

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

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

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

COMMENT OF RAILS TO TRAILS CONSERVANCY TO STB ORDER DATED
JANUARY 27, 2023

The Rails to Trails Conservancy (“RTC”) submits this comment in the above-referenced proceeding in response to this Board’s request for comments on a letter the U.S. Department of Justice (“USDOJ”) dated Oct. 12, 2022, placed in the public record of AB-55 (Sub-No. 794X) on December 14, 2022. The USDOJ letter alleges facts that, if true, constitute a scheme which amounts to an abusive mis-use not only of (1) this Board’s “two-year out-of-service” abandonment exemption regulation (49 C.F.R. 1152.50) to halt a then-pending adverse abandonment proceeding brought by City of St. Petersburg against CSX Transportation, Inc. (“CSX”),¹ but also (2) this Board’s interim trail use/railbanking regulation (49 C.F.R. 1152.29) and the federal interim trail use statute (16 U.S.C. 1247(d)).

Background. A basic purpose of adverse abandonment procedures is to prevent abuse of federal preemption to forestall state or local eminent domain proceedings.² The declared purpose of 16 U.S.C. 1247(d) is to foster trails, consistent with future rail reactivation. Yet USDOJ’s letter shows that CSX and its subsidiary corporation Georgetown and High Line Railway Company LLC (“GHL”) are purporting to use statutes and regulations designed to foster trails not to foster trails but as a means to prevent trails.

¹ *City of St. Petersburg – Adverse Abandonment – CSX Transportation, Inc. in Pinellas County, Fla.*, AB 1289.

² *E.g., Modern Handcraft, Inc.—Abandonment*, 363 I.C.C. 969 (1981) (*Modern Handcraft*),

USDOJ's allegations indicate that the CSX/GHL "arrangement" has thwarted St. Petersburg's effort to remove federal preemption from the property here in question so the City may use eminent domain to secure a trail. At the same time, USDOJ has indicated that CSX is using federal preemption under the guise of a "NITU" not to enable a trail, but instead to enable continued unauthorized commercial use of a long-unused (and de facto abandoned) rail line which, but for STB preemption, would be regarded as abandoned at state law, and now either in the hands of St. Petersburg (through use of eminent domain) or in the hands of underlying landowners. This use of 16 U.S.C. 1247(d) and 49 C.F.R. 1152.29, as USDOJ argues in its Reply Comments in this proceeding at p.2, is not a proper invocation of the statute and regulation.. CSX's use of the notice of exemption process instead is an inappropriate ruse simply to fend off an adverse abandonment proceeding and thwart legitimate public use of unused CSX property.

Summary. Notice of exemption procedures in general are not intended for such controversial proceedings. As a minimum, STB should vacate the authorization of abandonment in AB-55 (Sub-No. 794X) and require CSX either to file an application to abandon or use the petition for exemption process to seek abandonment authority. Either an application or the petition process will allow an opportunity for development of the record.

In addition, STB should reinstitute St. Petersburg's adverse abandonment proceeding. The agency dismissed that proceeding without addressing the city's request for waivers, much less the merits of the abandonment application it intended to file if waivers were granted. The sole ground for dismissal was that the agency had granted CSX an exempt abandonment. *See City of St. Petersburg, supra*, AB 1289, served Jan. 3, 2020, slip op. 1. Since CSX should be denied use of the notice of exemption process, it follows that AB 1289 was improperly

dismissed.

CSX should not be so fearful of state law eminent domain. The railroad's right to compensation will be protected under state law, plus finally the public interest will be protected as well. Given the facts laid out by USDOJ, there is no public interest protected by what CSX has contrived here.

Interest of commenting party. RTC, which began operations in 1986, is a nation-wide non-profit organization with over 160,000 members and supporters dedicated to conserving otherwise-to-be abandoned railroad corridor for use of trails and for other compatible public purposes, most notably, through the use, defense, and protection of the federal railbanking statute, 16 U.S.C. § 1247(d). RTC has engaged in the railbanking process in a host of cases in order to preserve railroad corridor for interim trail use compatible with possible future rail reactivation. RTC is invariably concerned when railroads misuse the railbanking law to actively thwart bona fide trail use in order to perpetuate a non-rail and non-public use of rail corridors subject to this Board's jurisdiction, as USDOJ indicates has occurred here.

