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February 13, 2020

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
February 13, 2020
Part of
Public Record

Re: **Docket No. AB-55 (Sub-No. 794X), CSX Transportation, Inc.—Abandonment
Exemption—in Pinellas County, FL**

Dear Ms. Brown:

Attached for efilng is CSX Transportation, Inc.'s Response to the Appeal filed by the
City of St. Petersburg, FL.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,

/s/ *Louis E. Gitomer*

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-55 (Sub-No. 794X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–
IN PINELLAS COUNTY, FL

CSXT REPLY TO THE CITY OF ST. PETERSBURG’S APPEAL

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Dated: February 13, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-55 (Sub-No. 794X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
PINELLAS COUNTY, FL

CSXT REPLY TO THE CITY OF ST. PETERSBURG’S APPEAL

CSX Transportation, Inc. (“CSXT”) opposes the relief requested in the Appellant Brief of the City Of St. Petersburg, Florida, Seeking Board Review of the January 13, 2020 Decision of the Director of the Surface Transportation Board’s Office of Proceedings (the “Appeal”) filed by the City of St. Petersburg (the “City”) on February 3, 2020.

BACKGROUND

On August 20, 2019, CSXT filed a verified Notice of Exemption (the “Notice”) under 49 C.F.R. Part 1152, Subpart F—Exempt Abandonments for CSXT to abandon an approximately 0.86-mile rail line on its Clearwater Subdivision, between milepost ARE 897.57 and milepost ARE 898.43, in St. Petersburg, Pinellas County, Fla. (the “Line”). At the time of filing the Notice, there had been no traffic over the Line for at least two years. A Notice of the exemption was served and published in the Federal Register on September 9, 2019 (84 Fed. Reg. 47,339), and the exemption became effective on October 9, 2019 (the “Abandonment Decision”). The Surface Transportation Board (the “Board”) granted the City a public use condition temporarily keeping the right-of-way and trail-related structures intact to permit the City (or any other interested party) to negotiate with CSXT to acquire the right-of-way for public use upon abandonment. See *CSX Transp., Inc.—Aban. Exemption—in Pinellas Cty., Fla.*, AB 55 (Sub-

No. 794X), slip op. at 2-3 (STB served Oct. 8, 2019). The public use condition will expire on April 6, 2020.

Prior to CSXT filing the Notice, on July 23, 2019, the City petitioned the Board for waiver and exemption of certain requirements of the regulations and statute, respectively, in order to file an adverse abandonment of the Line (the “Petition”) in Docket No. AB 1289, City of St. Petersburg, Fla.—Adverse Abandonment—CSX Transportation Inc. in Pinellas County, Fla. The Board dismissed the Petition as moot after the CSXT was authorized to abandon the Line. *City of St. Petersburg, Fla.—Adverse Abandonment—CSX Transportation Inc. in Pinellas County, Fla.*, Docket No. AB 1289 (served January 3, 2020) (the “*Director’s Decision*”).

The Georgetown High Line Railway Company, LLC (GHL”), a wholly owned subsidiary of CSXT, filed a request for the issuance of a Notice of Interim Trail Use or Abandonment (a “NITU”) on August 29, 2019. On August 29, 2019, as supplemented on September 4, 2019, the City requested a public use condition and a NITU. CSXT notified the Board on September 3, 2019 that it was willing to negotiate trail use with GHL but not with the City. On September 9, 2019, the City, supported by the National Association of Reversionary Property Owners (“NARPO”), responded arguing that GHL is not a qualified trail sponsor, as it is a CSXT subsidiary, and does not intend to actually negotiate for interim trail use. CSXT replied on September 30, 2019, and GHL responded on October 18, 2019, pursuant to a Board order on October 8, 2019, that although GHL is a wholly owned subsidiary of CSXT, it is not a rail carrier and it does not own or operate any railroad. GHL further stated that it views the line “as valuable property for trail use, and is ready, willing, and able to negotiate trail use with CSXT.” (Id. at 3-4).

The Director of the Office of Proceedings, under authority delegated by the Board under 49 C.F.R. 1011.7(a)(2)(iv), reviewed the requests for a NITU from GHL and the City.

