

SERVICE DATE – JUNE 22, 2020

SURFACE TRANSPORTATION BOARD

DECISION

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

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN PINELLAS
COUNTY, FLA.

Decided: June 19, 2020

Digest:¹ The Board denies an appeal of a decision of the Director of the Office of Proceedings issuing a notice of interim trail use or abandonment to CSX Transportation, Inc., and Georgetown and High Line Railway Company, LLC.

BACKGROUND

On August 20, 2019, CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 0.86-mile segment of rail line located between mileposts ARE 897.57 and ARE 898.43 in downtown St. Petersburg, Pinellas County, Fla. (the Line). 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.

On August 29, 2019, the City of St. Petersburg (the City) filed a request for issuance of a public use condition under 49 U.S.C. § 10905 and (as supplemented on September 4, 2019) a request for issuance of a notice of interim trail use or abandonment (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29.² The Georgetown and High Line Railway Company, LLC (GHL), also requested a NITU on August 29, 2019. In a

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In City of St. Petersburg, Fla.—Adverse Abandonment—CSX Transportation Inc. in Pinellas County, Fla., Docket No. AB 1289, the City initiated a proceeding on July 23, 2019, seeking a third-party, or “adverse,” abandonment of the Line and indicating that it was interested in creating a public park and extension of the existing Pinellas Trail on the Line’s right-of-way. Subsequently, CSXT filed its verified notice in this docket. By decision served January 3, 2020, in Docket No. AB 1289, the Board dismissed the adverse abandonment proceeding without prejudice, noting that CSXT had been authorized to abandon the Line in this docket. See City of St. Petersburg, AB 1289, slip op. at 1 (STB served Jan. 3, 2020).

response filed on September 3, 2019, CSXT notified the Board that it was willing to negotiate an agreement for interim trail use/rail banking with GHL but not with the City.

The City filed a response on September 9, 2019, claiming 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.³ (City Reply 3-4, 7, Sept. 9, 2019.) CSXT replied on September 30, 2019, acknowledging that GHL is a CSXT subsidiary and stating that GHL is a “placeholder” for a third-party trail sponsor who is not prepared to close on the purchase. (CSXT Reply 5, Sept. 30, 2019.) According to CSXT, “GHL will negotiate in the event that the third party backs out.” (Id.)

By decision served October 8, 2019, the Director of the Board’s Office of Proceedings (Director), among other things, imposed the public use condition requested by the City and directed GHL to respond to the City’s September 9, 2019 filing challenging GHL’s status as a potential trail sponsor.⁴ In its reply, filed October 18, 2019, GHL stated that, although it is a wholly owned subsidiary of CSXT, it is not a rail carrier and it does not own or operate any railroad. (GHL Reply 3, Oct. 18, 2019.) Noting that there is another potential trail sponsor that may seek a NITU in the future, GHL 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.)

By decision and notice of interim trail use or abandonment served January 13, 2020 (Director Order), the Director granted GHL’s request for a NITU because GHL had complied with the requirements of 49 C.F.R. § 1152.29 and because CSXT had expressed its willingness to negotiate for interim trail use/rail banking with GHL. The Director noted that the Board’s role under the Trails Act is limited, that the Board has no specific fitness or qualification test for trail sponsors, and that the Board 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.” Director Order, AB 55 (794X), slip op. at 2 (quoting Nat’l Trails Sys. 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). This NITU authorizing interim trail use/rail banking negotiations between CSXT and GHL is set to expire on July 11, 2020. The Director also denied the City’s request for a NITU, noting that the interim trail use/rail banking program is voluntary and that CSXT did not agree to negotiate for interim trail use/rail banking with the City. Director Order, AB 55 (794X), slip op. at 2.

On February 3, 2020, the City filed its appeal,⁵ arguing that the Director erred by not making factual findings related to GHL’s qualifications as a trail sponsor, and that the Director’s decision was therefore unsupported by the record. (City Appeal 6, Feb. 3, 2020.) The City states that the Board applies a rebuttable presumption of fitness to trail sponsors and argues that the City has presented evidence to rebut the presumption that GHL is qualified to serve as a trail sponsor. (Id. at 6, 11.) Specifically, the City contends that GHL is not qualified to serve as a

³ On September 10, 2019, the National Association of Reversionary Property Owners filed a letter in support of the City’s September 9, 2019 reply.

