF Railway Company*, STB Finance Docket No. 35148, slip op. at 4 (STB served Sept. 18, 2009).

[25] *The Port of Seattle— Acquisition Exemption—Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35128 (STB served Oct. 27, 2008).

On December 18, 2009 BNSF consummated the sale to the Port of the real property and physical assets of the Redmond Spur.[26] BNSF entered into a Trail Use Agreement with King County and transferred the common carrier reactivation rights to King County.[27] King County became the interim trail user for the Redmond Spur.

The Redmond Spur conveyance was part of a larger transaction in which the Port of Seattle acquired 33 miles of the Woodinville Subdivision plus the Redmond Spur from BNSF, for a purchase price of $81.4 million.[28] The segments south of Woodinville, including the Redmond Spur, were railbanked, with King County assuming the role of interim trail user.[29] North of Woodinville, the segment running between Woodinville and the BNSF main line in Snohomish, Washington ("the Freight Segment") remains in active freight service.[30]

The Port did not want to assume common carrier responsibilities to the handful of shippers on the Freight Segment. Instead, the Port and BNSF solicited proposals from short line operators to provide common carrier rail service on the Freight Segment only. BNSF's August 1, 2008 Request for Quote (RFQ) began as follows:

> BNSF Railway and the Port of Seattle have entered into a sale and donation agreement in which the Port will purchase the corridor later this year. A portion of the corridor will be

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[26] Letter of February 4, 2010 from David T. Rankin, BNSF Railway, to Ms. Cynthia T. Brown re STB Docket No. AB-6 (Sub No. 463X) at 1 (STB filed Feb. 5, 2010).

[27] *Id.*

[28] Seventh Amendment to Purchase and Sale Agreement between BNSF Railway Company, the Port of Seattle and King County § 2 (December 17, 2009), Ex. 19 to King County's Comments.

[29] Notice of Consummation of Trail Use Agreement in *BNSF Railway Company—Abandonment Exemption—in King County, WA*, STB Docket No. AB-6 (Sub. Nos. 463X, 464X, and 465X) (STB filed March 8, 2010).

[30] The Woodinville Subdivision map attached as Ex. A to these comments shows the interconnections between the North Segment, the Redmond Spur and the railbanked segment south of Woodinville.

railbanked for use as a trail. However, the section between Woodinville and Snohomish will remain in use for freight rail service. Prior to the close of the BNSF/Port transaction, a third party operator (TPO) will be chosen to serve freight customers in an arrangement that would allow the TPO to operate an excursion train as well.[31]

Two parties responded to the RFQ, but one of the proposals was facially unresponsive. The other proposal entailed a joint venture between GNP and Ballard Terminal Railroad (BTR), a Seattle-based short line operator.[32] GNP and BTR proposed that [redacted]

[redacted]

[31] BNSF Request For Quote at 1 (August 1, 2008), Ex. 35A to King County's Comments.

[32] Odom Statement ¶ 4.

[33] GNP Rly Inc. and Ballard Terminal Railroad Company LLC, Proposal for Third Party Operator for the Woodinville Subdivision at 21 ("GNP Proposal"), Ex. D to Redmond's Comments.

[34] *Id.* at 9.

[35] *Id.* at 22 (emphasis in the original).

[36] Id. at 22.

[37] Id. at 22-23.

[38] Id. at 23 (emphasis in the original).

The RFQ invited the Third Party Operator at its discretion to operate an excursion train as well as freight service on the Freight Segment, but the RFQ did not authorize excursion service south of Woodinville. In its initial proposal, GNP urged BNSF and the Port to ease this restriction. GNP argued that

Between September 2008 and December 2009 the parties negotiated agreements for the acquisition by the Port of the Woodinville Subdivision and the Redmond Spur, and the assumption by GNP of the rail freight franchise north of Woodinville. The draft agreements included a Railroad Right of Way License ("the License Agreement") that authorized GNP to

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[39] Id. at 23.

[40] *Id.* at 19 (emphasis in the original).

[41] *Id.* at 24.

[42] *Id.* at 19.

provide excursion service only on the first 2.5 miles of the Redmond Spur, and that barred GNP from offering freight service on the Redmond Spur.[43] GNP initially assumed that the Port would waive these restrictions.[44] In November 2009, however, GNP learned of the Port's intent to sell King County the real property comprising the Woodinville Subdivision south of Woodinville, and the north three miles of the Redmond Spur. GNP assumed that King County would not support an expansion of GNP's excursion rights.[45] In a November 25, 2009 letter to the Port GNP Chairman Tom Payne argued that the Port's inability to deliver excursion rights south of Woodinville "represents a substantial change to the basic premises of our agreements with the Port that substantially affects the viability of our proposal."[46]

Mr. Payne proposed that if the Port did not allow GNP to run excursion service out of Bellevue, the $1 million franchise fee that GNP owed the Port at closing should be reduced to $10,000.[47] GNP did not challenge or even comment on the prohibition in the draft License Agreement against running freight on the Redmond Spur.

On December 9 Mr. Payne wrote another letter to the Port, in which he declared that the loss of excursion service to Bellevue would "reduce GNP's revenues by approximately 80%."[48]

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[43] Railroad Right of Way License Between Port of Seattle and GNP Rly. Inc. § 2.2 and 2.8 ("License Agreement"), Ex. E to Redmond's Comments

[44] Letter of November 25, 2009 from Thomas Payne to Dan Thomas and Joe McWilliams, Ex. F to Redmond's Comments.

[45] *Id.* at 3-4.

[46] *Id.* at 3.

[47] *Id.*

[48] Letter of December 9, 2009 from Thomas Payne to Craig Watson and Joe McWilliams at 2, Ex. G to Redmond's Comments.

Nevertheless, Mr. Payne opined that if the Port reduced its franchise fee as proposed and made other financial concessions, GNP would proceed to closing.

One day later the Port replied to Mr. Payne's letters. Port Real Estate Director Joe McWilliams confirmed that the Port would not allow excursion service to Bellevue, that the Port would extend GNP's excursion rights to MP 3.39 of the Redmond Spur under certain conditions, and that the Port would allow GNP to defer payment of $990,000 of the $1 million franchise fee until GNP obtained financing.[49] Mr. McWilliams also reaffirmed the prohibition against freight service on the Redmond Spur: "*Freight use of the Redmond Spur remains unchanged under the License Agreement and will be limited solely to perform head and tail operations that permit turning into the Y tracks.*"[50]

The final agreements between the Port and GNP, signed on December 18, 2009., (1) deferred payment of the franchise fee as GNP requested, (2) retained the prohibition against rail freight service on the Redmond Spur, and (3) forbade excursion service south of MP 2.5 of the Redmond Spur. An Operations and Maintenance Agreement ("the O&M Agreement") between the Port and GNP allowed GNP and its partner to provide rail freight and excursion service on the Freight Segment, between Woodinville and Snohomish.[51] The License Agreement allows GNP to provide excursion service on the first 2.5 miles of the Redmond Spur south of

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[49] Letter of December 10, 2009 from Joe McWilliams to Thomas Payne at 1–2, Ex. H to Redmond's Comments ("McWilliams Dec. 10, 2009 Letter").

[50] *Id.* at 1 (emphasis in the original). The "Y tracks" are located where the Redmond Spur merges into the Woodinville Subdivision, just south of Woodinville. *See* Map of the Woodinville Subdivision attached to Redmond's Comments as Exhibit A.

[51] Operations and Maintenance Agreement Between Port of Seattle and GNP Rly, Inc., Exhibit 17 to King County's Comments.

Woodinville ("the Excursion Spur"),[52] and to utilize the first mile of the Redmond Spur for head and tail operations.[53] The maps attached as Exhibits A and B to these comments show the relative locations of the Freight Segment, the Redmond Spur and the Excursion Spur.

The License Agreement expressly prohibits GNP and its partner from operating freight service on the Redmond Spur:

> TPO[54] shall have the right to utilize the Excursion Spur between milepost 0.0 in Woodinville and milepost 1.0 for all head and tail operations necessary for TPO's Rail Freight Service under the O&M Agreement, *but shall have no right to operate other common carrier or contract freight service on the Excursion Spur.*[55]
>
> *TPO is prohibited from using the Excursion Spur at any time for the purpose of setting out or picking up rail cars.*[56]

These contract provisions were the product of intensive negotiations between GNP, the Port, BNSF and King County.[57] The O&M and License Agreements awarded valuable property rights in the Freight Segment to GNP, essentially for free.[58] The prohibitions quoted above against using the Redmond Spur for freight service or excursion service south of MP 2.5 reflect operating rights GNP requested but did not get.

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[52] License Agreement § 2.1, Ex. E to Redmond's Comments. The 2.5 mile Excursion Spur (defined in § 1.7 of the License Agreement) connects the Freight Segment with a cluster of wineries south of Woodinville that attract substantial tourist traffic.

[53] *Id.* at § 2.8.

[54] In the O&M and License Agreements GNP is the "TPO" or Third Party Operator.

[55] License Agreement at § 2.8 (emphasis added), Ex. E to Redmond's Comments.