With respect to GHL, the Director granted a NITU based on the following analysis:

Because GHL has complied with the requirements of 49 C.F.R. § 1152.29, and because CSXT is willing to negotiate for trail use with GHL, GHL's request for a NITU will be granted. The Board's role under the Trails Act is limited. See *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990). Indeed, the Board "has no specific fitness or qualification for trail sponsors; it requires only [a] Statement of Willingness from the trail sponsor to assume liability and to pay taxes, and the acquiescence of the railroad in rail banking." *Nat'l Trails System Act & R.R. Rights-of-Way*, EP 702, slip op. at 7 (STB served Apr. 30, 2012); see also 49 C.F.R. § 1152.29(a), (d)(1). GHL has submitted the requisite Statement of Willingness and CSXT has confirmed its willingness to negotiate for trail use with GHL. Nothing more is required. Further, in response to concerns that GHL does not intend to negotiate trail use, GHL has clarified that it is "ready, willing, and able" to negotiate trail use.

CSX Transportation, Inc.-Abandonment Exemption-in Pinellas County, Fla., Docket No.

AB 55 (Sub-No. 794X), slip op. at 2, served January 13, 2020 (the "*Director's Decision*").

With respect to the City, the Director refused to grant a NITU based on the following analysis:

The City's request for a NITU, however, will be denied. The interim trail use program is voluntary and consensual between the railroad and the trail sponsor. See *Rail Abans.—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 598 (1986). Although the City's request also complies with § 1152.29, CSXT does not agree to negotiate with the City. See 49 C.F.R. § 1152.29(d)(1) ("If . . . a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a [NITU]"); see also *Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694, 699-702 (D.C. Cir. 1988).

Director's Decision, at 2.

However, the Director did acknowledge the prior grant of the City's request for a 180-day period to negotiate public use, indicated that the condition would remain in

effect until April 6, 2020, and stated that “CSXT must keep the remaining right-of-way intact for the remainder of the public use condition period to permit public use negotiations.” *Id.* at 3. CSXT is complying with that requirement.

The City petitioned for an extension of time to file an appeal on January 17, 2020, which was granted by the Board. *CSX Transportation, Inc.-Abandonment Exemption-in Pinellas County, Fla.*, Docket No. AB 55 (Sub-No. 794X), served January 27, 2020.

The City filed the Appeal on February 3, 2020.

RESPONSE TO THE APPEAL

The City claims that three arguments merit reconsideration: (1) GHF is not a “qualified rail sponsor;”¹ (2) the *Director’s Decision* “is contrary to law and policy” and (3) “CSXT’s use of subsidiaries as trail sponsor is without governing precedent.” Appeal at 7. Instead of supporting these arguments, the City shifts gears and raises the issues of: (a) General Regulatory Authority (*Id.* at 8); (b) Georgetown/CSXT Request is Not as it Seems on its Face (*Id.* at 8-10); (c) There are Specific Errors in the Decision (*Id.* at 10-13); (d) Public Policy Favors Rulemaking (*Id.* at 13-16); and (e) The Goals of the City Align with the Trail Act (*Id.* at 16-18).

CSXT will respond to three unjustified reasons for reopening the *Director’s Decision* and then address the five enumerated invalid arguments. With respect to all of the arguments presented by the City, none of them demonstrate that the *Director’s Decision* would be affected materially because of new evidence, changed circumstances, or material error. See 49 C.F.R. 1152.25(e)(2)(ii). The City is merely restating arguments previously made and justifiably rejected.

¹ The language in the statute and regulations is “qualified private organization.” CSXT will use that designation.

I. CSXT's response to the three unjustified reasons for reopening. None of the reasons posited by the City demonstrate that the *Director's Decision* should be reversed.

(1) GHL is a qualified private organization. On August 29, 2020, as part of GHL's request for a NITU, GHL submitted the information required by the Board's rules: (a) a map, as required by 49 C.F.R. § 1152.29(a)(1); (b) a Statement of Willingness to Assume Financial Responsibility, as required by 49 C.F.R. § 1152.29(a)(2); and (c) an acknowledgement that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in 49 C.F.R. § 1152.29(a)(2) and subject to possible future reconstruction and reactivation of the right-of-way for rail service, as required by 49 C.F.R. § 1152.29(a)(3).

In adopting the rules governing trail use it was stated: "... we will require interested persons to include in their comments only an *indication* of their willingness to assume the financial responsibilities in section 1247(d). We will not require either an affidavit of user responsibility, or proof of such responsibility. Rather, these matters will be the subject of negotiations between the parties." *Rail Abandonments-Use of Right-of-Ways as Trails*, 2 I.C.C. 2d 591, 605 (1986). Indeed, the Board has interpreted a "qualified private organization" in section 1247(d) to mean any organization willing to assume management and financial responsibility for the line in question. *See Idaho N. & Pac. R.R. Co.-Abandonment and Discontinuance Exemption-in Washington & Adams Counties, ID*, Docket No. AB-433 (Sub-No. 2X) (served April 1, 1998) and *Jost v. Surface Transp. Bd.*, 194 F.3d 79 (D.C. Cir. 1999).

