UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

ORAL ARGUMENT

IN THE MATTER OF:

GNP RAILWAY

v.

Docket No.

FD 35407

KING COUNTY


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

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

BEFORE:

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

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

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

King County Washington, the trail sponsor in the City of Redmond, Washington, opposed the request saying that GNP does not own the right-of-way or have any other contractual rights to it, and so is not in a position to resume rail service.
In an effort to move things along, counsel, were you here for the earlier instructions in the prior case? If so, I'll skip that.

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

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

MR. HEFFNER: Thank you. Chairman Elliott and members of the Board, my name is John Heffner, and I appear on behalf of GNP. And, as you have indicated, I will speak for 15 minutes. My colleague, Jim Savage, will
handle the rebuttal for five, and we have two representatives of GNP here today. On my left is Tom Payne, who's the Chairman, and right behind me over to the left we have Tom Jones.

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

Now, just as a point of clarification, the rail line in question actually looks kind of like an upside down wishbone. There is a segment that begins on the very north, that's Snohomish, and it proceeds south for about, I would say 15
miles, to a place called, "Woodinville."

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

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

Then there's the Redmond's segment that proceeds from Woodinville in kind of a southeasterly direction for seven miles to the City of Redmond. So, that's just for clarification. So, what we're talking about then is this little piece that's almost like the the heel of your shoe, and then can affect the sole of the shoe heading over to Redmond.
Now, both King County and Redmond acknowledge that the lines are eligible for reactivation as common carrier railroads, but in their terms, this is not the time or the circumstances. And, King County even goes so far as to say that it would fulfill its obligations as a rail trail sponsor and even allow the reactivation of rail service in the event a reasonable proposal is advanced to restore rail service. That's right in the January 7 reply at page two, but King County does not specify a standard and does not even have any experience for judging rail service proposals.

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

As the Board ruled in an earlier proceeding involving the King County acquisition of the BNSF common carrier...
obligation and restart rights, -- it was the acquisition of BNSF's common carrier obligation -- and forcefully reiterated more recently in the City of Maplewood case, the right to reactivate a railbanked line is not an exclusive right and would not preclude any other service provider from seeking Board authorization to restore rail service over a railbanked line if the county chose not to do so.

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

COMMISSIONER MULVEY: Well, did we get it wrong back in 2009 when we transferred
the, the rights to the trail sponsor? Was
that a mistake or should we have kept the
rights with the abandoning railroad as it's
normally done?

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

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

COMMISSIONER MULVEY: But as the,
the question of bonafide, what represents it?
Who constitutes a bonafide applicant? Under
what statutory provision would the Board have
the power to force the owner of a railbanked
rail line in this case, King County, to let
another party with no property rights on the
line to use its properties since we assigned
the property to King County?

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

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

But, I would point out to you that
the rights and obligations that were conveyed
to King County, and the obligation to honor a
restart request go together. And, in fact, if you look at the various agreements between the parties, and you look at the King County decision, that is that roughly 2009 decision, you'll see that the Board understood that these rights and obligations go together as a package.

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

The agreement between the Port and the GNP would on the surface limit GNP's activities over what I'll call the "Railbanked
segments," to excursion service, not to common carrier freight service. But there's nothing in the agreement that would preclude GNP from reactivating that as an active rail line. And, in fact, there was a conversation between Tom Payne and the lady who is the general counsel for the Port where they had this very conversation.

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

Now, there are two points --

CHAIRMAN ELLIOTT: Mr. Heffner, let me ask you a question. I was reading through the filing by King County, and I noticed on page 19 of their confidential version, I don't think I'm speaking about anything that's confidential, that there is a limitation on
GNP to operate freight service. I mean, at this point, if there is a limitation for GNP to operate freight service on the lines at issue, aren't we done?

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

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

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

COMMISSIONER MULVEY: So you wouldn't think it would be a breech of the contract if you were to try and introduce freight rail service?
MR. HEFFNER: Again, in the context of a reactivation, Commissioner Mulvey.

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

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

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

And, if they are, they really make a potential mockery of what the whole rail trail program is about, because it would always be possible for the trail user, or perhaps even the trail owner to put a stop to the reactivation of rail service unless the
carrier desiring to reactivate had gotten that right from the abandoning carrier or had negotiated a contractual right with the rail line, the right-of-way owner, or perhaps the rail trial party.