[56] *Id.* at § 2.2 (emphasis added).

[57] *See* Verified Statement of Pam Bissonnette ("Bissonnette Statement") at ¶ 5. Pam Bissonnette's Verified Statement is submitted as part of King County's Comments in opposition to GNP's Petition.

[58] BNSF deeded to GNP a permanent, exclusive freight easement over fifteen miles of right of way comprising the Freight Segment. GNP paid BNSF ten dollars for this property. Odom Statement at ¶ 17.

GNP's Petition for Exemption identifies two customers—Drywall Distributors and Building Specialties—that "have come forward and asked GNP to serve them."[59] One of them, Drywall Distributors, has no rail siding and never received freight service.[60] The other, Building Specialties, was BNSF's last freight customer on the Redmond Spur.[61] Its rail traffic shrank from 290 cars in 2000 to three cars in 2006, and none thereafter.[62] Because the credibility of GNP's petition depends on GNP's projections of future traffic from these shippers, Redmond deposed the managers who signed letters of support for GNP. Their testimony, discussed in Section II.A.3 of these comments, reveals that each company would welcome the flexibility to ship by rail, but neither has invested any effort to evaluate the feasibility of shipping by rail. When Redmond asked the owner of Drywall Distributors the basis for his estimate of 40 carloads per year, Mr. McDonald replied, "it's a speculative number."[63]

Since filing its petition GNP has submitted four more letters of support from companies that GNP would like the Board to believe are prospective shippers.[64] One of them, UniSea Inc., demolished both its industrial track and the street crossing that carried the track to Unisea's facility twenty years ago, in compliance with a building permit for a plant expansion.[65] A

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[59] GNP Petition for Exemption at 5.

[60] Deposition Transcript of Scott McDonald at 15, 82 ("McDonald Deposition"), Ex. I to Redmond's Comments.

[61] Odom Statement at ¶ 5.

[62] *Id.*.

[63] McDonald Deposition at 68 Ex. I to Redmond's Comments.

[64] Section II.A.3 of these comments discusses in more detail the shipper support letters referenced in this paragraph.

[65] *See* Hope Statement at ¶ 12, 13; Sept. 11, 1989 Building Permit Letter, Ex. J to Redmond's Comments (requiring Unisea to removal rail tracks as condition to approving construction project).

second, Steeler, Inc., is landlocked and has no access to the Redmond Spur.[66] A third, Waste Management, discusses a future facility to be built on the Woodinville Subdivision, not the Redmond Spur.[67] The fourth letter, from Woodinville Lumber, recites that Woodinville Lumber "could envision receiving at least one car per month once the building economy improves and the line is open."[68] To fulfill this vision Woodinville Lumber would need to build a new industrial track, since none exists today anywhere near its facility.[69]

GNP's Chairman, Mr. Thomas Payne, signed a verified statement in support of GNP's Petition in which he envisions "250 carloads per year of rail traffic" from the two drywall companies.[70] Mr. Payne did not explain how two shippers, each of whom projected 40 carloads per year, would together receive 250 carloads per year.

GNP also submitted a verified statement from Robert C. Wallace, a property owner in Redmond. Mr. Wallace avers that his company owns industrial properties located at "14960 and 14980 NE 90th Street, Redmond, Washington."[71] Mr. Wallace declares that Wallace Properties "desires rail service to its industrial properties in Redmond which are located at MP 5.42 on the Redmond Spur."[72] Mr. Wallace did not identify the industries occupying those properties, or represent that the businesses occupying the "industrial properties" seek rail service.

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[66] *See* Hope Statement at ¶ 14; Odom Statement at ¶ 12.

[67] Letter of October 29, 2010 from Dean Kattler of Waste Management, Inc. (STB filed November 1, 2010).

[68] Letter of October 11, 2010 from Mike Bates of Woodinville Lumber (STB filed Nov. 5, 2010).

[69] Odom Statement at ¶ 12.

[70] Verified Statement of Thomas Payne at 4. Ex. B to GNP Petition For Exemption

[71] Verified Statement of Robert C. Wallace at 1, Ex. C to GNP Petition for Exemption.

[72] *Id.* at 2.

The properties that Mr. Wallace refers to in his statement are the parcels where Building Specialties' facility is located.[73] The industrial track that runs east from the Spur at MP 5.42 terminates at Building Specialties.[74] Just east of Building Specialties is a public street, 151st Avenue, N.E.[75] To extend the track across that street the property owner would require a right of way permit from the City of Redmond.[76]

In July 2010 the City of Redmond purchased from the Port of Seattle the southerly 3.9 miles of the Redmond Spur, between MP 3.4 and 7.3 ("the City Segment").[77] The right of way was railbanked, and King County was the trail user. The Port conveyed to Redmond all of its interest in the City Segment, subject to a trail easement it had previously conveyed to King County.[78] The purchase price was $10 million, paid in cash at closing.[79] In the purchase and sale agreement Redmond committed to grant Sound Transit a transportation easement over the entire City Segment, to be exercised "consistent with preservation of the corridor for future railroad use as required by 16 U.S.C. 1247(d) . . ."[80]

Redmond's acquisition of the City Segment was one component of a complex regional initiative to develop public infrastructure on the Woodinville Subdivision and the Redmond

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[73] See Hope Statement at ¶ 9; Aerial Map of Building Specialties, Ex. K to Redmond's Comments.

[74] *See* Hope Statement at ¶ 9; Aerial Map of Building Specialties, Ex. K to Redmond's Comments.

[75] *Id.*

[76] Hope Statement at ¶ 9.

[77] Hope Statement at ¶¶ 3,7; Map of Redmond Spur, Ex. B to Redmond's Comments.

[78] Real Estate Purchase and Sale Agreement Between Redmond and the Port, Ex. L to Redmond's Comments.

[79] Hope Statement at ¶ 7; Real Estate Purchase and Sale Agreement § 2.

[80] *Id.* § 6.1.

Spur, and to repay the Port's $81 million investment to acquire the rail lines. On November 5, 2009 Redmond entered into a Memorandum of Understanding (MOU) with the Port of Seattle, Sound Transit, King County, the Cascade Water Alliance, and Puget Sound Energy.[81] The MOU described the property interests that each party would acquire in the Woodinville Subdivision and the Redmond Spur.

Following execution of the MOU, the City commenced a master planning process for the downtown portion of the City Segment, subject to the requirement to preserve the right of way for future restoration of rail service.[82] The rail line bisects downtown Redmond.[83] The City plans several new street crossings to improve traffic flow through the urban core of the City.[84] The City plans to install a stormwater trunk line under the right of way.[85] Sound Transit plans to build the terminus of its East Link light rail line on the right of way in downtown Redmond.[86] The light rail line and station will occupy approximately one linear mile of the right of way.[87] The City plans to develop a regional trail on the right of way in coordination with King County, sharing the corridor with the Sound Transit light rail line.[88] King County seeks to improve its

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[81] Hope Statement at ¶ 5; MOU, Ex. M to Redmond's Comments.

[82] Hope Statement at ¶ 6.

[83] *Id.* at ¶ 17.

[84] *Id.*

[85] *Id.*

[86] Verified Statement of Joni M. Earl, CEO, Sound Transit ("Earl Statement") ¶ 6.

[87] Hope Statement at ¶ 18.

[88] *Id.* at ¶ 17.

existing County wastewater lines that occupy portions of the property.[89] PSE seeks easements for existing and proposed future utility line crossings of the right of way.[90]

On several occasions in the first half of 2010, GNP principals appeared before the Redmond City Council and met with City managers to pitch an alternative vision for development of the City Segment. GNP executives urged Redmond to authorize GNP to operate an excursion train between downtown Redmond and Snohomish.[91] They emphasized the economic benefits for the City of tourists arriving in Redmond to ride the excursion train.[92] GNP executives also expressed interest in operating a low budget commuter rail service between Snohomish and Redmond.[93]

In their presentations to the Redmond City Council GNP principals did not disclose any plan to provide common carrier freight service on the City Segment.[94] They emphasized the suitability of the corridor for excursion service, and for a low cost commuter rail operation between Snohomish and Redmond.[95] The GNP principals repeatedly emphasized that GNP's status as a "federal railroad" would enable GNP to develop passenger service quickly and inexpensively, without the burden of complying with state and local environmental and land use

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[89] *Id.* at ¶ 18.

[90] *Id.*

[91] Transcript of Redmond City Council Study Session (March 30, 2010) at 12-16 ("Redmond City Council Transcript"), Ex. N to Redmond's Comments.

[92] *Id.* at 30-31; *see also* Letter of May 19, 2010 from GNP CFO Doug Engle to Carolyn Hope, Ex.O to Redmond's Comments.

[93] Redmond City Council Transcript at 19-20, Ex. N to Redmond's Comments.

[94] Hope Statement at ¶ 20.

