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ENTERED
Office of Proceedings
February 27, 2023
Part of
Public Record

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February 27, 2023

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

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

Dear Ms. Brown:

Attached for efilng is the response of CSXT Transportation, Inc. and the Georgetown and High Line Railway Company, LLC to the decision served by the Surface Transportation Board on January 27, 2023.

Thank you for your assistance. If you have any questions, please call or email me.

Sincerely yours,

Louis E. Gitomer

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

RESPONSE OF CSX TRANSPORTATION, INC. AND GEORGETOWN AND HIGHLINE
RAILWAY COMPANY LLC TO DECISION SERVED JANUARY 27, 2023

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Attorneys for: CSX TRANSPORTATION,
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Dated: February 27, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

RESPONSE OF CSX TRANSPORTATION, INC. AND GEORGETOWN AND HIGHLINE
RAILWAY COMPANY LLC TO DECISION SERVED JANUARY 27, 2023

CSX Transportation, Inc. (“CSXT”) and Georgetown and High Line Railway Company LLC (“GHL”) respectfully respond to the decision of the Surface Transportation Board (the “Board”) served on January 27, 2023 (“January 27 Decision”).¹ The January 27 Decision asked CSXT and GHL to respond to information presented in a letter filed by the U. S. Department of Justice, Environment and Natural Resources Division (“ENRD”) (the “ENRD Letter”) and also to “explain whether, and if so how, the Line is being used as a recreational or historic trail.”

CSXT and GHL respond below to the ENRD Letter as requested by the *January 27 Decision*. In short, there has been no change to the relevant facts that underlay the Director of Proceedings’ January 13, 2020 decision to issue a Notice of Interim Trail Use to GHL for the Line² and the Board’s June 22, 2020 decision to uphold that decision on appeal. The Board was well aware at the time of those decisions that GHL is a wholly-owned CSXT subsidiary. It knew that GHL had previously acted as a trail sponsor, and had successfully obtained an NITU in a

¹ *CSX Transportation, Inc.-Abandonment Exemption-in Pinellas County, Fla.*, Docket No. AB 55 (Sub-No. 794X) (STB served January 27, 2023).

² As defined in prior decisions in this docket, the Line is an approximately 0.86-mile rail line on CSXT’s Clearwater Subdivision, between milepost ARE 897.57 and milepost ARE 898.43, in St. Petersburg, Pinellas County, Fla.

prior case that was transferred to other trail sponsors. And the Board correctly concluded on that factual record that GHL met the statutory requirements to be a qualified trail sponsor, and that an NITU was justified. Nothing in the ENRD Letter questions the fundamental correctness of the Board's 2020 decisions.

Before turning to the ENRD letter, it is worth reiterating that the STB's role under the Trails Act is limited and largely ministerial. *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001) (*CART*); *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990) (agency has "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use"). The STB plays no part in the negotiations between trail sponsors and railroads, nor does it analyze, approve, or set the terms of rail banking/interim trail use agreements. *Ga. Great S.*, 6 S.T.B. at 907. **The Board does not "regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail. . . ."** *Id.* (emphasis added). Moreover, the Board has no specific fitness or qualification test for trail sponsors; it requires only the Statement of Willingness from the trail sponsor to assume liability and to pay taxes, and the acquiescence of the railroad in rail banking. The Board has the authority to terminate rail banking/interim trail use if it determines that the trail sponsor does not have the ability to continue to meet the management, tax, and liability conditions of interim trail use. See 49 C.F.R. § 1152.29(a)(3); *Jost v. STB*, 194 F.3d 79, 89-90 (D.C. Cir. 1999).³

The Director's 2020 Decision that GHL was entitled to a NITU followed directly from this precedent:

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);

³ See, *National Trails System Act and Railroad Rights-of-Way*, Docket No. EP 702 (served April 30, 2012), at 7.

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) (STB served January 13, 2020), at 2.

The Board understood at the time that, while GHL was “ready willing and able to acquire the Line,” it viewed its initial role as being a “placeholder” for another potential trail sponsor that may seek a NITU in the future.⁴ GHL has been a successful placeholder for converting a railroad line into a trail that could be reactivated at a later date as a railroad line. See, e.g., *CSX Transportation, Inc.-Abandonment Exemption-in Worcester County, MA*, Docket No. AB-55 (SubNo. 691X) (served December 23, 2010).