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

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

CHAIRMAN ELLIOTT: Well, let me ask you about that, since you say whether or not there's a GNP at all. Our understanding through looking through some court documents
is that GNP presently is in involuntary
bankruptcy proceeding. Is that correct?

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

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

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

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

    MR. HEFFNER: Well, he's still a
shareholder, but he's no longer an officer.

CHAIRMAN ELLIOTT: What's his percentage?

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

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

MR. HEFFNER: I don't know that he's a necessary party of this proceeding.

He's been terminated in his role as an officer, but --

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

MR. HEFFNER: I believe it can, and the reason is, while it is my understanding that 4,000 shares of stock have been issued, there are 10,000 that are authorized to be issued, and there is, and Mr. Jones does wish to purchase stock in the company. But I must tell you of the three petitioning bankruptcy creditors, one of them is only entitled to
compensation when the company gets its full
financing, so their claim is really a
contingent claim.

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

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

MR. HEFFNER: I'm sure there are.
I cannot because I do not handle their
corporate work. You can understand that I
cannot address that, but if it's something
that you wish us to address in a supplemental
filing, we'd be happy to do that.
COMMISSIONER MULVEY: You've identified some shippers on the line and that there are would-be shippers. Are these shippers definitely going to ship or have they just speculated that they might ship if indeed service was restored?

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

In addition, I want to emphasize in terms of what I'll call, "The book of business." Most shortlines do not start out with a full book of business on day one. And, we're no different. And, in fact, the level of freight on the freight easement has doubled over the past year and my client advises it's likely to double again over the next year.
Now, I just want to hit a couple
of things remaining. Suppose that a shipper
were to call up King County and say, "We've
got ten carloads of freight coming from
Idaho," what would happen? I realize that I'm
out of time, and if you wish, I can, either
Mr. Savage or I can address some of these
other questions --

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

MR. HEFFNER: Yes, sir.

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

What is the rationale? What do
you understand it to be, and I'll ask this
question also of the other parties, the rationale for not wanting to restore rail service at this point?

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

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

So that -- I'm getting a little bit beyond my knowledge level, but that's what I think really drove them to get rid of some
segments as quickly as possible, as kind of a hot potato.

COMMISSIONER MULVEY: Thank you.

MR. HEFFNER: Thank you.

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

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

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

The Board's question, as Commissioner Mulvey indicated previously was, under what circumstances should the Board permit a carrier to permit the vacation of an
NITU, that is a Notice of Interim Trail Use, when the petitioning carrier does not own or have any other interests in the right-of-way? And, King County's answer to that question unequivocally is under no circumstances.

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

MR. SPITULNIK: Yes.

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

MR. SPITULNIK: It's rather difficult to imagine a clearer statement of the limitation on GNP's inability to operate
freight service on that line in the provision
that they agreed to in that agreement.

CHAIRMAN ELLIOTT: Thank you.

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

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

GNP has no property rights. If
they wish to try to force their way onto the
line, to try to force acquisition of their
property rights, that's a matter for State
Court, not for this Board.
As you all indicated previously, there's no provision of the statute that permits the Board in this context to award property rights to a carrier that doesn't already have them. This is not an OFA. This is not an Amtrak case. This is not a proceeding where the Board has the ability to transfer property rights.

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

In this proceeding, and in this transaction, the way the Board approved the creation of the trail in this case, King County has two roles. One is that we are in fact the trail user. We have obligations as the trail user that we've agreed to and our statement of willingness to assume financial responsibility.
And, in all of the documents that we have filed and in all of the agreements that we have reached, we have been very clear that we have the obligations of trail user to be responsible for the line to preserve it for reactivation of freight service. That if freight service is reactivated, then we have to get out of the way. Our trail has to get out of the way.

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

COMMISSIONER MULVEY: At what point do you or City of Redmond or the Port of Seattle or whoever has the property rights now has a responsibility to reactivate service if there's sufficient demand by shippers? And, who would decide what level of demand would be
sufficient that would activate the common
carrier obligation to restore service?