[95] Redmond City Council Transcript at 19.

regulations.[96] In a March 30, 2010 presentation to the Redmond City Council, GNP Chairman Tom Payne discoursed on the immunity of railroads from environmental regulation:

> I know there's a lot of controversy about how come it seems that environmental rules don't apply to railways. We're a different leopard. We're a black leopard. The other leopards have spots. It's a different legislative creature from transit.[97]

Mr. Payne made similar statements at a March 4 meeting with King County staff.[98] In February, GNP CFO Doug Engle told an audience of business and government leaders: "The beautiful part of being a federal railroad is the state has no jurisdiction over us."[99]

Mr. Payne told the Redmond City Council that the Redmond Spur, "quite plainly, needs a lot of work."[100] He stated that the track has a "50 percent defective tie count,"[101] and that it would not qualify as an FRA Class II railroad.[102] Council members asked how GNP planned to pay for the rehabilitation of the line. Mr. Payne replied that GNP had applied for a Federal Railroad Administration(FRA) RRIF loan, that the FRA has $35 billion to lend at four percent interest, and that "with a little help from a senator of ours in D.C. we might be able to get that down to intergovernmental rate of half a percent . . . ."[103]

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[96] *Id.* at 8, 18.

[97] Redmond City Council Transcript at 7.

[98] Bissonnette Statement, *supra* note 57 at ¶ 10.

[99] Earl Statement, *supra* note 86 at ¶ 12.

[100] Redmond City Council Transcript at 8.

[101] *Id.* at 28.

[102] *Id.* at 28.

[103] *Id.* at 17.

GNP principals pressed Redmond to make an immediate decision on GNP's proposal to establish excursion service on the Redmond Spur.[104] They expressed frustration with the pace of the City's planning process.[105] On June 3, 2010, GNP CFO Doug Engle commented: "[I]t is clear that staff is not aware of GNP's position as a railroad, and we want to bring some of the pertinent points and federal rulings to your attention. It is in the City's best interest to meet with us and discuss this matter more fully next week."[106]

Redmond managers met with GNP principals on June 14. At that meeting GNP representatives passed out copies of judicial opinions and Board decisions holding that railroads are immune from state and local environmental regulation.[107]

In the event that the Board vacated the NITU and reactivated common carrier rail service on the Redmond Spur, the City of Redmond would be forced to suspend a series of capital projects scheduled for implementation in the spring and summer of 2011. Those projects include:

- New street crossings of the railroad right of way at 161st Avenue NE and 164th Avenue N.E. in downtown Redmond;
- Construction of a 48 inch stormwater trunk line within the right of way at a depth of 10 to 20 feet below the ground surface;
- Construction of a 1.1 mile regional trail in downtown Redmond.[108]

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[104] Hope Statement at ¶ 21; *see also* Letter of May 19, 2010 from Doug Engle to Carolyn Hope, Ex. O to Redmond's Comments.

[105] Hope Statement at ¶ 24; *see also* June 3, 2010 E-mail from Doug Engle to Carolyn Hope, Ex. P to Redmond's Comments.

[106] June 3, 2010 e-mail from Doug Engle to Carolyn Hope, Ex. P to Redmond's Comments.

[107] Hope Statement at ¶ 25.

II. ARGUMENT

Redmond understands that every railbanked right of way is subject to future restoration of rail service. Redmond, which recently paid $10 million for four miles of the Redmond Spur, is prepared to step aside in the unlikely event that a carrier submits a credible proposal for reactivation of freight service, and that the carrier pays for the use of Redmond's property. Neither the Board's decisions nor the national rail transportation policy, however, require the owner of a railbanked right of way to step aside for the establishment of an excursion train. GNP's sole interests in invoking the Board's jurisdiction are (1) to operate an excursion train on property that GNP does not own, and (2) to insulate its operations from state and local environmental and land use regulation. GNP filed its petitions only after failing to persuade the Redmond City Council to welcome a low rent excursion train into downtown Redmond. GNP's claims of eager shippers are not credible and conflict with GNP's own assertions to the Port and to King County. *See* Section II.A. of these comments, *infra*.

Even if GNP had a credible plan for freight service on the Redmond Spur, the Board's rules implementing 49 U.S.C. § 10902 do not allow an operator proposing to acquire a rail line to simply expropriate the owner's property rights. 49 CFR 1150.43 specifies the information to be provided in an exemption notice for a rail line acquisition, including "a statement that an agreement has been reached or details about when an agreement will be reached."

GNP's attempts to evade this requirement are not persuasive. While GNP contends that the Trails Act preempts the Board's acquisition rules, the authorities GNP cites do not support

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(. . . continued)

[108] *Id.* at ¶ 17.

that conclusion. Nor can GNP reconcile its interpretation of the Trails Act with § 10904, which specifies a very different procedure to accomplish the result GNP seeks here. *See* Section II.B *infra.*

A. GNP has no credible plan to provide rail freight service on the Redmond Spur.

1. The Board will not hesitate to scrutinize the facts alleged in a petition to ascertain the true nature of a proposed transaction.

From time to time the Board encounters a petition that seeks to invoke the preemptive force of federal common carrier regulation to implement private agendas that enjoy no support in the rail transportation policy of 49 U.S.C. § 10101. These petitions invariably seek to cloak the petitioner's business plans in the mantle of common carrier freight service. When presented with facts that call into question the credibility of the petitioner's plans for common carrier service, the Board will revoke a class exemption or deny a petition for exemption in order to develop a more complete record.

In *The Land Conservancy of Seattle and King County,*[109] a non-carrier filed a notice of exemption to acquire and to provide rail service on a line of railroad adjoining the Redmond Spur.[110] Three months later the Land Conservancy proposed to abandon service and railbank the right of way.[111] The Board revoked the exemption, commenting that the record "raised serious

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[109] *The Land Conservancy of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Railway Company,* 2 S.T.B. 673 (1997) ("*The Land Conservancy*")

[110] 2 S.T.B. at 673.

[111] *Id.* at 674.

questions regarding the propriety of the parties' use of the Board's procedures in this manner to accomplish their goals."[112]

In *Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—In King County, WA, In the Matter of An Offer of Financial Assistance*,[113] the Board rejected an OFA petition for the same line segment at issue in *The Land Conservancy*, finding that "the record does not permit us to conclude that the offer is motivated by a desire to provide continued rail service."[114] Looking behind the petitioner's allegations, the Board declared: "[W]e will not allow our jurisdiction to shield a railroad, or any other party seeking relief before us, from the legitimate processes of Federal, state or local law."[115]

In *Riverview Trenton Railroad Company*,[116] the Board revoked a class exemption for a rail line acquisition in which the carrier was alleged to have invoked Board jurisdiction to avoid condemnation of its property.[117] The Board explained that the class exemptions were intended for routine transactions, that RTR's project "attracted substantial controversy and opposition, including opposition from public agencies," and that "there are substantial factual and legal

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[112] *Id.* at 676–77.

[113] 3 S.T.B. 634 (1998), *aff'd sub nom. Redmond-Issaquah Railroad Preservation Association v. Surface Transportation Board*, 223 F.3d 1057 (9th Cir. 2000).

[114] 3 S.T.B. at 640.

[115] *Id.* at 636.

[116] *Riverview Trenton Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc.*, STB Finance Docket Nos. 33980 and 34040 (STB served February 15, 2002).

[117] *Id.*, slip op. at 3.

issues that have been presented here which require additional scrutiny and the development of a more complete record."[118]

The two recent decisions that most closely resemble the case at bar involve Mr. James Riffin, d/b/a The Northern Central Railroad.[119] Like GNP, Mr. Riffin sought to invoke Board procedures to acquire and operate rail lines in which he had no ownership interest.[120] Like GNP, Mr. Riffin sought to invoke the Board's jurisdiction to operate an excursion train.[121] And like GNP, Mr. Riffin attempted to deploy federal preemption to shield his activities from the reach of local environmental and land use regulation.[122] The Board revoked class exemptions for Mr. Riffin's operations, commenting that "The Board has a responsibility to protect the integrity of its processes, and the Board is concerned that Riffin may be using the licensing process in improper ways."[123]

The Board's power to deny an exemption, even when a petition might nominally qualify for the exemption, stems from the Board's inherent power to protect the integrity of its administrative processes.[124] To that end, the Board may draw legitimate inferences about the

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[118] *Id.*, slip op. at 7–8.

[119] *See James Riffin d/b/a The Northern Central Railroad—Acquisition and Operation Exemption—In York County, PA and Baltimore County, MD*, STB Finance Docket No. 34484 (served April 20, 2004), 2004 WL 839306 ("*Riffin I*"); *James Riffin d/b/a The Northern Central Railroad—Acquisition and Operation Exemption—In York County, PA*, STB Finance Docket Nos. 34501 and 34552 (served February 23, 2005), 2005 WL 420419 ("*Riffin II*").

[120] See *Riffin* I, supra note 119, slip op. at 1, 3.

[121] *See Riffin II, supra* note 119, slip op. at 2.

[122] *Id.* at 6.

