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November 10, 2010

E-FILE

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 35407, GNP RLY, Inc. – Acquisition and
Operation Exemption – Redmond Spur and Woodinville
Subdivision;

STB Docket No. AB 6 (Sub-No. 463X), BNSF Railway Company –
Abandonment Exemption – In King County, Washington;

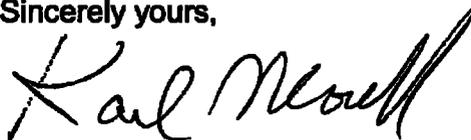
STB Docket No. AB 6 (Sub-No. 465X), BNSF Railway Company –
Abandonment Exemption – In King County, Washington;

Dear Ms. Brown:

Attached for e-filing are the Comments of BNSF Railway Company in the
above captioned proceedings.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35407

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

STB DOCKET NO. AB 6 (SUB-NO. 463X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON**

STB DOCKET NO. AB 6 (SUB-NO. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON**

COMMENTS OF BNSF RAILWAY COMPANY

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Dated: November 10, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35407

GNP RLY, INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
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BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company ("BNSF") hereby submits these comments pursuant to the decisions issued by the Surface Transportation Board ("Board") on September 15, 2010, ("*September Decision*") and October 19, 2010 ("*October Decision*"), in these proceedings.¹

BACKGROUND

On August 24, 2010, GNP Rly, Inc. ("GNP"), a Class III rail carrier, filed a petition for

¹ The October Decision specifies two different deadlines for filing comments in these proceedings: November 10th (in the third paragraph) and November 9th (in the second ordering paragraph). In the event November 9th is deemed the deadline, BNSF hereby seeks leave to late-file these Comments.

exemption pursuant to 49 U.S.C. § 10502 for an exemption from the provisions of 49 U.S.C. § 10902 to acquire from King County, Washington (“King County”) the residual common carrier rights and obligations, including the right to reinstitute rail service over two segments of railbanked railroad rights-of-way (“GNP Petition”). The two segments consist of the former BNSF Redmond Spur located between Milepost 0.0, at Woodinville, and Milepost 7.30, at Redmond, WA (“Redmond Spur”) and a segment of the former BNSF Woodinville Subdivision located between Mileposts 23.8 and 22.0 at and near Woodinville (“Woodinville Segment”) (the Redmond Spur and the Woodinville Segment will collectively be referred to as the “Lines”). BNSF abandoned the Redmond Spur in STB Docket No. AB-6 (Sub-No. 463X), *BNSF Railway Company – Abandonment Exemption – In King County, WA* (“Sub-463 Abandonment”). By decision served October 27, 2008, in the Sub-463 Abandonment, the Board issued a notice of interim trail use (“NITU”) on behalf of King County. BNSF abandoned a portion of its Woodinville Subdivision, including the Woodinville Segment, in STB Docket No. AB-6 (Sub-No. 465X), *BNSF Railway Company – Abandonment Exemption – In King County, WA* (“Sub-465 Abandonment”). By decision served November 28, 2008, in the Sub-465 Abandonment, the Board issued a NITU on behalf of King County.

On December 18, 2009, BNSF and King County entered into a trail use agreement for the Redmond Spur and the portion of the Woodinville Subdivision located between Milepost 11.25, near Wilburton, and Milepost 23.80, near Woodinville.² Pursuant to the Board’s decision in STB Finance Docket No. 35148, *King County, WA – Acquisition Exemption – BNSF Railway*

² The Trail Use Agreement also includes BNSF’s former rail line located between Milepost 5.0, in Kennydale, WA, and Milepost 10.60, in Wilburton, WA. See STB Docket No. AB-6 (Sub-No. 464X), *BNSF Railway Company – Abandonment Exemption – In King County, WA* (not printed), served October 27, 2008.

