



600 University Street, Suite 3600
Seattle, Washington 98101
phone 206.624.0900
fax 206.386.7500
www.stoel.com

January 7, 2011

HUNTER FERGUSON
Direct (206) 386-7514
hoferguson@stoel.com

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: **GNP Rly, Inc. Petition for Exemption, STB Finance Docket No. 35407;**

228606

**GNP Rly, Inc. Petition to Vacate NITU or Abandonment, STB Docket Nos. AB-6
(Sub. No. 463X) and AB-6 (Sub. No. 465X)**

228607

**The City of Redmond's Petition for Leave to Reply to the GNP Rly Inc.'s Sur-
Reply and Accompanying Reply**

228608

Dear Ms. Brown:

Please find enclosed the City of Redmond, Washington's Petition for Leave to Reply to the Replies of GNP Rly, Inc. filed in the above-captioned proceedings and Redmond's accompanying Reply. If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script that reads "Hunter Ferguson".

Hunter Ferguson
Attorney for City of Redmond, Washington

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

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

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**THE CITY OF REDMOND'S
PETITION FOR LEAVE TO REPLY TO
GNP RLY INC.'S SUR-REPLY**

Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: 206-624-9000
Facsimile: 206-386-7500
mcohen@stoel.com
hoferguson@stoel.com

Attorneys for the City of Redmond, Washington

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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PURSUANT TO 49 U.S.C. § 10502**

**THE CITY OF REDMOND'S
PETITION FOR LEAVE TO REPLY TO
GNP RLY INC.'S SUR-REPLY**

Pursuant to 49 C.F.R. § 1117.1, the City of Redmond, Washington (“Redmond”) petitions for leave to file a reply to a reply. On November 9, 2010 Redmond filed comments on GNP’s Petition For Exemption to acquire operating rights on the Redmond Spur. Approximately one month later the Board released its decision in *San Francisco Bay Railroad-Mare Island — Operation Exemption — California Northern Railroad (“Mare Island I”)*.¹ That decision

¹ STB Finance Docket No. 35304 (STB served December 6, 2010). On the same day, the Board issued a related decision in *San Francisco Bay Railroad-Mare Island — Mare Island Petition for Emergency Service Order and Petition for Declaratory Order — Lennar Mare Island, LLC*, STB Finance Docket No. 35360 (STB served December 6, 2010) (“*Mare Island*”)
(continued . . .)

affirmed a key contention in Redmond's comments, that an operator seeking Board authorization to acquire a rail line must document its contractual authority to acquire or occupy the property. King County first mentioned *Mare Island I* in its reply comments, filed December 15, 2010.² On December 22 GNP moved for leave to reply to the reply of King County.³ In its proposed Sur-Reply, GNP sought to distinguish *Mare Island I*. Redmond, which has had no opportunity to discuss this decision issued after the comment deadline, does not oppose GNP's motion for leave, so long as Redmond has an equal opportunity to address the significance of *Mare Island I*.

Although parties are not normally permitted to reply to replies,⁴ the Board may allow such replies when doing so would clarify the parties' legal arguments without prejudicing other parties or unduly prolonging the proceedings.⁵ These criteria are met here. *Mare Island I* addresses a core issue bearing on the facial adequacy of GNP's Petition For Exemption. Giving Redmond the same opportunity as GNP to address the relevance of that decision will not prejudice other parties or unduly prolong these proceedings.

Accordingly, Redmond should be permitted to file the following reply memorandum.

(. . . continued)

IP). Redmond does not discuss *Mare Island II* because that matter involved (1) a petition for emergency service, which is not at issue here, and (2) a petition for a declaratory order, which was denied based on the decision in *Mare Island I*. See *Mare Island II*, slip op. at 3–4.

² See Reply of King County, Washington Regarding Petitions of GNP Rly Inc. ("King County's Reply") at 5–7 (filed December 15, 2010).

³ See Motion of GNP Rly Inc. For Leave To Reply To King County's Reply Comments ("GNP's Sur-Reply") (filed December 22, 2010).

⁴ See 49 C.F.R. § 1104.13(c).

⁵ See *BNSF Railway Company — Discontinuance of Trackage Rights Exemption — In Peoria and Tazewell Counties, Ill.*, STB Docket No. AB 6 (Sub-No. 470X), slip op. at 1 (STB served June 4, 2010). The Board may also consider whether additional pleadings would enhance or complete the factual record. As Redmond does not seek to supplement the factual record, that criterion is not a factor in this context.