⁴ The October 8, 2019 decision also imposed two salvage-related conditions.

⁵ By decision served January 27, 2020, the Board granted the City until February 3, 2020 to file its appeal.

trail sponsor because it is a CSXT subsidiary; that the Board's Trails Act regulations do not expressly identify railroads as potentially qualifying as trail sponsors; that a railroad or its subsidiary serving as a trail sponsor is inconsistent with the management, liability, and tax responsibilities imposed on trail sponsors by those regulations; and that any negotiations between GHIL and CSXT would not be conducted at arms-length. (Id. at 9-12.)

The City also argues that GHIL is not qualified to serve as a trail sponsor because it does not intend to become a trail sponsor itself. (Id. at 11-13.) According to the City, over the past decade, GHIL has filed numerous requests to negotiate with CSXT for interim trail use/rail banking in other proceedings, but it has never finalized an interim trail use/rail banking agreement with CSXT. (Id. at 5, 12.) The City argues that GHIL sought the NITU so that CSXT and GHIL could engage in "internal deliberations" to allow CSXT to maximize the sale price for the Line. (Id. at 9, 15.) The City claims that CSXT is abusing the Trails Act process to keep the status of the Line "in limbo potentially indefinitely" to the detriment of the public. (Id. at 7.)

In addition, the City argues that permitting a carrier such as CSXT to negotiate for interim trail use/rail banking with a wholly owned subsidiary as the proposed interim trail sponsor represents a "fundamental change" to the qualification requirements for trail sponsors, which would be more appropriate for the Board to consider with input from stakeholders through a rulemaking. (Id. at 13-16.) According to the City, the outcome of such a rulemaking would show that public policy does not favor allowing carriers to negotiate for interim trail use/rail banking with wholly owned subsidiaries. (Id. at 15-16.)

On February 13, 2020, CSXT filed a reply to the City's appeal. CSXT argues that the Director's decision to issue the NITU was correct because GHIL and CSXT complied with the requirements of the Trails Act and 49 C.F.R. § 1152.29. (CSXT Reply 7-8, Feb. 13, 2020.) Also on February 13, 2020, GHIL filed a letter concurring with CSXT's arguments. (GHIL Letter 1, Feb. 13, 2020.)

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(a)(2)(iv), the Board has delegated to the Director the authority to determine, after a request for interim trail use/rail banking is filed under 49 C.F.R. § 1152.29, whether the Trails Act is applicable and, where appropriate, to issue a NITU. Appeals of such decisions by the Director determining the applicability and administration of the Trails Act "will be acted on by the entire Board as set forth at 49 C.F.R. § 1011.2(a)(7)." 49 C.F.R. § 1152.25(e)(1). In considering an appeal, the Board considers whether the Director made the correct decision given the circumstances presented. See, e.g., Union Pac. R.R.—Aban. & Discontinuance of Serv. Exemption—in Cerro Gordo Cty., Iowa, AB 33 (Sub-No. 327X), slip op. at 3 (STB served Jan. 26, 2018).⁶

⁶ The City and CSXT both reference an incorrect decisional standard for the Board's review of the Director Order. The City appears to argue that the Board should review the decision under the standard in 49 C.F.R. § 1115.2, which pertains to decisions issued by an administrative law judge, an individual Board Member, or an employee board. (See City

Under the Trails Act, the Board must “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor agrees to assume certain responsibilities for the right-of-way for use in the interim as a trail and the railroad consents to negotiate with the trail sponsor for such use. 16 U.S.C. § 1247(d); Nat’l Wildlife Fed’n v. ICC, 850 F.2d 694, 699-702 (D.C. Cir. 1988). The Trails Act is invoked when a prospective trail sponsor⁷ files a request with the Board to use or acquire for interim trail use/rail banking a right-of-way that a rail carrier has proposed to abandon. The request must include (1) a map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used; (2) a statement in the form prescribed by the Board’s regulations indicating the trail sponsor’s willingness to assume full responsibility for managing the right-of-way, any legal liability arising out of the transfer or use of the right-of-way, and the payment of any and all taxes that may be levied or assessed against the right-of-way; and (3) an acknowledgement that interim trail use is subject to the sponsor’s continuing to meet its responsibilities to manage the right-of-way and subject to possible future reconstruction and reactivation of the right-of-way for rail service. 49 C.F.R. § 1152.29(a). In exempt abandonment proceedings, if the railroad indicates its willingness to negotiate an interim trail use/rail banking agreement for the line, the Board will issue a NITU.⁸ 49 C.F.R. § 1152.29(d)(1).