[123] *Id.*

[124] *Riffin I, supra* note 119, slip op. at 3.

true nature of a transaction based on the evidence submitted to the Board.[125] In this case Redmond and the other Washington public agencies opposed to GNP's petitions have had little opportunity to develop a detailed record on GNP's proposal.[126] The available evidence is more than adequate, however, to show that GNP has misrepresented its plans for the Redmond Spur and the viability of freight service on the Redmond Spur.

2. The License Agreement between GNP and the Port of Seattle bars GNP from providing freight service on the Redmond Spur.

As documented above in the Statement of Facts,[127] GNP and its partner responded to a Request For Quote for a "Third Party Operator" ("TPO") to provide rail service to freight customers located between Woodinville and the BNSF main line in Snohomish. The Port of Seattle and BNSF were receptive to allowing the TPO to provide excursion service from the wineries just south of Woodinville to Snohomish.[128] The Port intended, however, to recoup its investment in the Woodinville Subdivision and the Redmond Spur by selling property interests in the railbanked lines to regional governments and a utility that had diverse plans for the right of way.[129] The Port refused to allow GNP to provide freight service on the Redmond Spur, or

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[125] *Redmond-Issaquah R.R. Preservation Ass'n v. S.T.B.*, 223 F.3d 1057, 1064 (9th Cir. 2003) (citing *Ralston Purina Co. v. Louisville & Nashville R.R. Co.*, 426 U.S. 476, 477–78 (1976)).

[126] After the Board extended the deadline for filing comments on GNP's Petition for Exemption, Redmond propounded targeted discovery requests to GNP. GNP's responses have not illuminated the issues raised by its petition For instance, in response to Redmond's request that GNP produce its written communications with prospective shippers, GNP objected that this information is "privileged." Ferguson Statement at ¶ 5. Redmond was able to depose representatives of the two drywall companies identified by GNP in its petition, but has had no opportunity to depose GNP's principals.

[127] See Section I, *supra*.

[128] License Agreement at §§ 1.6, 1.7, and 2.2, Ex. E to Redmond's Comments.

[129] MOU Preamble at (A) and (B), Ex. M to Redmond's Comments.

excursion service south of the "Excursion Spur," the segment of the Redmond Spur between MP 0 and 2.5. The License Agreement states, in relevant part:

> TPO [GNP] shall have the right to utilize the Excursion Spur between milepost 0.0 in Woodinville and milepost 1.0 for all head and tail operations necessary for TPO's Rail Freight Service under the O&M Agreement, *but shall have no right to operate other common carrier or contract freight service on the Excursion Spur.*[130]
>
> *TPO is prohibited from using the Excursion Spur at any time for the purpose of setting out or picking up rail cars.*[131]

This language literally prohibits freight service only on the "Excursion Spur," but the Excursion Spur comprises the first 2.5 miles of the Redmond Spur. It would not be possible for GNP to "operate other common carrier or contract freight service" on the Redmond Spur without operating on the Excursion Spur. Moreover, the parties construed these terms to prohibit freight service anywhere on the Redmond Spur. The December 10, 2009 letter from Port Real Estate Director Joe McWilliams to GNP Chairman Tom Payne, written eight days before the parties executed the License Agreement, states: "*Freight use of the Redmond Spur remains unchanged under the License Agreement and will be limited solely to perform head and tail operations that permit turning into the Y tracks.*"[132]

GNP's petition neglects to mention this contractual prohibition. Perhaps GNP believes that the Board should give it no weight. In other cases, however, the Board has not hesitated to consider practical constraints on a carrier's ability to provide service, ranging from a proposed

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[130] License Agreement § 2.8 (emphasis added).

[131] *Id.* at § 2.2 (emphasis added).

[132] McWilliams Dec. 10, 2009 Letter (emphasis in original), Ex. H to Redmond's Comments. *See also* Bissonnette Statement ¶ 5.

shipper's failure to secure building permits for its business[133] to concerns about the financial capability of an operator seeking an exemption to construct new rail lines,[134] to concerns about the operator's ability to obtain title to rail lines it seeks to acquire.[135] The prohibitions against GNP providing freight service on the Redmond Spur are enforceable by the Port, King County, and the City of Redmond.[136] Given these restrictions, a Board decision reactivating rail service might frustrate the development of the corridor for interim trail use, but it likely would not enable GNP to provide freight service on the Redmond Spur.

3. GNP's prospective shippers lack access to and interest in freight service on the Redmond Spur.

Only a year ago, the Board found that "there are no current prospects for future rail traffic" on the Redmond Spur.[137] GNP's Petition for Exemption declares, however, that two prospective customers that "have come forward and asked GNP to serve them."[138] Since filing its petition GNP has produced in piecemeal fashion four more letters from what GNP claims are

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[133] *Roaring Fork Railroad Holding Authority – Abandonment Exemption – In Garfield, Eagle and Pitkin Counties, CO*, 4 S.T.B. 116, 120 n. 15 (1999), *aff'd sub nom. Kulmer v. Surface Transportation Board*, 236 F.3d 1255 (10th Cir. 2001).

[134] *Ozark Mountain Railroad—Construction Exemption*, ICC Finance Docket No. 32204, 1994 WL 69876 at *4–*5 (1994)

[135] *Riffin I, supra* n. 119, slip op. at 3, 2004 WL 839306 at *3.

[136] King County is a third party beneficiary of the License Agreement between the Port and GNP. License Agreement at § 13.9, Ex. E to Redmond's Comments. Redmond is an assignee of the Port's rights under the License Agreement, as they pertain to the segment of the Redmond Spur that the City purchased from the Port. Real Estate Purchase and Sale Agreement Between the Port of Seattle and the City of Redmond § 9.2.3, Ex. L to Redmond's Comments.

[137] *King County, WA – Acquisition Exemption – Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35148, slip op. at 4 (STB served Sept. 18, 2009).

[138] GNP Petition for Exemption at 5 (quoting the Verified Statement of Thomas Payne).

prospective shippers.[139] A cursory look at these shippers confirms that GNP's assertions simply are not credible.

Drywall Distributors, one of the two shippers listed in GNP's petition, operates a drywall distribution business at MP 0.96 of the Redmond Spur. Scott McDonald, the owner of Drywall Distributors, filed a letter with the Board in which he declared: "We would expect to receive forty cars per year . . . starting as soon as the service is available."[140] At his deposition, however, Mr. McDonald revealed the following:

- There is no rail spur at Drywall Distributors. A new switch and industrial lead would be required to serve that customer.[141]
- Drywall Distributors never inquired about obtaining freight service when BNSF served freight customers on the Spur. Mr. McDonald testified that in the past he saw trains roll by his property on the way to Building Specialties.[142] When asked why he did not inquire about freight service, Mr. McDonald replied, "I don't have a siding."[143]
- Drywall Distributors has no current need or ability to use rail service.[144]
- Mr. McDonald learned of GNP's plans when two GNP representatives knocked on his door. They asked Mr. McDonald to sign a letter of support, and gave him the template of a letter to sign.[145]

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[139] *See* Sept. 14, 2010 Letter of Support and Verified Statement from Matt Surowiecki, Jr. of Steeler, Inc., attached to GNP's Petition for Exemption as Exhibit H (STB filed Oct. 27, 2010) ("Surowiecki Letter"); Oct. 15, 2010 Letter of Support and Verified Statement from Greg Clark of UniSea, Inc., attached to GNP Petition for Exemption as Exhibit I (STB filed Oct. 27, 2010) ("Clark Letter"); Oct. 29, 2010 Letter of Support from Dean Katttler of Waste Management, Inc. (STB filed Nov. 1, 2010) ("Kattler Letter"); Oct. 11, 2010 Letter of Support from Mike Bates of Woodinville Lumber, Inc. (STB filed Nov. 5, 2010) ("Bates Letter").

[140] McDonald Letter at 2, Ex. D to GNP Petition for Exemption.

[141] McDonald Deposition Transcript at 82, Ex. I to Redmond's Comments.

[142] *Id.* at 82.

[143] *Id.* at 82.

[144] *Id.* at 70.

[145] *Id.* at 41–45.

- Mr. McDonald's letter to the Board states: "We have asked our suppliers to quote us rates on this traffic and are awaiting their response."[146] Mr. McDonald testified, however, that he had not requested this information from any supplier.[147]

- Mr. McDonald performed no analysis of the relative cost of shipping by rail vs. truck, the cost of a new siding, or who would pay for that siding.[148] Asked about the basis for his statement that Drywall Distributors would receive 40 cars per year, Mr. McDonald replied: "it's a speculative number."[149]

The second of GNP's prospective shippers, Building Specialties, was the last freight customer of BNSF on the Redmond Spur. An overgrown industrial track diverts from the Spur at MP 5.4 to Building Specialties' warehouse. Building Specialties received 290 railcars in 2000, seven cars in 2005, three cars in 2006 and none thereafter.[150] Building Specialties did not object when BNSF proposed in 2008 to abandon freight service. Nor did Building Specialties protest when, in April 2007, BNSF notified the company that it was terminating the Industrial Track Agreement that covered maintenance and operation of the industrial track serving the property.[151] In a letter to the Board, however, Building Specialties manager Randy Mann stated that his company would expect to receive 40 carloads per year "as soon as the service is available."[152]

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[146] McDonald Letter at 2, Ex. D to GNP Petition for Exemption.