**THE CITY OF REDMOND'S REPLY TO
GNP RLY INC.'S SUR-REPLY**

I. INTRODUCTION

Contrary to GNP's arguments in its proposed Sur-Reply, *Mare Island I* is germane to this matter. In *Mare Island I* the Board confirmed a critical point made by Redmond in its comments: a carrier seeking an exemption to acquire a rail line *must show that it has an agreement or pending agreement* for possession of the line with the owner of the rail property to be eligible for an exemption. The facts at issue in *Mare Island I* differ in many respects from those presented here, but the key fact that mattered to the Board is common to both proceedings. Neither GNP nor the San Francisco Bay-Mare Island Railroad could satisfy the requirement that an operator seeking to acquire an existing rail line must produce proof that it holds contractual or operating rights to occupy the property. *Mare Island I* confirms that the Board will enforce that requirement.

II. ARGUMENT

In its comments on GNP's Petition For Exemption, Redmond urged the Board to deny GNP's Petition because GNP has not entered into an agreement with Redmond and with the Port of Seattle to access the Redmond Spur.⁶ Redmond noted that when a railroad files a notice of class exemption to acquire a rail line, the railroad is required by 49 C.F.R. § 1150.43(c) to include in its notice a "statement that an agreement has been reached or details about when an agreement will be reached." Redmond explained that, in light of the history of the Board's

⁶ See The City of Redmond's Comments in Opposition ("Redmond's Comments") at 38-48 (filed November 9, 2010).

regulations and the structure of ICCTA, 49 U.S.C. § 101 *et seq.*, the same substantive requirement of this regulatory provision — proof of an actual or pending agreement — applies to *petitions for exemption* as well as *notices*.⁷

On December 15 King County and GNP each filed replies to comments filed by other parties. King County’s reply cited the recently issued *Mare Island* decisions for the proposition that “an entity, even a railroad with Board authority to operate, cannot force its way onto a line without first obtaining sufficient property interests or contractual rights.”⁸ GNP’s reply asserted that proof of an agreement is not necessary because the Board’s regulations do not require such an agreement when a carrier seeks to reactivate a railbanked rail line.⁹

On December 22, GNP moved for leave to reply to King County’s reply comments. GNP devoted much of its sur-reply to efforts to distinguish the *Mare Island* decisions.¹⁰ GNP pointed out that the *Mare Island* decisions involved competing carriers, that the petitioner misrepresented the facts, that the petitioner sought an emergency service order, that the property owner was a developer, and that the corridor was not railbanked.¹¹

Redmond sees no need for the Board to consider the various factual differences alleged by GNP between the *Mare Island* facts and those presented here. The significance of *Mare Island I* is that the Board there confirmed the importance of the requirement that an operator seeking Board authorization to acquire a rail line must show that it has authority to occupy the property. The Board ruled that a notice of exemption was void *ab initio* because the acquiring

⁷ *See id.* at 40–41

⁸ King County’s Reply at 6.

⁹ *See Reply Comments of GNP Rly Inc. (“GNP’s Reply”)* at 14–18 (filed December 15, 2010).

¹⁰ *See GNP’s Sur-Reply* at 6–9.

¹¹ *See id.* at 6–8.

railroad had not reached an agreement with one of the owners of the subject rail property. The Board explained that the agreement required by the regulations was *material* to the proposed acquisition, that is, “the transaction would not have otherwise qualified for an exemption.”¹² In so ruling, the Board noted that “agreements would be *needed with both*” property owners.¹³

Like the railroad in *Mare Island I*, GNP seeks an exemption to acquire a rail line owned by other entities — Redmond and the Port of Seattle. That *Mare Island I* involved an exemption from 49 U.S.C. § 10901 while GNP seeks an exemption from 49 U.S.C. § 10902 is immaterial because, as the Board observed after it promulgated rules to implement the regulatory scheme under ICCTA, the regulatory criteria under both statutory provisions “are substantially the same.”¹⁴ Just as no agreement existed in *Mare Island I* between the railroad and one of the two property owners, GNP does not have agreements with Redmond and the Port that would allow it to operate freight service on the Redmond Spur. GNP has no agreement with Redmond. Although GNP has a limited license agreement with the Port concerning use of the northern part of the Redmond Spur for some rail operations, that agreement *expressly prohibits* GNP from operating freight service on the line.¹⁵ And just as the absence of an agreement was fatal to the

¹² *Mare Island I*, slip op. at 3 (citing *Berkshire Scenic Ry. Museum, Inc. v. ICC*, 52 F.3d 378 (1st Cir. 1995)).