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, 1295 (8th Cir. 1990). In administering the Trails Act, the Board need only be assured that the Trails Act has been properly invoked and that the statutory requirements regarding interim trail use/rail banking and the trail sponsor’s assumption of financial and managerial responsibility are met. See Jost v. STB, 194 F.3d 79, 89 (D.C. Cir. 1999); Goos, 911 F.2d at 1295; Ga. Great S. Div.—Aban. & Discontinuance Exemption—Between Albany & Dawson, in Terrell, Lee, & Dougherty Ctys., Ga., AB 389 (Sub-No. 1X), slip op. at 3 (STB served Apr. 16, 1999).

The Board applies a rebuttable presumption that any private organization that files a statement of willingness meets the statutory requirement to serve as a trail sponsor. See, e.g., A & R Line, Inc.—Aban. Exemption—in Cass & Pulaski Ctys., Ind., AB 855 (Sub-No. 1X), slip op. at 3 (STB served Aug. 13, 2004); see also Jost, 194 F.3d at 89; Nat’l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 7 (stating that “the Board has no specific fitness or qualification test 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

Appeal 7, Feb. 3, 2020; see also City Notice of Appeal & Request for Waiver & Extension 2, Jan. 17, 2020.) CSXT instead cites the standard of review in 49 C.F.R. § 1152.25(e)(2)(ii), which refers to petitions to reopen entire Board decisions. (CSXT Reply 6, Feb. 13, 2020.)

⁷ A prospective trail sponsor is “any state, political subdivision, or qualified private organization” that is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use/rail banking. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a).

⁸ In abandonment application proceedings, the Board would issue a certificate of interim trail use or abandonment (CITU). There is no functional difference between a NITU and a CITU.

banking”); Idaho N. & Pac. R.R., Aban. & Discontinuance Exemption—in Wash. & Adams Ctys., Idaho, 3 S.T.B. 50, 56-58 (1998). The Board has authority to revoke a trail use condition only if it is shown that the statutory requirements are not being met (e.g., the trail sponsor is not meeting its financial obligations for the property and its use as an interim trail). See, e.g., Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind., AB 290 (Sub-No. 168X), slip op. at 5 (STB served May 4, 2005). Moreover, the Board’s primary concern once parties reach an agreement for interim trail use/rail banking is that the statutory conditions under the Trails Act not be compromised and that nothing occur that would preclude a railroad’s right to reassert control over the right-of-way at some future time to reactivate rail service. See Idaho N. & Pac. R.R., 3 S.T.B. at 59.

Here, given the circumstances presented, the Board finds that the Director made the correct decision to issue the NITU to CSXT and GHL. In compliance with 49 C.F.R. § 1152.29, GHL’s NITU request included a map depicting, and a description of, the right-of-way proposed to be acquired or used, a statement of willingness as prescribed in the Board’s regulations, and an acknowledgment that GHL’s use of the right-of-way is subject to its continuing to meet its responsibilities and subject to possible future reconstruction and reactivation of the right-of-way for rail service. Also in compliance with 49 C.F.R. § 1152.29, CSXT timely notified the Board of its agreement to negotiate with GHL towards a possible interim trail use/rail banking agreement. Additionally, in response to the City’s September 9, 2019 filing questioning GHL’s intent to negotiate for interim trail use/rail banking, GHL confirmed that it is “ready, willing, and able” to negotiate with CSXT. (GHL Reply 3-4, Oct. 18, 2019.) Therefore, given the Board’s limited role in administering the Trails Act, the Director correctly determined that the Trails Act was applicable and correctly issued the NITU.

