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March 08, 2023

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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

Dear Ms. Brown:

Attached for e-filing is the United States' Statement Regarding the Response of CSX Transportation, Inc. and Georgetown and High Line Railway Company LLC to the decision served by the Surface Transportation Board on January 27, 2023.

Respectfully,

/s/ James D. Gette

James D. Gette

Chief

United States Department of Justice

Environment & Natural Resources Division

Natural Resources Section

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CSX Transportation, Inc. – Abandonment Exemption – Pinellas County, FL

**UNITED STATES’ STATEMENT REGARDING RESPONSE OF CSX
TRANSPORTATION, INC. AND GEORGETOWN AND HIGH LINE RAILWAY
COMPANY LLC
TO DECISION SERVED JANUARY 27, 2023**

The United States respectfully provides the following comments on the response of CSX Transportation, Inc. (“CSXT”) and Georgetown and High Line Railway Company LLC (“GHL”) to information provided by the United States in a letter transmitted to the Surface Transportation Board (the “Board”) on December 14, 2022. (Feb. 27, 2023) (“CSXT Response”).¹ That letter brought to the Board’s attention certain factual information ascertained by the United States in the course of litigating consolidated cases alleging takings resulting from the Board’s issuance of a Notice of Interim Trail Use or Abandonment (“NITU”) on January 13, 2020 in the above-captioned docket. *See Collective Edge LLC v. United States*, Case Nos. 20-34, 20-48, and 20-159 (Fed. Cl.). The NITU pertains to an approximately 0.86-mile portion of right-of-way between milepost ARE 897.57 and milepost ARE 898.43 (the “ROW”) in St. Petersburg, Pinellas County, Florida.

Filed in response to the Board’s order of January 27, 2023, the CSXT Response asserts that the Board’s “role under the Trails Act is limited and largely ministerial.” CSXT Response at 4 (citing *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001) (*CART*) and *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990)). Although CSXT and GHL are

¹ The United States clarifies that although the letter is dated October 12, 2022, it was not transmitted to the Board until December 2022 due to an administrative oversight.

correct that the Board has interpreted its authority as limited in the context of administering the Trails Act, this limited discretion assumes an underlying predicate—that the Trails Act has been properly invoked. That is, while acknowledging its role is limited in authorizing interim trail use, the Board has consistently recognized that it is charged with ensuring the proper administration of the Trails Act. *See Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, 4 I.C.C.2d, 152, 156 (1987) (“We lack any discretion to decide whether rail banking and 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 that the Trails Act has been properly invoked and that its requirements will be met.**”) (emphasis added). In fact, the Board has explained:

[I]f a serious challenge to the applicability of the statute is made in a particular case, we expect the Director to refer the matter to the full Commission, and we so instruct. **Referral would be appropriate, for example, if there were a serious claim that the offer was a subterfuge (i.e. that the right-of-way would not in fact be used for a trail)** or that a potential trail user was not capable of assuming liability for the right-of-way. Such substantive issues should be decided by the Commission.

4 I.C.C.2d at 156 (emphasis added). Thus, although the Board is not an investigative agency, when facts are brought to the Board’s attention suggesting that the Trails Act has not been properly invoked, the Board’s discretion is not so limited that it must ignore such facts. As the Board has recognized, it has both the authority and the discretion to “take actions that are ‘legitimate, reasonable, and directly adjunct to the agency’s explicit statutory power.’”

Decision at 3 (Nov. 7, 2019), Docket No. FD 35982, *Jackson County, Mo.—Acquisition and Operation Exemption—Union Pacific Railroad Company* (quoting *ICC v. Am. Trucking Ass’n*, 467 U.S. 354, 364-65 (1984)); *see also* 49 U.S.C. § 1321(a).

Further, the United States notes that CSXT and GHL admit in their response that GHL did not intend to build a trail at the time of the NITU. And, GHL still does not intend to build a trail. *See* CSXT Response at 5 (GHL “viewed its initial role as being a ‘placeholder’ for another potential trail sponsor that may seek a NITU in the future”; “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.”). Although CSXT and GHL mention unknown interested parties, to date the only identified party interested in being a trail sponsor and building a trail is the City of St. Petersburg, with whom CSXT refused to negotiate.

In addition, the United States clarifies its comments in the December 14, 2022 letter with respect to the Occupancy Easement between CSXT and Ferg’s Sports Bar and Grill. CSXT alleges that the Occupancy Easement “is a standard and unremarkable provision,” which “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.” CSXT Response at 6. On the contrary, CSXT gave up any residual rights to the easement when it requested the NITU and reached a trail-use agreement with GHL. In the litigation stemming from the Board’s issuance of the NITU, the parties have agreed that CSXT’s predecessor railroad acquired the relevant portion of the right-of-way by the Francis H. Wright Condemnation order, dated April 28, 1888, which provided the railroad with *an easement limited to railroad purposes*. *See* Joint Status Report and Stipulations, ECF No. 16 (Aug. 25, 2020) (attached hereto as Exhibit A). In neither the related litigation, nor the above-captioned proceedings before the Board has CSXT put forward evidence that it possesses fee simple interest in the relevant right-of-way. Consequently, as a result of the Board’s issuance of the

NITU and the trail use agreement between CSXT and GHL, GHL now holds a subordinate easement for trail use that is subject to the future reactivation of rail service. CSXT does not possess any “residual rights” that allow use of the right-of-way for other purposes, and it cannot properly lease interests in the right-of-way it does not own. Furthermore, even if CSXT could offer evidence that it in fact possessed some kind of “residual rights” in the right-of-way, which it has not, such use could continue only if it did not interfere with future trail use.

Dated: March 8, 2023

Respectfully submitted,

TODD KIM
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s/ James D. Gette
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CERTIFICATE OF SERVICE

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

s/ James D. Gette
JAMES D. GETTE