

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

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

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

Digest:<sup>1</sup> The Board reopens the proceeding and issues a notice of interim trail use or abandonment to CSX Transportation, Inc., and the City of St. Petersburg for a rail line in Florida.

Decided: January 12, 2024

In 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 rail line, between milepost ARE 897.57 and milepost ARE 898.43, in St. Petersburg, Pinellas County, Fla. (the Line).<sup>2</sup> 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.<sup>3</sup>

On August 29, 2019, the City of St. Petersburg (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 a notice of interim trail use or abandonment (NITU) under the interim trail use/railbanking provision of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). The Georgetown and High Line Railway Company (GHL) also requested a NITU on August 29, 2019. In a response filed on September 3, 2019, CSXT notified the Board that it was willing to negotiate an agreement for interim trail use/railbanking with GHL but not with the City.

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<sup>1</sup> 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 Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> A more detailed history of this proceeding is contained in the Board’s decisions served in this docket on June 22, 2020, CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla. (June 2020 Decision), AB 55 (Sub-No. 794X) (STB served Oct. 8, 2019), and November 14, 2023, CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla. (November 2023 Decision), AB 55 (Sub-No. 794X) (STB served Oct. 8, 2019).

<sup>3</sup> The exemption was subject to a public use condition, which expired on April 6, 2020, and two salvage-related conditions, which remain in effect. See CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla., AB 55 (Sub-No. 794X), slip op. at 1-3 (STB served Oct. 8, 2019).

By decision and NITU served January 13, 2020, the Director of the Board's Office of Proceedings (Director) found that, under the Trails Act and existing Board precedent, GHL qualified as a trail sponsor and that it was appropriate to issue a NITU permitting GHL and CSXT to negotiate for interim trail use/railbanking of the Line. CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla., AB 55 (Sub-No. 794X) (STB served Jan. 13, 2020). The City filed an administrative appeal of the Director's decision, which the Board denied. See June 2020 Decision, AB 55 (Sub-No. 794X) (STB served June 22, 2020). On June 23, 2021, CSXT and GHL jointly notified the Board that they had entered into an interim trail use/railbanking agreement for the Line, pursuant to 49 C.F.R. § 1152.29(h).

Subsequently, on December 14, 2022, the Board received from the United States Department of Justice, Environment and Natural Resources Division (DOJ), a letter (DOJ Letter) detailing certain information that DOJ ascertained in the course of litigating a consolidated Fifth Amendment takings case related to the Line before the United States Court of Federal Claims, Collective Edge, LLC v. United States, No. 20-34L (Fed. Cl. filed Jan. 13, 2020). DOJ asserted that neither CSXT nor GHL had constructed a trail on the Line, developed a plan to construct a trail, or had any present intention to develop a trail. (DOJ Letter 3.) DOJ noted that CSXT has leased portions of the Line to Ferg's Sports Bar and Grill (Ferg's)—one of the plaintiffs in the Fifth Amendment takings case—since 1994 and continues to collect rent from Ferg's. (Id. at 3.)

The Board placed the DOJ Letter in the docket, directed reply comments from CSXT and GHL, and invited reply comments from other interested parties. After considering the comments received, the Board, for the reasons stated in the November 2023 Decision, revoked the NITU issued to CSXT and GHL and reinstated CSXT's authority to abandon the Line. See Nov. 2023 Decision, AB 55 (Sub-No. 794X).<sup>4</sup> The Board noted, among other things, that CSXT and GHL's response to allegations concerning Ferg's indicated non-compliance with the Trails Act. Id. at 8. The Board explained that dual use of a railbanked right-of-way for trail and non-trail activities is permissible under the Trails Act, so long as the non-trail-activities are “not incompatible with either trail use or the restoration of rail service.” Id. at 8-9 (quoting Balt. & Ohio R.R.—Aban. & Discontinuance—in Montgomery Cnty., Md., AB 19 (Sub-No. 12), slip op. at 2 (ICC served Feb. 22, 1990)). However, CSXT and GHL did not argue that dual use with Ferg's was possible or describe how Ferg's could otherwise share the right-of-way with a trail. Nov. 2023 Decision, AB 55 (Sub-No. 794X), slip op. at 9. Accordingly, in addition to revoking the NITU, the Board required that if another trail sponsor requested issuance of a NITU in this proceeding, CSXT must explain, in any reply agreeing to negotiate, why continued occupation of the Line's right-of-way by Ferg's would not interfere with trail use or future rail use. Id. at 9 n.13.