¹³ *Id.*, slip op. at 4 n.8 (emphasis added).

¹⁴ 1 S.T.B. 95, 96 (decided June 14, 1996), published at 61 Fed. Reg. 32355 (June 24, 1996). For further discussion of this point, see Redmond’s Comments at 40–41.

¹⁵ See Railroad Right of License between Port of Seattle and GNP Rly, Inc. § 2.2, Ex. E. to Redmond’s Comments. Redmond discussed the terms of this license agreement in its earlier-filed comments. See Redmond’s Comments at 9–11.

railroad's attempt to secure an exemption in *Mare Island I*,¹⁶ the absence of an agreement permitting GNP to operate on the Redmond Spur is fatal to GNP's petition.

GNP fails in its attempts to meaningfully distinguish *Mare Island I*. A common thread running through many of GNP's arguments is that the requirements for obtaining an exemption from regulation under 49 U.S.C. § 10902 for the transfer of a short line do not apply if the line is railbanked.¹⁷ But GNP fails to identify any authority to support its assertion. As noted above and discussed in Redmond's Comments,¹⁸ the regulations codified at 49 C.F.R. Part 1150, subpart D set forth the terms that must be met to obtain authority to construct, acquire or operate a rail line, and those regulations do not contain special exceptions for railbanked lines. Therefore, an agreement between GNP and the property owners is necessary.

GNP asserts that this matter differs from the situation presented in *Mare Island I* because GNP has candidly acknowledged that it does not have an agreement with Redmond.¹⁹ The exemption notice at issue in *Mare Island I* was void not because the railroad failed to *state* that it had reached an agreement with the property owner. The railroad there was not entitled to an exemption because it had not *entered* into such an agreement.²⁰ As the First Circuit explained in *Berkshire Scenic Railway Museum, Inc. v. I.C.C.* — an opinion on which the Board relied in *Mare Island I* — the determination of whether an exemption notice is void properly turns on whether the disputed information in the notice “concern[ed] a *material part of the transaction*”

¹⁶ See *Mare Island I*, slip op. at 4.

¹⁷ See GNP's Sur-Reply at 6–7.

¹⁸ See Redmond's Comments at 39.

¹⁹ See GNP's Sur-Reply at 7.

²⁰ See *Mare Island I*, slip op. at 4.

itself, not simply the form of the notice.²¹ Redmond agrees that GNP is quite open about its inability to produce an agreement that would authorize GNP to occupy the Redmond Spur. But, as the Board clarified in *Mare Island I*, the absence of such an agreement is a fatal flaw in GNP's exemption petition.

III. CONCLUSION

For the foregoing reasons and those set forth in Redmond's Comments, the Board should deny GNP's Petition for Exemption.

January 7, 2011

Respectfully submitted,



Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: 206-624-9000
Facsimile: 206-386-7500
mcohen@stoel.com
hoferguson@stoel.com

Attorneys for the City of Redmond, Washington

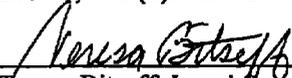
²¹ 52 F.3d at 381.

**Case Title: GNP RLY, INC.--ACQUISITION AND OPERATION
EXEMPTION--REDMOND SPUR AND WOODINVILLE SUBDIVISION
Docket No. 35407 and
STB Docket Nos. AB-6 (Sub No. 463X and Sub No. 465X)
CERTIFICATE OF SERVICE**