MR. SPITULNIK: Well, the Board --

I was about to get to that. Thank you very

much, Commissioner Mulvey. Because the second

part of what happened when this trail was

created was that King County acquired the

reactivation right, but the Board was very

clear in the decision where it said that King

County was acquiring that there's a second way

that somebody can come in.

King County, as the holder of what

would have been BNSF's reactivation right

could if it wished to restart service on this

line just the same as any abandoning railroad

would be able to, but the Board was very clear

that in the event that a bonafide petitioner

comes along, those are the Board's words, in

the event a bonafide petitioner comes along

and seeks authorization to operate rail

service and gets authorization to operate rail

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

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

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

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

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

MR. SPITULNIK: We have no property
rights.

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

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

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

And, if you don't have the property rights, then we'll ask you to just what you, the Board, will wait, we'll ask the parties to come back when they do have those property rights so that they can then go forward. And, Iowa Power makes it pretty clear that a party that seeks to reactivate a
rail service, if it's somebody other than the 
abandoning carrier, should have the regulatory 
authority that they need, should be able to 
restart service, and in the Iowa Power case 
was also an indication that they should get 
consent of the abandoning carrier.

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

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

And, he makes much of the 
testimony in Ms. Bissonette's deposition about 
that we don't do rail. Well, remember the
timing of this transaction. Remember how this transaction played out.

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

And, at that time, the only rail carrier that was in the picture that might have some interest in operating anywhere close to these line that were abandoned, that were abandoned and subject to trail use, had signed an agreement that would permit it to operate only on the northern section on what Mr. Heffner referred to as, "The freight segment."

And, indeed, that carrier had specifically agreed that it would not try to do anything further to the south.

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

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

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

CHAIRMAN ELLIOTT: Mr. Spitulnik,
could you move your mic up a little bit? I
think people are having some -- thanks.

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

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

And, if this were to be subject for a full application then the GNP would be required to make the full showing that the public convenience and necessity mandates the
re-institution of rail service over this line.

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

CHAIRMAN ELLIOTT: Thank you, counsel.

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

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

Redmond owns the southerly four miles of the Redmond's Spur. The city purchased that segment from the Port of
Seattle for $10 million cash about a year ago.

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

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

GNP addressed this requirement in its petitions to the Board. It says it's been talking with King County representatives,
however, the parties have not yet reached an agreement. That statement was true last summer when GNP filed its petitions. It's true today.

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

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

There's another huge legal problem with GNP's petition here in our view. And, that is if you granted their petitions, you
would really eviscerate the Board's OFA authority.

And, the fact, the way in which this transaction unfolded is more powerful in showing that than any arguments I could make.

In September of 2008, the BNSF filed a Notice of Exemption to abandon service on the Woodinville subdivision and the Redmond Spur.

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

They weren't seeking the ability to provide freight service. They were seeking the ability to provide excursion service. But one can presume that they were well aware of the abandonment application. In fact, the record is replete with statements by them that indicate they knew what was, they knew what BNSF was proposing to do, and yet they did not
file any expression of interest to do an OFA,
neither did anyone else.

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

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

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

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

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

But, it's not a state law issue where a carrier files a facially incomplete application. The showing that they have that
right to access the right-of-way is one of your 10902 requirements.

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

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

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

    GNP negotiated that contract with an eye to their business plan for this right-of-way. They knew very well when they entered
into it what it said and they accepted that provision. If you're planning to run freight, you're not going to sign a contract that says you can't.

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

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

And, for various reasons that are outside the scope of this proceeding, the Port
went along with that. And, the final agreement forbids GNP from running freight on the Redmond Spur.

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

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

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

MR. COHEN: Well, the short-term plans are a trail and a storm water trunk line
to be installed this summer unless the Board
enjoins them from doing so.

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

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

In the long-term, that same mile
of the Redmond Spur running through downtown
Redmond is the last mile of the East Link
light rail system that Sound Transit is trying
to build out to Redmond from downtown Seattle.
COMMISSIONER MULVEY: There's some issue about whether or not the construction season will pass if the Board delays this. We're familiar with construction seasons and I'm familiar with the Seattle area. It's raining most of the time. Is the construction season really going to end in October or can the work actually be done even later because you don't get a lot of, in this area, a lot of snow and very cold weather?

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

COMMISSIONER MULVEY: Okay. Thank you.