[147] McDonald Deposition at 52.

[148] *Id.* at 50–51.

[149] *Id.* at 68.

[150] Odom Statement at ¶ 5, Ex. 35 to King County's Comments.

[151] Odom Statement at ¶ 11.

[152] Mann Letter at 2, Ex. E to GNP Petition for Exemption.

At his deposition, Mr. Mann explained that GNP approached him about receiving freight service, and produced the template of a support letter for him to sign.[153] Mr. Mann said that manufacturers of building products negotiate shipping rates with railroads, and quote him a delivered price per thousand square feet of product.[154] "We have no idea what they're paying for freight," Mr. Mann testified.[155] The form letter supplied by GNP and signed by Mr. Mann states: "We have [sic] will be asking our suppliers to quote us rates on this traffic and await their response."[156] In fact, Building Specialties, like Drywall Distributors, has not contacted its suppliers for quotes.[157] As Mr. Mann explained, "Because we don't have rail, so what's the point?"[158]

The testimony of Randy Mann and Scott McDonald confirms that both drywall companies would welcome the option of receiving freight by rail, but neither has any specific plans to use rail service. In Mr. McDonald's words, their interest is "speculative." For Mr. Tom Payne, however, 40 speculative carloads per year from two shippers adds up to 250 carloads per year.[159]

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[153] Mann Deposition Transcript at 18, 64–66, Ex. Q to Redmond's Comments.

[154] *Id.* at 60–61.

[155] *Id.* at 61.

[156] Mann Letter at 2, Ex. E to GNP Petition.

[157] Mann Deposition Transcript at 29, 41–47, Ex. Q to Redmond's Comments.

[158] *Id.* at 42.

[159] Payne Statement at 4, Ex. B to GNP Petition For Exemption.

Moreover, claims Mr. Payne, "the Line is adjacent to property owned by Wallace/Knutson LLC which is the owner of a rail served industrial park which was formerly served by BNSF. An unused rail spur currently crosses this property."[160]

This statement, like many of Mr. Payne's pronouncements, omits material information. The "unused rail spur" serves only Building Specialties.[161] The reason the spur is "unused" is because Building Specialties does not use it.[162] At one time, the rail spur crossed 151st Ave. N.E. to serve UniSea, Inc., another of GNP's phantom shippers. In 1989, however, Redmond permitted a building expansion for UniSea. The project required the space on UniSea's property formerly occupied by the rail spur for a code-required fire lane.[163] As a condition to approval of the project, the City of Redmond required UniSea to pay for removal of the industrial track across 151st Ave N.E.[164] The crossing no longer exists.[165] The "unused rail spur" could not serve any shipper other than Building Specialties.

In the weeks following submittal of its Petition for Exemption, GNP filed four more letters from prospective shippers. The first, from UniSea, states that Unisea would expect to receive or ship "at least one refrigerated car per week starting as soon as the service is

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[160] *Id.*

[161] Hope Statement at ¶ 9; Aerial Map of Building Specialties, Ex. K to Redmond's Comments; Mann Deposition Testimony at 18–20.

[162] An aerial map showing the UniSea property in relation to Building Specialties and the industrial track is Ex. R to Redmond's comments.

[163] Hope Statement at ¶ 12.

[164] UniSea Building Permit Letter, Ex. J to Redmond's Comments. The approval condition states: "In 151st Avenue N.E. right-of-way fix railroad crossing (remove tracks and repair roadway to City standards as crossing is being abandoned for use of railroad."

[165] Hope Statement at ¶ 13.

available."[166] UniSea did not explain how that car would cross 151st Ave, N.E. to reach Unisea's plant.

The second letter, from Mr. Matt Surowiecki of Steeler, Inc., states that Steeler recently purchased a property on Willows Road in Redmond, and that Steeler aspires to receive freight deliveries from "a rail siding off of the Redmond Spur."[167] The Steeler property has no frontage on the Redmond Spur or on the "rail siding" that serves Building Specialties.[168] Steeler's facility is surrounded by private property belonging to other businesses.[169] At least two privately held parcels separate Steeler, Inc. from the Redmond Spur.[170] Nor can Steeler access the industrial track serving Building Specialties. Between Steeler Inc. and the industrial track lie an indoor soccer complex and a salmon-bearing stream.[171] There is no other "rail siding" within a mile of Steeler Inc.[172]

Waste Management Inc. filed a letter on October 29 stating that it has submitted permit applications to build a "commercial and demolition material recovery facility" on a site in Maltby, Washington, from which Waste Management envisions shipping solid waste by rail.[173]

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[166] Clark Letter, attached to GNP Petition for Exemption as Exhibit H.

[167] Surowiecki Letter at 1, attached to GNP Petition for Exemption as Exhibit H.

[168] *See* Hope Statement at ¶ 14; Aerial Map of Steeler, Inc., Ex. S to Redmond's Comments; Aerial Map of Building Specialties Neighboring Properties, Ex. T to Redmond's Comments.

[169] Hope Statement at ¶ 14.

[170] *Id.*

[171] *Id.*

[172] Hope Statement at ¶ 14.

[173] Kattler Letter (STB filed Nov. 1, 2010).

The Maltby site is nowhere near the Redmond Spur.[174] It is located on the Freight Segment, north of Woodinville.[175] Waste Management explains that it supports GNP's petition, not because the Maltby site lacks rail service, but rather to "further solidify the railroad's long-term economic viability."[176]

Finally, Mike Bates of Woodinville Lumber, which is adjacent to Drywall Distributors, filed a letter stating that he "could envision" receiving at least one car per month once the economy improves.[177] Like Drywall Distributors, Woodinville Lumber would need to build a new industrial spur to receive freight. According to Mr. Bates, "[i]t is possible that once the track is operational and our neighboring business is receiving shipments, that we to [*sic*] will be interested in receiving materials by rail."[178]

GNP may assume that the Board is unable or unwilling to evaluate the credibility of its assertions about eager shippers. In *Roaring Fork*,[179] however, the Board declared that "there must be some assurance that shippers are likely to make use of the line if continued service is made available, and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service."[180] The Board rejected an OFA petition when it determined that three out of five potential shippers "are not even in a position to use the line."[181] Where a party's

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[174] Hope Statement at ¶ 16.

[175] *Id.*

[176] Kattler Letter.

[177] Letter of October 11, 2010 from Mike Bates of Woodinville Lumber (STB filed Nov. 5, 2010).

[178] Bates Letter.

[179] *Roaring Fork Railroad Holding Authority*, *supra* n. 133.

[180] 4 S.T.B. at 119–20.

[181] *Id.* at 120.

claims about plans to provide freight rail service are challenged, the Board will not hesitate to examine whether rail service is viable.[182]

4. GNP's real plan for the Redmond Spur is to run an excursion train between Redmond and Snohomish, and to invoke federal jurisdiction to preempt local regulation of GNP's excursion service.

In pitching for the engagement to deliver freight to customers north of Woodinville, GNP repeatedly told the Port and BNSF that [redacted] On the Redmond Spur, however, where there are no current freight customers, GNP is positively buoyant about the prospects for freight service. GNP can afford to be optimistic, because GNP's plans for the Redmond Spur do not rely on moving a single freight car. GNP's plan for the Redmond Spur is to run an excursion train from a shopping mall in downtown Redmond to Snohomish. GNP would be pleased to serve any freight traffic that it can drum up on the Spur, but GNP's business plan has three economic drivers: (1) [redacted] (2) free occupancy of the Redmond

[182] *See, e.g.*, *The Land Conservancy*, 2 S.T.B. at 677 (observing that the facts in the record "support the conclusion that TLC never had any intention of reinstituting rail service on the line"); *Ozark Mountain Railroad—Construction Exemption*, ICC Finance Docket No. 32204, 1994 WL 69876 at *5 (1994) (requiring harder look where party seeking construction exemption failed to support cost and service volume projections); *Napa Valley Wine Train, Inc.—Petition for Declaratory Order*, 7. I.C.C. 2d 954, 967, 1991 WL 166559 at *7-*8 (1991) (concluding that putative freight rail service that did not involve a regular service schedule, consisted of only one car per month, and constituted only a fraction of railroad's revenue did not provide a sufficient nexus to interstate commerce to permit preemptive federal regulation of railroad's activities).

[183] GNP Rly Inc. and Ballard Terminal Railroad Company LLC, Proposal for Third Party Operator for the Woodinville Subdivision at 21 ("GNP Proposal"), Ex. D to Redmond's Comments at 23, 41; Bissonnette Statement ¶ 14.