The City has presented no argument or facts to show that GHL "does not have the ability to continue to meet the financial and liability conditions of the statute." *Id.* Indeed, as a subsidiary of CSXT, GHL should have no problem meeting the ongoing financial and liability conditions.

(2) The *Director's Decision* is not contrary to law and policy. The *Director's Decision* is consistent with the requirements of 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. GHL submitted the information required by 49 C.F.R. § 1152.29. In those instances, “We lack any discretion to decide whether rail banking and the use of the right-of-way as a trail is desirable for a particular line; Congress has made that determination In administering the statute, we need only be assured the the Trails Act has been properly invoked and that its requirements will be met.” *Rail Abandonments-Supplemental Trails Act Procedures*, 4 I.C.C. 2d 152 (1987); *Iowa Southern R. Co.-Exemption-Abandonment*, 5 I.C.C.2d 496, 502-503 (1989); and *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990).

(3) There is precedent for CSXT’s use of a subsidiary as trail sponsor. To the contrary, the City has even stated that GHL has sought a NITU in the past, that the Board has granted the NITU, and that the line has been converted to trail use by a third party, where GHL was the placeholder. See Appeal at 5.

GHL has requested that a NITU be granted previously in CSXT abandonment proceedings and the Board has granted the NITU.² Being a subsidiary of CSXT did not prevent the conversion of a railroad line into a trail.

The three reasons for reopening the *Director's Decision* do not demonstrate new evidence, changed circumstances, or material error.

II. The five enumerated reasons put forward by the City do not demonstrate new evidence, changed circumstances, or material error in the *Director's Decision*.

² See, e.g., *CSX Transportation, Inc.-Abandonment Exemption-in Worcester County, MA*, Docket No. AB-55 (Sub-No. 691X) (served December 23, 2010), where GHL was granted a NITU, which was eventually transferred to the Cities of Leominster and Fitchburg (decision served August 3, 2017), who acquired the railroad line for a trail. As is the case here, GHL was a successful placeholder for converting a railroad line into a trail that could be reactivated at a later date as a railroad line.

(a) General Regulatory Authority. The City relies on 49 C.F.R. 1152.50(c)(1) for the proposition that the Board must consider the rail transportation policy in determining whether to accept a request for a NITU. The City is incorrectly asking the Board to apply the criteria used by the Board to determine whether to exempt railroad lines that had not been used for two or more years to requests for a NITU.

In *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, 891-892 (1983) (the “*Abandonment Exemption*”), the Interstate Commerce Commission (the “ICC”) determined that exemption of the abandonment of railroad lines from 49 U.S.C. 10903 “is not necessary to carry out the goals of the rail transportation policy.” The *Abandonment Exemption* did not mention trails use and did not contain rules governing trails. Indeed, the ICC was in the very initial stages of preparing rules under the National Trails System Act Amendments of 1983 and did not serve its notice of proposed rulemaking in *Rail Abandonments-Use of Rights-of-Way as Trails* (49 CFR Parts 1105 and 1152, Ex Parte No. 274 (Sub-No. 13), served February 20, 1985. The rules governing trail use were adopted in *Rail Abandonments-Use of Rights-of-Way as Trails*, 2 I.C.C.2d (1986) on April 16, 1986.

The rules at 49 C.F.R. 1152.50(c)(1) do not apply to requests for trail use.

(b) Georgetown/CSXT Request is Not as it Seems on its Face. The City appears to claim that CSXT and GHL are the same entity. CSXT admits that it controls GHL, but the two are separate entities. There is no evidence to the contrary. GHL sought the NITU, not CSXT.

The City next claims that the NITU prevents reversionary interests from being triggered. That is the specific purpose of the 16 U.S.C. 1247(d), to permit continuous trails to be created and preserve the corridor for future rail use. As argued in Section I.(1) of this reply, a “qualified private organization” in section 1247(d) to mean any organization willing to assume

management and financial responsibility for the line in question. *See Idaho N. & Pac. R.R. Co.-Abandonment and Discontinuance Exemption-in Washington & Adams Counties, ID*, Docket No. AB-433 (Sub-No. 2X) (served April 1, 1998) and *Jost v. Surface Transp. Bd.*, 194 F.3d 79 (D.C. Cir. 1999).