On December 14, 2023, the City filed a request for a new public use condition and a new request for issuance of a NITU, noting that the Line connects to an existing trail in Pinellas County sponsored by the City. (See City NITU Request, Dec. 14, 2023; see also City Letter 1,

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<sup>4</sup> CSXT and GHL have appealed the November 2023 Decision to the U.S. Court of Appeals for the Eleventh Circuit. See CSX Transp., Inc. v. STB, No. 23-13860 (11th Cir. filed Nov. 27, 2023).

Sept. 4, 2019.) CSXT filed a reply on December 20, 2023, agreeing to negotiate with the City for interim trail use/railbanking. As to how continued occupation of the Line’s right-of-way by Ferg’s would not interfere with trail use or future rail use, CSXT, while contending that this inquiry is irrelevant, explains that the lease with Ferg’s is terminable at will upon 30 days’ notice by CSXT for any reason or no reason at all. (CSXT Reply 1-2, Dec. 20, 2023.) It emphasizes that it “retains the authority to alter or remove entirely Ferg’s occupation of the right-of-way to accommodate whatever form or level of trail use a sponsor determines is best.” (Id. at 2.) CSXT further explains that, as the Board has recognized, dual use of a right-of-way for trail and non-trail activities is permissible under the Trails Act. (Id. at 2.) According to CSXT, the exact contours of any dual use in this situation cannot be known for certain until negotiations with the City conclude. (Id.)

Public Use. Under 49 U.S.C. § 10905 and 49 C.F.R. § 1152.28(a)(2)(iii), a public use condition may be imposed for a maximum of 180 days. The previously imposed public use condition, which expired on April 6, 2020, fully consumed that permitted period, so the City’s current request for an additional public use condition will be denied. See CSX Transp., Inc.—Aban. Exemption—in Lucas Cnty., Ohio, AB 55 (Sub-No. 471X), slip op. at 2 (STB served July 20, 2010) (“Under 49 U.S.C. § 10905, the Board may only impose public use conditions for up to 180 days after the effective date of an abandonment, as its authority to impose such a condition expires after that period.”) (citing 49 C.F.R. § 1152.28(b); Rail Abans.—Pub. Use Conditions—Revision, 8 I.C.C.2d 392, 395-98 (1992)).

Interim Trail Use. The City’s request for a NITU complies with the requirements of 49 C.F.R. § 1152.29, and CSXT has indicated that it is willing to negotiate an agreement for interim trail use with the City. Although CSXT’s letter does not provide the anticipated level of detail regarding why Ferg’s status would not interfere with trail use or future rail use, CSXT in its reply nevertheless appears to acknowledge that “dual use of a right-of-way for trail and non-trail activities is permissible under the Trails Act, so long as the non-trail activities”—here, Ferg’s—“are ‘not incompatible with either trail use or the restoration of rail service.’” November 2023 Decision, AB 55 (Sub-No. 794X), slip op. at 8-9 (quoting Balt. & Ohio R.R.—Aban. & Discontinuance—in Montgomery Cnty., Md., AB 19 (Sub-No. 12), slip op. at 2 (ICC served Feb. 22, 1990)). With this in mind, and to afford the City an opportunity to negotiate for interim trail use/railbanking, a NITU will be issued.<sup>5</sup> The parties may negotiate an interim trail use agreement during the one-year period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) & (h). If no agreement is reached within one year, CSXT may fully abandon the Line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail

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<sup>5</sup> The Board may accept requests for interim trail use/railbanking under the Trails Act as long as the right-of-way remains within the Board’s jurisdiction (i.e., the abandonment has not been consummated) and the carrier is willing to enter negotiations. See, e.g., Union Pac. R.R.—Aban. Exemption—in Osborne & Rooks Cntys., Kan., AB 33 (Sub-No. 269X), slip op. at 2 (STB served Mar. 12, 2010).

purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

It is ordered:

1. This proceeding is reopened.
2. The request for public use condition is denied, as discussed above.
3. The notice served and published in the Federal Register on September 9, 2019, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/railbanking as set forth below to permit the parties to negotiate for interim trail use for the rail line, for a period of one year from the service date of this decision and notice, until January 12, 2025.
  4. If an interim trail use/railbanking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
  5. Interim trail use/railbanking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 3 above.
  6. If an interim trail use/railbanking agreement is reached (and thus, interim trail use/railbanking is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2), (h).
  7. If interim trail use/railbanking is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use/railbanking agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
  8. If an agreement for interim trail use/railbanking is reached by January 12, 2025, interim trail/railbanking use may be implemented. If no agreement is reached, CSXT may fully abandon the Line, subject to any outstanding conditions.
  9. This decision and notice is effective on its service date.