Spur, and (3) low interest financing of its capital and operating costs through a Federal Railroad Administration "RRIF" loan.[184]

On what evidence does Redmond ask the Board to dismiss GNP's asserted intention to run freight trains on the Redmond Spur? The key indicia are as follows:

- There has been no freight service on the Redmond Spur since 2006.[185] No one protested when BNSF proposed to abandon service.
- [redacted] Yet shippers on the Woodinville Subdivision generated 179 carloads of freight in 2008, compared with zero on the Redmond Spur.[188]
- GNP signed a Lease Agreement that bars GNP from running freight on the Redmond Spur.[189]
- GNP threatened to cancel the transaction when the Port told GNP that it would not be allowed to run excursion trains to Bellevue or to Redmond.[190]

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[184] Bissonnette Statement ¶ 9-10; Redmond City Council Transcript at 17, Ex. N to Redmond's Comments.

[185] Odom Statement at ¶ 5, Ex. 35 to King County's Comments.

[186] GNP Proposal at 50, Ex. D to Redmond's Comments.

[187] GNP Letter of December 9, 2009 at 2, Ex. G to Redmond's Comments. Mr. Payne's letter includes a multi-colored table that shows virtually all GNP revenues on the Woodinville Subdivision coming from excursion service.

[188] BNSF Shipping Records for the Woodinville Subdivision, Ex. G to Odom Statement.

[189] License Agreement at §§ 2.2 and 2.8, Ex. E to Redmond's Comments.

[190] GNP Letters of November 25 and December 9, 2009, Ex. F and G to Redmond's Comments.

- GNP approached Redmond with detailed plans to run excursion and commuter trains from downtown Redmond to Snohomish.[191] GNP CFO Doug Engle told the Redmond City Council that 400,000 people come to the Puget Sound area each year to board cruise ships, and that they could spend the weekend before or after in Redmond.[192] Mr. Engle said that local families would ride the train to Snohomish to gather Halloween pumpkins and Christmas trees.[193] The GNP principals also described plans to run a diesel commuter train from Snohomish to Redmond, funded by a $50 million grant they hoped to receive from Sound Transit.[194] They told the City Council that "the next step for us, after excursion service, is to take that on."[195] In none of these presentations did GNP mention any plans to carry freight on the Redmond Spur. To the contrary, in May of this year GNP described the freight element of its business plan as "Woodinville "wye" to Snohomish."[196]

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[191] *See* Hope Statement at ¶¶ 19 - 22; Excerpts from GNP's May 11, 2010 presentation, to City staff, Ex. U to Redmond's Comments.

[192] City Council Tr. at 14, 16, Ex. N to Redmond's Comments. In a May 2010 letter to a Redmond planner Mr. Engle added: "Only Redmond City staff can calculate for City decision-makers the tax and activity benefit that having a minimum 1000 (growing to 2000 in three years) extra tourists per week patronizing Redmond's hotels, shops, restaurants and other establishments will have." Letter of May 19, 2010 from Douglas Engle to Carolyn Hope, Ex. O to Redmond Comments.

[193] "And to that end, what we've thought about is having a baggage car and a baggage handler that can actually accommodate the tree and the pumpkins and make it easy for local folks to go up, get on the train, go up and back, enjoy it." City Council Tr. 14.

[194] City Council Tr. 20; Bissonnette Statement ¶ 11-12.

[195] City Council Tr. 20.

[196] GNP May 11, 2010 presentation to City staff at 2, Ex. U to Redmond Comments.

- GNP presented the same business plan to King County. In a March 4 meeting with County staff, Mr. Payne said that freight would only be from Woodinville north, and that there was no revenue from freight south of Woodinville.[197]
- Only when Redmond deferred action on GNP's offer to partner on excursion service did GNP petition the Board to restore freight service.
- GNP has every reason to claim that it wants to run freight, because the Board lacks jurisdiction over intra-state excursion trains.[198] Only through assertion of federal jurisdiction over the Redmond Spur can GNP hope to expropriate Redmond's property interest in the Redmond Spur without Redmond's consent and claim immunity from local land use regulation.[199]

5. The Board should reject GNP's petition outright or, at minimum, require GNP submit a formal application pursuant to § 10902.

In its Petition GNP seeks to spin its excursion business as an adjunct to rail freight operations. The Napa Valley Wine Train presented similar arguments.[200] In an attempt to preempt state and local regulation of its excursion train, the Wine Train argued that its business plan included interconnections with carriers who provide interstate passenger and freight service:

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[197] Bissonnette Statement ¶ 11.

[198] The Board's jurisdiction over rail transportation does not extend to wholly intrastate passenger rail service. *Cuyahoga Falls & Hudson Rly. Co. v. Village of Silver Lake*, 122 Fed. Appx. 845, 847-48, 2005 WL 332424 at *3 (6th Cir. 2005); *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. and Fla. Dep't of Transp.*, STB Finance Docket No. 33472, slip op. at 2-3, 1998 WL 92052 at *2 (STB served Mar. 5, 1998); *Napa Valley Wine Train, Inc.—Petition for Declaratory Order*, 7 I.C.C. 2d 954, 967, 1991 WL 166559 at *7 (1991); *Magner-O'Hara Scenic Rly. v. ICC*, 692 F.2d 441, 444-45 (6th Cir. 1982).

[199] Excursion trains are subject to local regulation. *Cuyahoga Falls*, 122 Fed. Appx. at 848, 2005 WL 332424 at *3; *Napa Valley Wine Train*, 7 I.C.C. 2d at 967, 1991 WL 166559 at *7.

[200] *Napa Valley Wine Train*, 7 ICC 2d at 965–66; 1991 WL 166559 at *5-*6.

"Wine Train acknowledges that the amount of freight traffic it has moved has not been large, but states that it has published interchange tariffs with SP and is soliciting more interstate traffic."[201] The ICC concluded, however, that "Wine Train's passenger service is (and will be) essentially local and that its freight operations are and will continue to by very minimal. Thus, we cannot conclude that Wine Train's service is an interstate operation in any respect."[202]

GNP's Doug Engle told the Redmond City Council that GNP plans to call its operation, "The Tasting Train."[203] Like its counterpart in Napa, GNP has no serious plan to haul freight on the Redmond Spur, and GNP has assumed contract obligations that prohibit GNP from hauling freight on the Redmond Spur. The evidence summarized above shows that GNP seeks to invoke the Board's jurisdiction to accomplish two illegitimate purposes: (1) to acquire by force of law Redmond's property rights in the Redmond Spur, and (2) to exempt its excursion train plans from state and local regulation.

Someday, perhaps, a legitimate demand for freight service will arise warranting reactivation of freight service on the Redmond Spur. GNP's plan is not that proposal.

6. Alternatively, the Board should require GNP to submit a full application under § 10902.

If the Board concludes that the GNP's plan for rail freight service is credible enough to justify a closer look, it should require GNP to formally apply for acquisition and operation authorization under § 10902. GNP's petition raises more questions than it answers:

- How does GNP propose to circumvent the contractual prohibitions in the License Agreement?

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[201] 7 I.C..C. 2d at 965; 1991 WL 166559 at *6.

[202] 7 I.C..C. 2d at 967-8, 1991 WL 166559 at *7.

[203] Redmond City Council Tr. 13, Ex. N to these comments.

- Do GNP's prospective shippers offer any more than a speculative interest in having rail service available on the Redmond Spur?
- From where will GNP obtain the financing to maintain and rehabilitate the line?

Redmond has tried to discover evidence relevant to those questions. But none of the information provided by GNP so far answers those questions in a manner supportive of GNP's proposed acquisition. Given that GNP has failed to address these issues in its individual petition and has withheld its business plan from the Board, such issues should be resolved only after submission of formal application under § 10902.

In *Ozark Mountain Railroad,*[204] a carrier proposing to construct new lines to provide interstate excursion rail obtained a class exemption under former 10505.[205] Property owners in the vicinity of the proposed line opposed the exemption. In light of the nature of the proposed project—excursion service, not freight—the lack of a clear business plan by the carrier, and the significant public opposition, the ICC concluded that "the application process, rather than the exemption process, is the more appropriate vehicle for the Commission to use in considering whether to approve the proposed construction and operation."[206]

GNP's proposal raises similar issues. If the Board finds that GNP's petition presents a credible case for restoration of freight service, the Board should require GNP to submit a full application so that the parties can develop a better record on both the demand for freight service on the Redmond Spur and GNP's capability to provide that service.

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[204] *Ozark Mountain Railroad—Construction Exemption*, ICC Finance Docket No. 32204; 1994 WL 69876 (1994)

[205] 1994 WL 698676 at *1. Former § 10505 employed the same pertinent language as § 10902 regarding when an exemption is proper.

[206] 1994 WL 698676 at *5. *Accord, Riffin I, supra* n. 119, 2004 WL 839306 at *2; *Riffin II,* 2005 WL 420419 at *4.

B. The Board should deny GNP's petition for exemption because a carrier seeking to acquire a line of railroad must have an agreement or real property interest in the rail line sufficient to accommodate the proposed service.

GNP has no property interest in the Redmond Spur, and no contractual right to run trains on it. Redmond and the Port hold the real property, and King County holds the rail reactivation rights.[207] GNP acknowledges that it has not obtained property rights or an agreement to restore rail service on the lines.[208] GNP contends that the railbanking statute compels the Board to approve a proposal by any carrier to reactivate rail service, without any showing that the petitioner holds a property interest or a contractual interest authorizing reactivation of rail service.