The Board finds that the City has failed to rebut the presumption that GHL is qualified to serve as a trail sponsor. First, GHL’s status as a CSXT subsidiary does not rebut the presumption. As explained above, the Trails Act and related Board regulations broadly permit any “qualified private organization”—i.e., any private organization willing to assume management responsibility and legal and tax liability for a right-of-way subject to interim trail use/railbanking, and to acknowledge the potential for future reconstruction and reactivation of rail service—to serve as a trail sponsor. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a). The Board will not blanketly exclude railroad subsidiaries from that phrase simply because, as the City contends, neither the Trails Act nor the Board’s regulations specifically identify “railroads,” “carriers,” or abandonment “applicants” as potential trail sponsors. In this instance, GHL has satisfied the requirements of the Trails Act and related Board regulations, and the City has failed to explain why GHL’s serving as a trail sponsor here would be inconsistent with the responsibilities imposed by the Trails Act.⁹

⁹ The Board notes that it has previously issued NITUs to allow GHL to negotiate for interim trail use/rail banking in several proceedings. See, e.g., CSX Transp., Inc.—Aban. Exemption—in Alachua Cty., Fla., AB 55 (Sub-No. 718X) (STB served Aug. 20, 2019) (issuing NITU to GHL to negotiate with CSXT for interim trail use/rail banking); CSX Transp., Inc.—Aban. Exemption—in Logan Cty., W. Va., AB 55 (Sub-No. 763X) (STB served Oct. 26, 2016) (same); N.Y. Cent. Lines, LLC—Aban. Exemption—in Suffolk Cty., Mass., AB 565 (Sub-No. 7X) (STB served June 10, 2008) (same).

The City also contends that any negotiations between CSXT and GHL will not be conducted at arms-length. However, the fact that GHL is a subsidiary of CSXT does not in and of itself indicate that they will not engage in arms-length negotiations.¹⁰ Moreover, the Board has previously allowed interim trail use/rail banking among related parties, and has also allowed negotiations to proceed when the trail sponsor is the owner of the line. See City of Fishers—Pet. for Partial Revocation of Exemption, FD 36137 (STB served Dec. 21, 2018) (issuing a NITU to a trail sponsor that was also one of three joint owners of the subject line); T & P Ry.—Aban. Exemption—in Shawnee, Jefferson, & Atchison Ctys., Kan., 2 S.T.B. 36, 46 (1997) (denying reconsideration of a decision to issue a NITU where a petitioner argued, among other things, that the trail sponsor was unqualified because it was a holding company for the railroad and because the trail sponsor’s officers or employees were also the railroad’s officers or employees), pet. for review granted on other grounds sub nom. Becker v. STB, 132 F.3d 60, 63 & n.5 (D.C. Cir. 1997); cf. King Cty., Wash.—Acquis. Exemption—BNSF Ry., FD 35148 (STB served Sept. 18, 2009) (finding that an entity could be both the trail sponsor and the party with the right to reactivate rail service on the subject line).

Second, the City’s argument that GHL does not intend to become the trail sponsor itself does not necessarily rebut the presumption that GHL is qualified. As previously stated, GHL filed a statement of willingness in compliance with 49 C.F.R. § 1152.29(a)(2), and a reply indicating that it is “ready, willing, and able” to negotiate trail use, both of which were signed by GHL’s counsel. (See GHL NITU Request, Aug. 29, 2019; GHL Reply 4, Oct. 18, 2019.) The Board’s rules permit it to rely on pleadings signed by a party’s counsel. See 49 C.F.R. § 1104.4(a); Norfolk S. Ry.—Pet. for Exemption—in Balt. City & Balt. Cty., Md., AB 290 (Sub-No. 311X), slip op. at 10 (STB served Jan. 27, 2012).

In addition, GHL’s failure to reach an interim trail use/rail banking agreement with CSXT in other cases does not demonstrate bad faith here. NITUs provide time for railroads and trail sponsors to negotiate for interim trail use/rail banking, but the issuance of a NITU does not mean that reaching an interim trail use/rail banking agreement is guaranteed. See Limiting Extensions of Trail Use Negotiating Periods, EP 749 (Sub-No. 1), slip op. at 4 (STB served Dec. 4, 2019) (citing data compiled by the Rails-to-Trails Conservancy indicating that, as of November 2018, of the 718 CITUs/NITUs that were issued since 1987, at least 393 corridors were successfully rail banked and remain rail banked today).