By the Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz dissented with separate expressions.

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BOARD MEMBER FUCHS, dissenting:

While I concur with the decision to issue a NITU to CSXT and the City, I continue to disagree with the majority’s approach in this proceeding. I do not find CSXT’s recent summary of its position toward dual use of the right-of-way—a position the Board accepts here—to be inconsistent with the carrier’s previously stated position, which the Board rejected in deciding to revoke the NITU between CSXT and GHIL. To explain the Board’s seemingly conflicting actions, the decision presents a straightforward CSXT citation in the carrier’s recent reply as a new acknowledgment, but the decision overstates the citation, omits critical context where CSXT affirms its previously stated position,<sup>1</sup> and fails to acknowledge CSXT’s previous statements that suggest the carrier has not changed its position.<sup>2</sup> I view CSXT’s reply to be an elaboration of its previously stated position, rather than a new acknowledgment, and the Board could have easily received this elaboration by requesting information, rather than revoking the previous NITU in this proceeding. See Nov. 2023 Decision, AB 55 (794X), slip op. at 12, 15 & n.8 (Member Fuchs dissenting) (the Board “ought to have requested additional briefing”). Through its recent actions, the Board leaves the impression that it now simply disfavors corporate affiliate placeholder trail sponsors, notwithstanding any conflict with prior precedent or agency regulations and any broader drawbacks for the preservation of railroad rights-of-way.

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<sup>1</sup> (See CSXT Reply 2, Dec. 20, 2023 (“In any event, CSXT retains the authority to alter or remove entirely Ferg’s occupation of the right-of-way to accommodate whatever form or level of trail use a sponsor determines is best.”); id. (“In any event, CSXT continues to maintain that this inquiry is irrelevant. There are only two requirements of the Trails Act . . .”).)

<sup>2</sup> (See CSXT Reply 9-10, March 28, 2023 (citing T&P Ry.—Aban. Exemption—in Shawnee, Jefferson & Atchison Cntys., Kan., 2 S.T.B. 36, 43, 46 n.16, 47 (1997) pet. for review granted on other grounds sub nom. Becker v. STB, 132 F.3d 60 (D.C. Cir. 1997) (declining to revoke a NITU where a utility’s transmission lines would remain in the corridor) and Kan. E. R.R. —Aban. Exemption—in Butler & Greenwood Cntys., Kan., AB 563 (Sub-No. 1X), slip op. at 3 (STB served June 2, 2006) (concluding that “plans for the dual use of the right-of-way as both a trail and a utility corridor . . . are not inconsistent with the Trails Act” where “the utility corridor will not interfere with any trail use and future rail use”)); id. at 12 (CSXT is “considering hiring a third party to operate the trail, especially in light of significant use the trail may receive if the Tampa Bay Rays build their new baseball stadium in the vicinity of the trail”); see also CSXT Reply 2, Dec. 20, 2023 (“The exact contours of any dual use in this situation cannot be known for certain until the negotiations with St. Petersburg conclude, which were ongoing under the prior NITU issued to CSXT and GHIL.”).)

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BOARD MEMBER SCHULTZ, dissenting:

I write separately to express my disagreement with the Board’s comments on the status of Ferg’s Sports Bar and Grill (Ferg’s) and the sufficiency of CSXT’s reply to the City’s request for a NITU. The Board states that CSXT did not “provide the anticipated level of detail regarding why Ferg’s status would not interfere with trail use or future rail use.” Decision 3. I disagreed with the Board’s November 2023 Decision, including the decision to seek additional information from CSXT, and I disagree with the continued direction in this case in which the Board has decided to expand its ministerial role under the Trails Act and attempt to police the use of a right-of-way before even issuing a NITU. As the Board has stated, “dual use of a right-of-way for trail and non-trail activities is permissible under the Trail Act, so long as the non-trail activities are ‘not incompatible with either trail use or the restoration of rail service.’” November 2023 Decision, AB 55 (Sub-No. 794X), slip op. at 8-9 (quoting Balt. & Ohio R.R.—Aban. & Discontinuance—in Montgomery Cnty., Md., AB 19 (Sub-No. 12), slip op. at 2 (ICC served Feb. 22, 1990)). The Board’s initial demand for additional information from CSXT in its November 2023 Decision, and the Board’s statement that CSXT’s reply did not “provide the anticipated level of detail”—details that are not normally required—create an unnecessary barrier to the establishment of a trail. The Board should not take this approach in future cases.