Argument

The letter submitted by the U.S. Department of Justice alleges sufficient facts to support a conclusion that CSX has potentially misused the railbanking law in a manner that not only subverts a bona fide public use of the corridor but also perpetuates CSX's unlawful de facto abandonment of the corridor at issue. First, for almost 30 years, CSX according to US DOJ has leased the full width of the corridor to a private commercial enterprise and adjacent landowner, Ferg's Sports Bar and Grill, for a use that is inconsistent with railroad use. In collateral litigation against the United States, Ferg's Sports Bar and Grill has alleged that it is the underlying

landowner, and but for the continuation of the corridor under this Board's jurisdiction pursuant to the railbanking law, would possess title and possessory rights to the corridor.

CSX's longstanding lease of the full width of a rail corridor that is not used for rail purposes for commercial non-rail uses (*i.e.*, a bar) constitutes an unlawful *de facto* abandonment. This Board has not hesitated to grant an adverse abandonment application under similar circumstances, *i.e.*, either to prevent a misuse of the federal preemption over railroad corridors to forestall use of eminent domain in order to secure the unused rail corridor for public use (*Modern Handcraft, supra*), or to thwart underlying landowners from exercising rights flowing from fee title. This principle has long been recognized at state law. *See Kansas City Area Transp. Auth. of Kansas City Area Transp. Dist. v. Ashley*, 555 S.W.2d 9, 11 (Mo. 1977) ("We do not believe the ICC will allow this appellant-railroad to persist in a nonservice (embargoed) status and continue to exist under the facade of an operating railroad merely to keep a right-of-way easement in a metropolitan area out of public use in the face of the congressional intent evidenced by 49 U.S.C. sec. 1a(10), which clearly demonstrates a national policy that unused railroad right of ways be utilized where feasible for other public purposes.")

CSX in its "Response" (dated February 27, 2023), does not deny the allegations by USDOJ, but instead argues that "the Board does not 'regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail.'" CSX Reply at p. 4. But what CSX fails to acknowledge is this: the interim trail use/railbanking remedy is for a "trail" not to prevent a trail. As USDOJ notes, CSX describes no current plan for a trail by either CSX or GHL. Instead, CSX and GHL are instead thwarting the only identified entity seeking a trail (namely, St. Petersburg) by purporting to use STB preemption to evade state law eminent domain. They claim they can get away with this because STB does not look at the purpose for

invoking the railbanking statute. If this argument were true, the federal interim trail use statute would be abused by multiple parties using it to avoid trails, rather than foster them. This serves no public purpose.

The federal railbanking law states that federal “interim trail use” remedy is available only “[i]f a State, political subdivision, or qualified private organization” is prepared to assume responsibility for “interim use” consistent with the Trails Act. 16 U.S.C. 1247(d). CSX and GHL are a private for-profit railroad and its for-profit real estate subsidiary. Neither purport to be a State or local government. Neither is a trail entity or land trust. Neither purport to be interested in developing a trail on the premises. USDOJ categorically states that the conveyance by CSX to GHL reserved an “occupancy” easement which apparently prevents the purported interim trail user (GHL) from interfering with existing occupancies on the property. USDOJ indicates that CSX is using this situation to extract increasing rents. An interim trail user which is disempowered from doing a trail and is instead enabling continued non-rail commercial use of the corridor for private profit of the railroad cannot be deemed to be a “qualified private organization.” It instead is an enabler of a misuse of STB processes to defeat St. Petersburg’s efforts to secure this corridor for trail use.

Conclusion

USDOJ has alleged ample evidence to show that a notice of exemption proceeding is inappropriate in this case, and that CSX is using STB exemption and interim trail use procedures to prevent state-law eminent domain proceedings aimed at securing trail use. The abandonment authorization should be vacated as inappropriate in the circumstances. City of St. Petersburg’s adverse abandonment proceeding (AB 1289) should be reinstituted.

Respectfully submitted,



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Certificate of Service

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

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