Moreover, that GHL may not be the entity that ultimately enters into an interim trail use/rail banking agreement with CSXT is not dispositive, as the Board frequently grants requests to substitute one prospective trail sponsor for another. See, e.g., Pittsburg & Shawmut R.R.—Aban. Exemption—in Clarion & Jefferson Ctys., Pa., AB 976 (Sub-No. 2X) et al. (STB served Jan. 30, 2020). Indeed, interim trail use/rail banking was successfully established in a case in which a NITU originally was issued to GHL and then transferred to other trail sponsors who

¹⁰ In addition, in other contexts, the agency has declined to adopt a presumption that a subsidiary and a parent are necessarily one and the same. See, e.g., Mountain Laurel R.R.—Acquis. & Operation Exemption—Consol. Rail Corp., FD 31974, slip op. at 10 (STB served May 15, 1998).

acquired the rail line for a trail. See CSX Transp., Inc.—Aban. Exemption—in Worcester Cty., Mass., AB 55 (Sub-No. 691X) (STB served Aug. 3, 2017).¹¹

Furthermore, the Board recently adopted a new rule intended to lead to more efficiency, clarity, and finality in the Trails Act process, as well as to protect against unduly protracted interim trail use/rail banking negotiating periods. The new rule establishes a one-year initial negotiating period under a CITU/NITU for parties to negotiate for interim trail use/rail banking,¹² allowing for three one-year extensions, with further extensions granted only if extraordinary circumstances are shown. See Limiting Extensions of Trail Use Negotiating Periods, EP 749 (Sub-No. 1). The rule's limitation on CITU/NITU extensions will prevent carriers and trail sponsors from keeping rail lines “in limbo” indefinitely, as the City argues will happen here.¹³

At the same time, implicit in the Trails Act is an expectation that the parties intend to use the NITU negotiating period to actively pursue interim trail use/rail banking. As in prior cases involving CSXT and GHL, *see, e.g., supra* note 9, GHL has satisfied the regulatory requirements to become a trail sponsor by submitting a NITU request with, among other things, a statement of willingness as prescribed in the Board's regulations. However, the Board has reviewed the record before it and notes that the combination of unusual circumstances here, taken together, could raise concerns about the intent of CSXT and GHL to actually engage in negotiations. Therefore, even though the Board is denying the City's appeal to overturn the Director Order

¹¹ The City fails to support its argument that allowing carriers to negotiate for interim trail use/rail banking with wholly owned subsidiaries represents a “fundamental change” to the qualification requirements for trail sponsors that would be more appropriate to consider through a rulemaking. As noted, the Board has previously allowed interim trail use/rail banking among related parties, so the Board's finding that GHL is qualified to serve as a trail sponsor is not a “fundamental change” to those requirements. In addition, the Board has broad discretion in determining whether to initiate a rulemaking. *See, e.g., Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008). And to the extent the City's appeal can be interpreted as requesting a rulemaking proceeding, it has not followed the requirements for making such a request. *See* 49 C.F.R. § 1110.2(c). The Board finds no basis for instituting a rulemaking proceeding has been presented here.

¹² The NITU in this case was issued on January 13, 2020, before the new rule became effective on February 2, 2020. Accordingly, the NITU authorizes GHL and CSXT to negotiate for 180 days.

¹³ The City also argues that federal preemption during the NITU negotiating period “poses special problems for municipalities who would potentially remain without recourse for health, safety, and welfare concerns related to the property,” (Appeal 10, Feb. 3, 2020), but that concern is misplaced. Although federal preemption under 49 U.S.C. § 10501(b) is broad, it is not unlimited. States and municipalities generally retain their police powers to protect public health and safety. *See, e.g., San Pedro Peninsula Homeowner's United, Inc.—Pet. for Declaratory Order*, FD 36065, slip op. at 4 (STB served Mar. 6, 2017) (citing *Ass'n of Am. R.R.s. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005)).

granting GHL's NITU request, CSXT and GHL are reminded that prospective trail sponsors and railroads are expected to operate diligently and in good faith in concluding their interim trail use/rail banking negotiations. Given the circumstances here, in any future extension request, GHL must describe the efforts made to negotiate with CSXT and the progress of those negotiations.

It is ordered:

1. The City's appeal of the Director's January 13, 2020 decision is denied.
2. In any future NITU extension request, GHL must describe the efforts made to negotiate with CSXT and the progress of those negotiations.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.