The City then argues that CSXT has created a new category of rail line in continual negotiation. The City cites *Limiting Extensions of Trail Use Negotiating Periods*, Docket No. EP 749 (Sub-No. 1) but then proceeds to claim that by negotiating with GHL, CSXT can keep the line in limbo for years. The City ignores the the results of Docket No. EP 749 (Sub-No. 1), which limits the time period for the negotiation of trail use in order to “foster administrative efficiency, clarity, and finality.” *Id.* at 6.

GHL has stated to the Board that it is ready willing and able to acquire the Line, but that it views its initial role as a placeholder for a competitor with the City for acquisition of the Line as a trail. The NITU request by GHL is exactly as it seems.

(c) There are Specific Errors in the Decision. First the City claims that the Board has created a rebuttable presumption of fitness. But the City fails to rebut the presumption, the Board has said “if it is shown that the trail sponsor does not have the ability to continue to meet the financial and liability conditions of the statute, the trail condition would be involuntarily revoked.” *Central Kansas Railway, Limited Liability Company-Abandonment Exemption-in Marion and McPherson Counties, KS*, STB Docket No. AB-406 (Sub-No. 6X), slip op. at 4-5 (served December 18, 1998). The City has not shown that GHL is unable to meet the financial and liability conditions of the statute and has provided no basis to revoke the NITU. Instead the City again argues that GHL is not a “qualified private organization.” Appeal at 11. As argued in Section I(1) of this Reply, the Board has interpreted a “qualified private organization” under

section 1247(d) to mean any organization willing to assume management and financial responsibility for the line in question. *See Idaho N. & Pac. R.R. Co.-Abandonment and Discontinuance Exemption-in Washington & Adams Counties, ID*, Docket No. AB-433 (Sub-No. 2X) (served April 1, 1998) and *Jost v. Surface Transp. Bd.*, 194 F.3d 79 (D.C. Cir. 1999). Based on Board precedent, GHL is a “qualified private organization.”

The City argues that GHL is not qualified because it has only stated that it is willing to negotiate with CSXT, instead of stating that it intends to acquire the Line. However, in the request for a NITU filed on August 29, 2019, GHL stated that “GHL is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of, and for payment of any and all taxes that may be levied or assessed against the right-of-way”. The City ignored the NITU request which specifically complies with the Board’s requirements under 49 C.F.R. 1152.29(a)(3). GHL’s compliance demonstrates that there are no errors in the *Director’s Decision*.

(d) Public Policy Favors Rulemaking. CSXT takes no position on whether the City should seek to open a new rulemaking before the Board. Nor does CSXT take a position on the scope of the rulemaking. However, CSXT does oppose the City’s repeated and unfounded allegations that allowing an affiliate of a railroad to seek to become a trail user should be prohibited. As previously noted, one of the principal goals of the Trails Act is to preserve contiguous rail corridors for future reactivation for rail use. By seeking to limit those parties eligible to become trail users, the City seeks to reduce the ability to preserve the limited number of contiguous rail corridors, contrary to the will of Congress.

The City claims that a taking claim brought against the United States where a railroad seeks to maximize the sale price of a trail results in taxpayers paying a takings claim. First, a

takings claim is only valid if the railroad does not own the real property in fee simple or an equivalent manner. Second, the takings claim, if valid, will be paid regardless of the identity of the trail user. However, whether or not a takings claim is filed, the issuance of a NITU is governed by the Board's requirements at 49 C.F.R. 1152.29, which has been complied with by GHL and CSXT.

(e) The Goals of the City Align with the Trail Act. The goals of the Trails Act are the interim development of a trail in order to preserve a contiguous corridor for reactivation for rail use. The City wants to acquire the Line for trail use and development at less than market value (Appeal at 17-18). Nowhere does the City mention that it is amenable to reactivating the Line for rail purposes.

There is no requirement that CSXT sell the Line for trail use. But, if CSXT does agree to negotiate trail use with a party, there is also no requirement that CSXT sell the property for less than fair market value. The city, on the other hand, wants to limit the field of potential trail users to itself in order to depress the value that CSXT can receive in negotiations. Such a position is not consistent with the Trails Act.

III. Conclusion.

The City has not demonstrated that there is new evidence, changed circumstances, or material error in order for the Board to overturn the *Director's Decision*. Therefore, CSXT respectfully requests that the Board deny the City's appeal.

Respectfully submitted,

/s/ *Louis E. Gitomer*

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Attorneys for: CSX TRANSPORTATION,
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Dated: February 13, 2020

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document on all parties of record in this proceeding, by email.

// *Louis E. Gitomer*

February 13, 2020