Since the Board’s 2020 decisions confirming GHL’s right to an NITU, CSXT and GHL proceeded to negotiate a Purchase and Sale Agreement. They notified the Board of this agreement in 2021. The Line is not currently being used as a recreational or historic trail, but CSXT and GHL have received interest from other parties and hope to replace GHL with another trail user.

The ENRD Letter largely consists of 16 bullet points, which ENRD contends include information that “was not available to the Board when it issued the NITU and subsequently

⁴ See CSX Response to Appeal at 10, *CSX Transp., Inc.—Abandonment Exemption—Pinellas Cty., FL*, STB Docket No. AB-55 (Sub-No. 794X) (filed Feb. 13, 2020).

authorized interim trail use and railbanking.” But the information in the letter does not include any facts that undermine the basic logic of the Board’s 2020 Decisions.

The first six bullet points are not new information at all – they largely recount events in the procedural history of this proceeding or the AB-1289 adverse abandonment proceeding instituted by the City of St. Petersburg.

The next four bullet points refer to the June 17, 2021 Purchase and Sale Agreement and the Deed between CSXT and GHL. These documents obviously were negotiated after the Board granted the NITU, but nothing that DOJ cites would have been relevant to that decision. As the Board has recognized, it “plays no part in the negotiations between trail sponsors and railroads, nor does it analyze, approve, or set the terms of rail banking/interim trail use agreements.” *Id.* The ENRD Letter appears to focus on the “Occupancy Easement” reserved to CSXT, but this is a standard and unremarkable provision. Indeed, the very nature of a railbanking agreement is that the railroad retains a residual right to reactivate service. Moreover, the Occupancy Easement here reduced the cost of the trail to the trail user, by allowing CSXT to retain residual rights and benefits that it receives as a result of negotiating agreements with third parties

The eleventh bullet point states that a trail has not been constructed. CSXT and GHL agree that a trail has not been constructed in the twenty months since the Purchase and Sale Agreement was signed, and that at this time, the Line is not being used as a recreational or historic trail. But nothing in the Trails Act requires sponsors to immediately construct trail facilities. Again, the Board has recognized its limited involvement to “regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail.”⁵ GHL continues to comply with the Board’s criteria for a trail user to “meet the management, tax, and

⁵ *National Trails System Act and Railroad Rights-of-Way*, Docket No. EP 702 (served April 30, 2012), at 7.

liability conditions of interim trail use. *See* 49 C.F.R. § 1152.29(a)(3); *Jost v. STB*, 194 F.3d 79, 89-90 (D.C. Cir. 1999). The ENRD letter does not suggest otherwise.

The last five bullet points refer to property that CSXT leased to a tenant (Ferg's Sports Bar and Grill) beginning in 1994. In the Occupancy Easement referred to above, CSXT retained certain interests in the Line, including the lease to Ferg's. As the continued owner of the lease to Ferg's CSXT should be expected to honor the lease, modify the rental in light of the existing market and agreement with Ferg's, and collect the rent as the landlord. The lease to Ferg's was not assigned to GHL and therefore GHL has no rights or obligations under the lease with Ferg's. CSXT is the proper party to negotiate the rental rate and collect the rent. And there is nothing unusual about portions of a trail being leased to businesses, as any visitor to New York City's High Line can attest.

In short, nothing in the ENRD Letter either undermines the basis of the Board's 2020 decisions on the NITU or suggests that either CSXT or GHL have not fully complied with all of the Board's regulations under 49 CFR 1152.29.

Respectfully submitted,

/s/ *Louis E. Gitomer*

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Attorneys for: CSX TRANSPORTATION,
INC.

Dated: February 27, 2023

CERTIFICATE OF SERVICE

I certify that I have this day served copies of document upon all parties of record in this proceeding, by email or mail, postage pre-paid.

/s/ *Louis E. Gitomer*

Louis E. Gitomer
February 27, 2023