GNP is incorrect. When an entity other than the abandoning carrier or its successor in interest seeks to reactivate rail service on a railbanked line, it must either reach an agreement with the entity holding the reactivation rights, or otherwise secure a property interest in the right of way adequate to support the proposed service. This conclusion flows from the plain language of the Board's acquisition regulations, and from the structure of the ICCTA. The decisions cited by GNP for the proposition that 16 U.S.C. 1247(d) allows any carrier to expropriate Redmond's property by filing a petition to revoke a NITU do not support that conclusion.

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[207] GNP Petition at 6; *King County, WA—Acquisition and Exemption—BNSF Railway Company*, STB Finance Docket 35148 (STB served Sept. 18, 2009).

[208] GNP Petition For Exemption at 6.

1. **A Class III carrier seeking to acquire a rail line under 49 U.S.C. 10902 must produce a statement that an agreement has been reached or details about when an agreement will be reached for acquisition of the property.**

A Class III carrier filing a notice of class exemption to acquire a rail line under § 10902 must include in its notice "A statement that an agreement has been reached or details about when an agreement will be reached;"[209] GNP addresses this requirement as follows:

> GNP has been talking with King County representatives about restoration of common carrier rail service on the Line; however the parties have not yet reached an agreement. Nevertheless, in view of agency precedent cited above that the abandoning rail carrier *or any other approved rail service provider* [emphasis supplied] may reassert control to restore service on the line in the future, the fact that King County has not as yet agreed to GNP's restoration of service presents no bar to this Board's ability to issue an exemption authorizing GNP to restore service or to the restoration of service itself.[210]

In other words, GNP argues that the Board should waive GNP's failure to satisfy the plain language of the acquisition rule because the railbanking statute allows any rail carrier to reactivate rail service. This argument contains a huge non-sequitur. The railbanking statute may indeed allow any railroad to reactivate service on a railbanked right of way. But 16 U.S.C. 1247(d) does not address the terms upon which the Board will approve the transfer under § 10902 of a rail line. The Board's acquisition regulations do address those terms. 49 CFR 1150.43(c) states that a Class III carrier seeking to acquire a rail line must show that it has or will soon have an agreement to access the line. Nothing in the regulation waives that requirement for acquisition of railbanked rights of way. GNP's petition seeks an exemption from § 10902, and GNP must satisfy the requirements specified by the Board for small line acquisitions.

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[209] 49 CFR 1150.43(c).

[210] GNP Petition at 13-14.

Since GNP characterizes its proposed land grab as "an issue of first impression,"[211] it is useful to trace the history of § 1150.43(c) to confirm that the Board and the ICC before it did and do expect a carrier seeking authority to acquire a line to show that it has contractual rights to occupy the property. Prior to the enactment in 1995 of ICCTA, 49 U.S.C. 10901 governed both construction and operation of new rail lines and proposals to acquire and operate existing rail lines.[212] In 1981, after Congress passed the Staggers Rail Act,[213] the ICC simplified the rules governing line acquisitions. The revised rules adopted in 1982 required all applications to provide "A description of the proposal and the *significant terms and conditions, including consideration to be paid* (monetary or otherwise). As *Exhibit B*, copies of all relevant agreements."[214]

In 1985 the Commission exempted from regulation "all acquisitions and operations under section 10901 . . ."[215] Newly adopted 49 CFR 1150.33(c) imposed the requirement that a notice include "A statement that an agreement has been reached or details about when an agreement will be reached."[216]

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[211] GNP Petition For Exemption at 6.

[212] *R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Acquisition and Operations Exemption—Line of Norfolk Southern Railway Company*, STB Finance Docket No. 35143, slip op. at 6 (Service Date July 27, 2009).

[213] Pub. L. 96-448, 94 Stat. 1895 (1980).

[214] 49 CFR § 1120.4(a) (emphasis added), as adopted at 47 Fed.Reg. 8195, 8200 (Feb. 25, 1982). The Commission subsequently recodified the rules governing line acquisitions in 49 CFR Part 1150. 47 Fed. Reg. 49581 (Nov. 1, 1982). The quoted text now appears as § 1150.4(a).

[215] 49 CFR 1150.31(a), as adopted on December 19, 1985, published at 51 Fed. Reg. 2503–04 (Jan. 17, 1986).

[216] 51 Fed.Reg. at 2504.

In 1995 Congress enacted the ICCTA. It includes a new provision, 49 U.S.C. 10902, to govern the acquisition or operation of additional rail lines by Class II or Class III railroads. On June 14, 1996 the Board adopted a new class exemption for small line acquisitions under § 10902.[217] The Board noted that "the criteria for approving a transaction under section 10902 are substantially the same as those found in section 10901 . . ."[218] The Board retained the requirement that the notice for a small line acquisition must include "A statement that an agreement has been reached or details about when an agreement will be reached."[219]

Although the Board has specified only that a *notice* of exemption must include a showing that the carrier has or will soon have an agreement conveying an interest in the subject line, GNP correctly assumed that the same requirement applies to a carrier seeking to acquire a line by filing a *petition* for exemption. The Board never adopted rules specifying the content of a petition for exemption from § 10902, as it did for notices of exemption. It would not make sense, however, to require a carrier to establish its interest in a rail line in a class exemption proceeding but not in a petition for exemption. Just as a party filing a notice of exemption must establish that it has an agreement to acquire the subject line, so too must a party filing a petition for exemption.

GNP concedes that it has no agreement to acquire an interest in the Redmond Spur. GNP argues that the Board should not apply the plain language of its § 10902 acquisition rules because GNP proposes to reactivate service on a railbanked right-of-way. But no such exemption appears in 49 CFR 1150.43(c). The rule applies the common sense requirement that a

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[217] 1 S.T.B. 95 (decided June 14, 1996), published at 61 Fed.Reg. 32355 (June 24, 1996)..

[218] 1 S.T.B. at 96.

[219] 49 CFR 1150.43(c), as adopted at 1 S.T.B. 110 (1996), published at 61 Fed.Reg. 32355 (June 24, 1996).

carrier seeking to acquire a rail line belonging to another party must produce an agreement with that party authorizing use of the owner's property. That agreement can be with the abandoning railroad (if it retained the right to reactivate rail service), or with the entity that currently holds the rail line. The rule does not allow GNP to expropriate Redmond's real property.

The Board should deny GNP's petition because GNP failed to satisfy the minimal application requirements to qualify for an exemption.

2. The Board decisions on which GNP relies contemplate that the prospective carrier has a property interest in the rail line, either through a chain of title from the abandoning railroad or a contractual right to restore rail service.

GNP says that Trails Act "precedent" and "Congressional intent" compel the Board to ignore the plain language of its acquisition regulations and to reactivate rail service on the Redmond Spur without any showing that GNP has an agreement with the owners of the property.[220] In evaluating this argument, it is important to distinguish real issues from red herrings. No one questions that interim trail use is subject to restoration of rail service at any time, or that a railroad other than the abandoning railroad may petition the Board to restore service. The issue is whether 16 U.S.C. 1247(d) overrides the requirement in 49 CFR 1150.43(c) that a carrier petitioning the Board to acquire a rail line must show the Board that it has or will have a property or contractual interest enabling the carrier to occupy the right of way.

GNP contends that because any rail service provider has the right under § 1247(d) to restore service, it therefore follows that the Board may not demand the property interest showing required by its acquisition rules. GNP Petition at 14. GNP cites no authority at all for this proposition. GNP cites three decisions, while acknowledging that "these cases do not squarely address the issue posed here . . ." *Id.* at 7. *Birt v. Surface Transportation Board*, 90 F.3d 580

[220] GNP Petition For Exemption at 7.

(D.C. Cir. 1996), stands only for the undisputed proposition that the abandoning railroad "retains the right to reassert control over the easement at some point in the future if it decides to revive rail service."[221]

Iowa Power[222] undermines GNP's position. That decision involved a railbanked right of way acquired by the Iowa Natural Heritage Foundation from the Iowa Southern Railroad Company. Two years later a newly formed railroad (CBEC) petitioned the ICC under §10901 to acquire 3.8 miles of existing line from Iowa Southern and build 1.8 miles of new line to serve a coal-fired power plant. The project also involved reactivation of a short segment of railbanked right of way. The new carrier (CEBC) together with the interim trail user petitioned the ICC to modify the NITU to restore service over 350 feet of the railbanked line.[223] Iowa Southern, the abandoning railroad, was not a party to the petition to modify the NITU. The Commission held that "the abandoning railroad is the real party in interest here. . . . Given the fact that the abandoning carrier voluntarily agreed to the interim trail use (and rail banking), prior to our modification of a NITU or CITU, we find that the abandoning carrier, if available, should at least concur in the non-carrier's proposal."[224] The Commission conditioned its order modifying the NITU to require that the abandoning railroad, Iowa Southern, file a letter of concurrence.[225]

Applying the holding of *Iowa Power* to the facts of this case, BNSF's successor in interest, King County, is the "real party in interest" that must consent to GNP's petition to vacate

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[221] 90 F.3d at 583.