<u>Filed By</u>	<u>Address</u>	<u>Email</u>	<u>Filed For</u>
1. Matthew Cohen	Stoel Rives Llp 600 University Street, Suite 3600 Seattle, WA 98101 Tel: 206-386-7569 Fax: 206-386-7500	Mcohen@Stoel.Com	City Of Redmond WA
2. Hunter Ferguson	Stoel Rives Llp 600 University Street, Suite 3600 Seattle, WA 98101 Tel: 206-386-7514	Hoferguson@Stoel.Com	
3. Charles A. Spitulnik W. Eric Pilsk Allison J. Fultz	Kaplan Kirsch & Rockwell Llp 1001 Connecticut Avenue, Nw. Suite 800 Washington, DC 20036 Tel: (202) 955-5600	cspitulnik@kaplankirsch.com epilsk@kaplankirsch.com afultz@kaplankirsch.com	King County, WA
4. Pete Ramels, Andrew Marcuse	Office of the Prosecuting Attorney Civil Division W400 King County Courthouse 516 Third Avenue Seattle, WA 98104 Tel:	pete.ramels@kingcounty.gov andrew.marcuse@kingcounty.gov	King County
5. John D. Heffner James H. M. Savage	Law Offices 1750 K Street, N.W., Suite 350 Washington, DC 20006 Tel: 202-296-3333 Fax 202-296-3939	j.heffner@verizon.net jsavagelaw@aim.com	Gnp Rly Inc.
6. Denis Law	City Of Renton 1055 S Grady Way Renton, WA 98057 Tel: 425-430-6500	by U. S. Mail	City Of Renton
7. Lawrence J. Warren	City of Renton PO Box 626 Renton, WA 98057 Tel: 425-430-6480	lwarren@rentonwa.gov	City of Renton
8. Isabel Safora Anne DeKoster	Port Of Seattle P. O. Box 1209 Seattle, WA 98111	safora.i@portseattle.org dekoster.a@portseattle.org	Port Of Seattle
9. Kevin Sheys	K&L Gates LLP 1601 K Street NW Washington, DC 20006 Tel: 202-778-9855 Fax: 202-778-9100	kevin.sheys@klgates.com	Port Of Seattle
10 Tay Yoshitani	The World Trade Center Baltimore, MD 211202-3041	by U. S. Mail	Port Of Seattle
11 Steve Sarkozy	City Of Bellevue P. O. Box 90012 Bellevue, WA 98009 Tel:	by U. S. Mail	City Of Bellevue
12 Kurt Tripiett	City Of Kirkland 125 5Th Ave Kirkland, WA 98033 Tel:	by U. S. Mail	City Of Kirkland

13 Robert P. Vom Eigen	Foley & Lardner LLP 3000 K Street, N.W., Suite 500 Washington, DC 20007-5143 Tel: (202) 672-5300 Fax: (202) 672-5399	Rvomeigen@Foley.Com	Central Puget Sound Regional Transit Authority
14 Davit T. Rankin Kristy D. Clark	BNSF Railway PO Box 961039 Forth Worth, TX 76131-2828	david.rankin@bnsf.com kristy.clark@bnsf.com	BNSF
15 Karl Morell	Ball Janik LLP 1455 F Street NW, Suite 225 Washington, DC 2005 Tel: 202-638-3307 Fax: 202-783-6947	kmorell@billp.com	BNSF Railway Co
16 Jordan Wagner	401 S. Jackson St. Seattle, WA 98104	jordan.wagner@soundtransit.org	Sound Transit
17 Andrea C. Ferster	Rails-To-Rails Trails Conservancy 2121 Ward Court, N.W., 5th Floor Washington, DC 20037	afferster@railstotrails.org	Rails-To-Rails Trails Conservancy
18 Jean M. Cerar	Issaquah Valley Trolley PO Box 695 Issaquah, WA 98027	info@issaquahhistory.org	Issaquah Valley Trolley
19 Mike Bates	Woodinville Lumber, Inc. 15900 Woodinville-Redmond Road NE Woodinville, WA 98072 Tel: 425-488-1818 Fax: 425-488-7409	by U. S. Mail	Woodinville Lumber, Inc.
20 Kathy Cox	Marketing Philharmonic 218 Main Street #668 Kirkland, WA 98033 Tel: 425-822-3925	by U. S. Mail	Marketing Philharmonic
21 Don Davis	Master Builders Association of King & Snohomish Counties 335 - 116th Avenue SE Bellevue, WA 98004 Tel: 425-451-7920 Fax: 425-646-5985	by U. S. Mail	Master Builders Association of King & Snohomish Counties
22 Dean Kattler	Waste Management of Washington, Inc. 13225 NE 126th Place Kirkland, WA 98034 Tel: 425-823-6164 Fax: 425-814-7866	by U. S. Mail	Waste Management, Inc.
23 Ernest F. Wilson	17509 NE 38th Court Redmond, WA 98052 Tel: 425-869-8899	ewilson@spiretech.com	Ernest F. Wilson
24 Paul Zimmer	Eastside Rail Now PO Box 3524 Bellevue, WA 98009 Tel: 425-646-8517	by U. S. Mail	Eastside Rail Now

I certify that I have sent to the parties of record as set forth above & obtained from the STB website, via email/pdf and/or via U. S. Mail the following: (1) Cover letter from Hunter Ferguson to Cynthia T. Brown; and (2) Redmond's Petition for Leave to Reply to GNP's Sur-Reply.



 Teresa Bitseff, Legal Secretary
 STOEL RIVES LLP

Dated: Friday, January 07, 2011