Company (not printed), served September 18, 2009 (“**King County Acquisition**”), BNSF transferred the reactivation rights with respect to certain BNSF rail lines, including the Redmond Spur and Woodinville Segment, to King County. BNSF also donated and sold various BNSF rail lines, including the Redmond Spur and Woodinville Segment, to The Port of Seattle (“**Port**”). See STB Finance Docket No. 35128, *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company* (not printed), served October 27, 2008.

On August 24, 2010, GNP also filed a petition, pursuant to 49 C.F.R. § 1152.29(c)(2), to vacate the NITU issued in the Sub-463 Abandonment and a portion of the NITU issued in the Sub-465 Abandonment.

COMMENTS

It is unclear whether GNP is simply seeking permissive authority to acquire the reactivation rights from King County, where King County’s acquiescence is required for the transaction to be consummated, or whether it is seeking an order from the Board mandating the transfer of the reactivation rights over the objection of King County. The objective of GNP is unclear because, on the one hand, GNP alleges that it “has been talking with King County representatives about restoration of common carrier service” (GNP Petition at 6), while, on the other hand, GNP argues that King County “cannot stand in the way of GNP’s service restoration” (GNP Petition at 7). If GNP is seeking a permissive order, the GNP Petition should be rejected as premature or incomplete. If GNP is seeking a mandatory order, the GNP Petition should be denied because the Board does not have the authority to grant GNP the relief it seeks.

The Board seeks comments from interested persons specifically on the following issue: “under what circumstances will the Board grant a carrier’s request to vacate a NITU to permit reactivation of rail service, when the petitioning carrier does not own or have any other interest

in the ROW.” *September Decision*, slip op. at 3. As the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have consistently held, the Board cannot mandate the reactivation of rail service on a railbanked corridor without the acquiescence of the party holding the reactivation rights. BNSF respectfully urges the Board to uphold this long held policy in these proceedings. Requiring the acquiescence of the party holding the reactivation rights is legally sound, makes for good public policy, and is totally consistent with Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) (the “Trails Act”).

In adopting final rules implementing the Trails Act, the ICC specifically found that interim trail use under the Trails Act “is subject to reactivation of rail service by the owner of the right-of-way” and not a third party. *Rail Abandonments – Use of Rights-Of-Way As Trails*, 2 I.C.C. 2d 591, 596 (1986)(“*Rail Abandonments*”).³

GNP cites several cases in support of its contention that King County, the party with the reactivation rights, cannot stand in the way of GNP’s service restoration. All of the cases cited by GNP, as well as all other cases involving the reactivation or rail service on a railbanked corridor, have one very significant feature: the entity seeking to reactivate service either possessed the reactivation rights or had the acquiescence of the party with the reactivation rights. The GNP Petition is fatally flawed because of GNP’s failure to first obtain King County’s permission to reactivate service on the Lines.

In *Iowa Power – Const. Exempt. – Council Bluffs, IA*, 8 I.C.C.2d 858, 866 (1990) (“*Iowa Power*”), the ICC held that the abandoning railroad, which possessed the reactivation rights, was

³ In *Rail Abandonments*, the United States Department of Transportation and the Association of American Railroads argued that, under the Trails Act, only the abandoning railroad is entitled to reactivate rail service. 2 I.C.C.2d at 593.