[222] *Iowa Power, Inc. – Construction Exemption – Council Bluffs, IA.*, 8 I.C.C.2d 858, 1990 WL 512397 (1990).

[223] 8 I.C.C.2d at 866, 1990 WL 512397 at 4-5.

[224] 8 I.C.C.2d at 866-67, 1990 WL 512397 at 5.

[225] 8 I.C.C.2d at 869, 1990 WL 512397 at 6.

the NITUs. The ICCTA did not amend the regulatory scheme in any way that undermines the Commission's holding in *Iowa Power*. As a result of the ICCTA, §10902 now governs acquisition of a rail line by a Class III carrier, but the criteria for Board approval of the transaction have not changed.[226]

GNP relies most heavily on *Georgia Great Southern*.[227] In that case the successor in interest to the abandoning railroad sought to reactivate rail service on a railbanked line and to vacate the attendant NITU.[228] The petitioner, Georgia Southwestern Railroad (GSWR), acquired from the abandoning railroad the exclusive right to reactivate rail service.[229] Because the railroad that held the reactivation rights petitioned to vacate the NITU, the Board held, relying on *Iowa Power*, that GSWR required no other authority to vacate the NITU. The Board specifically ruled that the Trails Act does not speak to compensation, and that it was not the role of the Board to determine whether the interim trail user was entitled to compensation for loss of its property rights in the corridor.[230]

Redmond believes that *Georgia Great Southern* was a shortsighted decision that will undermine the viability of the railbanking program, but it will not help GNP here. Unlike GNP, GSWR held the reactivation rights to the railbanked corridor. The Board relied on that fact in holding that reactivation required no authorization from the Board other than to vacate a

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[226] *Class Exemption For Acquisition or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902*, STB Ex Parte No. 529, 1 S.T.B. 95, 96 (decided June 14, 1996).

[227] *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, in Terrrell, Lee, and Dougherty Counties, GA*, 6 S.T.B. 902 (2003)

[228] *Georgia Great Southern*, slip op. at 1, 6 S.T.B. at 903.

[229] 6 S.T.B. at 903.

[230] 6 S.T.B. at 906.

NITU.[231] Here, by contrast, GNP seeks to acquire a rail line in which it holds no property rights. GNP correctly assumed that this acquisition requires Board approval under § 10902. As such, GNP must show that it has an agreement with the owner(s) of the property and/or the holder of the reactivation rights to occupy the right of way.

One other recent Board decision, not cited by GNP, supports Redmond's analysis of the regulatory scheme. In *R.J. Corman*,[232] a Class III carrier (RJCP) petitioned the Board under §§ 10901 and 10502 to acquire a railbanked right of way and reactivate rail service. In a separate docket, RJCP filed a notice of exemption under § 10902 to acquire the right to reinstitute rail service from Norfolk Southern, the successor in interest to the abandoning railroad.[233] RJCP's Notice of Exemption contained the information required by 49 CFR 1150.43(c). It stated that "NS has granted RJCP an option to acquire NS/Conrail's residual common carrier rights and obligations, including the right to reinstate rail service, on the former Snow Shoe Industrial Track."[234]

The Board held that by virtue of the enactment of § 10902, a carrier need no longer apply for construction authority under § 10901 to reactivate rail service. The Board, citing *Iowa Power* and *Georgia Great Southern*, held that § 10901 authority is not required for reactivation of rail service by the abandoning railroad or its successor. "The exemption from Section 10902 (if

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[231] *Id.*

[232] *R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Construction and Operation Exemption—In Clearfield County, PA*, STB Finance Docket No. 35116 (Service Date July 27, 2009).

[233] *R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Acquisition and Operations Exemption—Line of Norfolk Southern Railway Company,* Verified Notice of Exemption, STB Finance Docket No. 35143 (STB filed May 20, 2008).

[234] *Id.* at 3.

granted), combined with vacating the CITU under the Trails Act, would provide RJCP all the authority it needs to acquire, restore, and reinstitute rail operations over the [railbanked] Eastern Segment."[235]

These decisions are fatal to GNP's position. They confirm that a carrier seeking to acquire a railbanked right of way must satisfy the requirements of § 10902, including showing that the carrier has an agreement to occupy the rail corridor it seeks to acquire.

It is no coincidence that the caption of § 10902 is entitled, "Short Line Purchases by Class II and Class III Rail Carriers."[236] The Board's acquisition regulations merely confirm that a carrier seeking to acquire a rail line under § 10902 must purchase the right to occupy the property.

3. GNP's interpretation of § 10902 would subvert the operation of 49 U.S.C. § 10904, the OFA statute.

On September 8, 2008 BSF filed its Notice of Exemption to abandon service on the Redmond Spur.[237] At the time, GNP, BNSF and the Port were negotiating over the terms for GNP and its partner to assume the freight franchise north of Woodinville. BNSF and the Board published notice of the opportunity to file an OFA as required by the Board's rules,[238] but no one responded.[239] BNSF proceeded to consummate its sale of the Redmond Spur property rights to

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[235] *R.J. Corman*, note 228 *supra*, slip op. at 5.

[236] The caption of a statute is a relevant and helpful aid in statutory interpretation. *United Transportation Union et al. v. Surface Transportation Board*, 169 F.3d 474, 479 (D.C. Cir. 1999).

[237] Notice of Exemption, BNSF Railway Company Abandonment Exemption In King County, Washington, STB Docket No. AB-6 (Sub. Nos. 463X), filed Sept. 8, 2008.

[238] 73 Fed.Reg. 55899 (Sept. 26, 2008)

[239] Decision and Notice of Interim Trail Use or Abandonment at 1, STB Docket No. AB-6 (Sub.No. 463X), served October 27, 2008.

the Port, and the reactivation rights to King County.[240] Less than two years after BNSF published notice of its plans and invited interested parties to pursue an OFA, GNP filed its current Petition, inviting the Board to reactivate rail service without the inconvenience of demonstrating GNP's financial responsibility or offering to pay the fair market value of the property.

When a carrier proposes to abandon a line, "any person" may file an OFA, "which is an offer to purchase or subsidize a rail line and so to facilitate continued freight rail service." *Borough of Columbia v. STB*, 342 F.3d 222 (3d Cir. 2003). To approve an OFA, the Board must conclude that the offeror is "financially responsible." 49 U.S.C. § 10904(d)(2). The abandoning railroad and the offeror may then attempt to negotiate a sale of the line. *Id.* If they cannot reach an agreement, either party may request the Board to set the conditions and amount of compensation for the transaction. *Id.* § 10904)(e). The Board may consider the potential for future rail traffic on the subject line, whether a putative shipper is physically capable of receiving service, and whether the offeror is serious about providing freight rail service,. *Kulmer, supra* note 133, 236 F.3d at 1257; *Redmond-Issaquah R.R. Preservation Ass'n v. S.T.B.*, 223 F.3d 1057, 1064 (9th Cir. 2003).

The OFA process targets precisely the situation that GNP claims to exist on the Redmond Spur: an unrecognized demand for continuing rail service on a right of way proposed for abandonment, and an independent carrier ready to assume the common carrier obligation. Section 10904, of course, requires the offeror to purchase the rail line, and to demonstrate that it has the resources and the intent to continue rail freight service.

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[240] Letter of February 4, 2010 from David T. Rankin, BNSF Railway, to Ms. Cynthia T. Brown, STB Docket No. AB-6 (Sub No. 463X).

In assessing GNP's legal arguments the Board should ask this question: why would any prospective operator file an OFA if it could skip the entire process, wait a few months, and then ask the Board to reactivate rail service without paying for the property rights? Redmond submits that no one would be so foolish as to pay fair market value for an asset that they can obtain for nothing.

A basic rule of statutory construction is that "effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant."[241] A statute should be construed so that "one section will not destroy another."[242] Congress obviously intended that independent operators should have the ability to preserve rail service on a rail corridor proposed for abandonment, but Congress specified a procedure for an independent to preserve rail service on a line proposed for abandonment. GNP's interpretation of 16 U.S.C. 1247(d) would gravely undermine the operation of 49 U.S.C. 10904, by discouraging any small carrier from submitting an OFA on a line proposed for railbanking. If a line proposed for abandonment can be acquired only by payment of fair market value, but a railbanked line can be reactivated for free, no one will feel compelled to use the statutory procedure that Congress established in § 10904.

The Board should reject GNP's petition, not only because it omits information required by 49 CFR 1150.43, but also because GNP's petition presents an interpretation of the Trails Act that would subvert a core component of the ICCTA acquisition and abandonment scheme.

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[241] *Consolidated Rail Corp. v. United States of* America, 896 F.2d 574, 579 (D.C.Cir.1990).

[242] *AFL-CIO v. Potter*, 343 F.3d 619, 626 (2nd Cir. 2003).

III. CONCLUSION

For the foregoing reasons, the Board should reject GNP's proposal, or in the alternative, require GNP to submit a full application pursuant to § 10902.

DATED: November 8, 2010

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