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

COMMISSIONER MULVEY: Okay. Thank you.
MR. COHEN: Thank you very much.

CHAIRMAN ELLIOTT: Thank you, Mr. Cohen.

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

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

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

MR. SAVAGE: Yes and yes.
CHAIRMAN ELLIOTT: Can you explain exactly where we are? Has GNP done everything they need to as a corporation to go ahead with this transaction that they're proposing?

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

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

Once that is finalized, and it shall be finalized by May 25, which is the date set down by the bankruptcy court for the finalization of GNP funding. GNP will meet with the creditors and will work out a plan.
for paying them presumably 100 cents on the dollar, which will result in the dismissal of the bankruptcy proceeding.

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

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

And, under the very specific railroad bankruptcy provisions, there is no possibility of Mr. Engle benefitting as a current shareholder of GNP by the implosion of GNP.
CHAIRMAN ELLIOTT: So, at the present time, Mr. Engle is not onboard. Is that what you're saying?

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

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

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

COMMISSIONER MULVEY: Maybe this is a money issue. If the Board were to prevent GNP from reactivating rail service on this line, how would GNP compensate the owner of
the property for its use? How would you compensate the Port of Seattle or the City of Redmond?

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

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

MR. SAVAGE: No. GNP has a compensation arrangement in place with the Port for the freight easement. The Port is the owner of the first 3.4 miles of the Redmond Spur. Should we be granted operating
authority, which this Board can grant under 10502, the Prairie Central decision, even in the absence of our showing of a present ability to consummate the transaction.

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

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

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

VICE CHAIRMAN BEGEMAN: Just remind
the Board what the terms are with respect to
the contract not to provide freight service
when you entered into it, how long that
contract goes for.

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

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

MR. SAVAGE: December 2009. And --

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

MR. SAVAGE: 2010. And, under the

VICE CHAIRMAN BEGEMAN: So, eight
months later.

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

VICE CHAIRMAN BEGEMAN: It's
actually, if you're not going -- true, but my
question is if the company at the time, the
carrier envisioned in December 2009 that it wasn't providing freight service for ten years.

MR. SAVAGE: It was --

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

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

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

MR. SAVAGE: The public multipurpose easement is in the record and it does require the county to cooperate with the party seeking to reactivate freight service,
which happens, in this case, to be GNP.

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

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

COMMISSIONER MULVEY: So all those occurred or developed after you had already signed that --
MR. SAVAGE: That's correct, Commissioner.

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

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

COMMISSIONER MULVEY: To a large degree, the idea of the rails-to-trails program was to preserve the rights-of-way for the reactivation of rail service. And, I think the focus really was on freight,
although, we have approved it to be used for passenger services as well.

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

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

COMMISSIONER MULVEY: But we could condition the authority on carrying freight, i.e. freight service must be provided, not just passenger service.
MR. SAVAGE: Passengers are actually, are something that the community does not oppose in principal. After all, they are doing the study of their own with regard to providing trolley service up the line from Redmond towards our Woodinville --

COMMISSIONER MULVEY: Sound service.

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

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

So, all of these proposed uses are compatible. We don't think that it's the excursion business that detracts or causes
Redmond to have these concerns about our operation because they know that the wineries on the Spur are tourist destinations. There have been attempts to operate tourist trains on the line before.

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

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

MR. SAVAGE: We had contacted the STB with a suggestion that the parties conduct or have a meeting, I guess, mediated to some extent, I don't know whether formally or
informally, by the Board's Office of Public Assistance. The Board had approved that and I believe the other parties had not opposed it.

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

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

VICE CHAIRMAN BEGEMAN: Prior to your filing last year with the Board, had there been any efforts to have conversations with King County or the Port or Redmond? I think you said actually you didn't know Redmond was participating, but -- or did you just sort of surprise everyone -- I mean, to discuss the issue of the property rights,
which is a pretty big deal?

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

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

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

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

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

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

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

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

CHAIRMAN ELLIOTT: Thank you very
much, counsel. Thank you all counsel for your thoughtful arguments. We'll take the matter under advisement. And, the meeting of the Board is now adjourned. Thank you.

(Whereupon, the above-entitled matter concluded at 11:16 a.m.)
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In the matter of: GNP Railway v King County

Before: STB

Date: 05-12-11

Place: Washington, DC

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