“the real party in interest” to reactivate rail service on a railbanked corridor.⁴ Consequently, the ICC specifically conditioned its modification of the extant NITU on the filing of a letter of concurrence from the abandoning carrier with the reactivation rights. In *N&W – Aban. St. Marys & Minister In Auglaize County, OH*, 9 I.C.C.2d 1015 (1993) (“*N&W*”), the ICC vacated a certificate of interim trail use or abandonment (“CITU”) at the request of a third party. That third party, however, had acquired the reactivation rights from the abandoning railroad with the prior approval of the ICC. Most importantly, the abandoning railroad had agreed to the transfer of the reactivation rights and the termination of the CITU. In STB Docket No. AB-3 (Sub-No. 98X), *Missouri Pacific Company – Abandonment Exemption – In St. Louis County, MO (Carondelet Branch)* (not printed), served April 25, 1997 (“*MP*”), the abandoning railroad with the reactivation right sought to partially vacate the NITU in order to reactive rail service on a segment of the railbanked corridor. In *Georgia Great Southern – Abandon. & Discon. Of Service – GA*, 6 S.T.B. 902 (2003) (“*Great Southern*”), the Board granted a petition to vacate a NITU that was sought by the successor in interest to the abandoning rail carrier and the holder of the reactivation rights in order to reactivate service on the railbanked corridor. In STB Finance Docket No. 35143, *R.J. Corman Railroad Company/Pennsylvania Lines Inc. – Acquisition and Operation Exemption – Line of Norfolk Southern Railway Company* (not printed), served June 5, 2008 (“*R.J. Corman*”), the Board authorized the transfer of the reactivation rights to the party seeking to reactivate service on a railbanked line. The holder of those rights, however, agreed to the transfer. In STB Docket No. AB-3 (Sub-No. 104X), *Missouri Pacific Railroad Company – Abandonment Exemption – In Muskogee, McIntosh and Haskell Counties, OK* (not printed),

⁴ The ICC’s rationale was that, in entering into a Trails Act arrangement, the abandoning “railroad forgoes the ability to dispose of the property in any other way ... [and] risks the possibility that it will not be allowed later to abandon the line. Id at 866.

served May 11, 2009, the Board partially vacated the NITU at the request of one of the trail sponsors after the abandoning rail carrier voluntarily transferred its reactivation rights to the trail sponsor.

In every proceeding involving the reactivation of a railbanked corridor, the party seeking to reactivate service was either the abandoning railroad with the reactivation rights, a third party that had acquired the reactivation rights from the abandoning railroad with the acquiescence of the abandoning railroad, or a third party that had the permission or approval of the abandoning railroad. Moreover, GNP's reliance on *Birt v. STB*, 90 F.3d 580 (D.C. Cir. 1996) ("*Birt*") is misplaced. The Court in *Birt* specifically referred to the abandoning carrier as the entity entitled to reactivate rail service on a railbanked corridor and not some third party that did not have the approval of the abandoning carrier. GNP has not, and cannot, cite to a single case where the ICC or the Board forced the transfer of the reactivation rights over the objection of the party holding those rights.

Another distinguishing feature between prior reactivations and the one sought by GNP in these proceedings is the interests of the trail sponsor, here King County, and the owner of the corridor, here the Port. In *Iowa Power*, the trail sponsor and owner of the corridor reached an agreement with the third party seeking to reactivate rail service and joined in the request to modify the extant NITU. In *N&W*, it was the trail sponsor and owner of the corridor that sought to vacate the CITU so that rail service could be reinstated by a third party. In *R.J. Corman*, the trail sponsor was in negotiations with the party seeking to reactivate rail service over compensation for investment made in the trail. In *MP* and *Great Southern*, the abandoning rail carrier and the successor to the abandoning rail carrier, respectively, were the parties seeking to reactive rail service.

To date, the ICC and the Board have consistently held that a third party may not reactivate rail service on a railbanked corridor without the permission of the party holding the reactivation rights. The ICC and the Board have also consistently accommodated the interests of all parties involved in a reactivation of rail service under the Trails Act and BNSF respectfully urges the Board to continue to do so.

The Trails Act mandates that the Chairman of the Board, along with the Secretary of Transportation and the Secretary of the Interior, "encourage State[s], local agencies and private interests to establish appropriate trails [under the Trails Act]." 16 U.S.C. § 1247(d). Under the Trails Act, trails may be established "pursuant to donation, transfer, lease, sale, or otherwise...." *Id.* Permitting third parties to reactivate rail service over a railbanked corridor over the objections of the party holding the reactivation rights, the trail sponsor and the owner of the corridor would likely undermine the rails-to-trails program. As the ICC noted in *N&W*, why would the abandoning railroad donate a right-of-way to the trail sponsor if a third party can expropriate that property over the objection of abandoning railroad. Conversely, why would a trail sponsor pay to acquire the right-of-way and spend money erecting a trail if a third party can expropriate that property without any assurances that the trail sponsor will be appropriately compensated.

The rails-to-trails program under the Trails Act has been very successful due in large part to the ICC's and Board's consistent current policy of not permitting a third party to expropriate the railbanked corridor without the permission of the party holding the reactivation rights. Under current policy, the parties to the railbanking agreement can adequately protect their respective interests. The abandoning railroad can protect its rights to reactivate the corridor in the future by retaining the reactivation rights. The trail sponsor can protect its interest in the

corridor through (i) the trail use agreement by, for example, providing that the abandoning railroad must pay the trail sponsor the fair market value of the corridor if the abandoning railroad reactivates the corridor or, if permitted by the Board, (ii) acquiring the reactivation rights. If the Board were to change that policy and permit third parties unilaterally to reactivate railbanked corridors, the parties to a railbanking agreement would no longer be able to protect their respective interests and the rails-to-trails program under the Trails Act would likely be significantly diminished if not come to an end.

In any event, any new policy concerning reactivation of railbanked corridors should not be applied retroactively. There is a longstanding hostility toward retroactive laws in our judicial system because of the uncertainties and economic dislocations that such laws often produce. Our Nation's commerce is dependent on individuals entering into transactions knowing what the law permits and what it proscribes. Except in unique circumstances, aspects of a transaction which are beneficial one day should not be rendered worthless the next simply through a change in law or agency policy. It is essential to the continued flow of commerce and the promotion of business transactions that laws which have adverse retroactive effects be tightly circumscribed. Avoiding retroactive effects is particularly imperative in situations such as exist here where numerous parties relied on consistent ICC and Board policy for many years in entering into railbanking agreements. *See Retail, Wholesale, and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1973); *Mason General Hospital v. Secretary of HHS*, 809 F.2d 1220 (6th Cir. 1987). Should the Board decide to change its policy, it should do so prospectively and have it applied to any NITUs and CITUs issued after the date the new policy is adopted. In so doing, the Board will protect the respective interests of the parties that have previously entered into railbanking arrangements.

GNP necessarily acknowledges that only the party with the reactivation rights may reinstitute rail service pursuant to the Trails Act since it is seeking those rights in this proceeding. GNP is seeking the transfer of the reactivation rights through the exemption provisions of Section 10502. To the extent GNP is seeking the transfer of those rights without the acquiescence of King County, the Board cannot grant GNP the relief it seeks.⁵ The Board cannot utilize its exemption powers to compel an entity to take a particular action against its will. ICC Finance Docket No. 31303, *Wisconsin Department Of Transportation – Abandonment Exemption* (not printed), served December 5, 1988. The Board's power under Section 10502 "is limited to the power to deregulate; to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry." *Brae Corp. v. United States*, 740 F.2d 1023, 1055 (D.C. Cir. 1984). Consequently, the Board can exempt from regulation the transfer of the reactivation rights to GNP only if King County agrees to such a transfer. The Board cannot through the exemption process force King County to transfer the reactivation rights against its will. Thus, at a minimum, GNP has invoked the wrong process for the forced transfer of the reactivation rights.

⁵ While the tracks on the Lines are still in place, they are owned by the Port. The Port cannot be forced to allow GNP to utilize those tracks. The Trails Act deals with rail corridors approved for abandonment, the Act does not deal with personal property rights.

CONCLUSION

BNSF respectfully urges the Board to deny the GNP Petition on grounds that GNP must first obtain the permission of King County before it can reinstitute rail service under the Trails Act. Alternatively, the Board should deny the GNP Petition because it has inappropriately invoked the Board's exemption procedures which do not permit the Board to force King County into transferring the reactivation rights to GNP.

Respectfully submitted,



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Dated: November 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2010, I have caused a copy of the forgoing Comments to be served on all parties of record in these proceedings by first class mail.

A handwritten signature in black ink that reads "Karl Morell". The signature is written in a cursive style with a large initial "K".

Karl Morell