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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
July 7, 2025
Part of
Public Record

Re: Ohi-Rail Corporation – Discontinuance – In Perry and Muskingum Counties, Ohio,
AB 1321X; Conrail Abandonment of Lines in Zanesville, Ohio, AB 167 (Sub-No.
445)

Dear Ms. Brown:

The Ohio Rail Development Commission, as the successor to the Ohio Rail Transportation Authority, hereby submits its reply to Newark, Heath, & Buckeye Lake Scenic Railway's Motion for Preliminary Injunction (Expedited Consideration Requested) in the respective captioned matters, filed on June 16, 2025. If there are any questions about this matter, please contact me directly, either by telephone: 202-663-7831 or by email at czorbaugh@mullinslawgroup.net. If I am unavailable, you may contact Spencer M. Naake, who can be reached at (202) 663-7829, or by e-mail at snaake@mullinslawgroup.net.

Sincerely,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh
Special Counsel for the Ohio Rail Development
Commission

Enclosures

cc: Alan Klodell
Matt Dietrich
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1321X

**OHI-RAIL CORPORATION – DISCONTINUANCE OF SERVICE AND LEASE
OPERATIONS – IN PERRY AND MUSKINGUM COUNTIES, OH**

AB 167 (Sub-No. 445N)

CONRAIL ABANDONMENT OF LINES IN ZANESVILLE, OH

**OHIO RAIL DEVELOPMENT COMMISSION’S REPLY TO
NEWARK, HEALTH, & BUCKEYE LAKE SCENIC RAILWAY’S
MOTION FOR PRELIMINARY INJUNCTION (EXPEDITED
CONSIDERATION REQUESTED)**

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July 7, 2025

**Attorneys for Ohio Rail Development
Commission**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1321X

**OHI-RAIL CORPORATION – DISCONTINUANCE OF SERVICE AND LEASE
OPERATIONS – IN PERRY AND MUSKINGUM COUNTIES, OH**

AB 167 (Sub-No. 445N)

CONRAIL ABANDONMENT OF LINES IN ZANESVILLE, OH

The Motion for Preliminary Injunction, filed by Z&W¹ in this proceeding, must be denied. It fails to meet any one of the prerequisites set by the Board for imposition of a preliminary injunction. It fails to carry the heavy burden that is to be borne by the proponent of such an extraordinary request for relief. The Board must deny the request for a preliminary injunction in this proceeding.

INTRODUCTION

On February 1, 2023, the STB published a Discontinuance of Service Exemption regarding some 14.8 miles of rail line in Ohio. On June 16, 2025,² Z&W filed a Petition to Reopen and Vacate Discontinuance (“Petition”) and concurrently filed a Motion for Preliminary Injunction (“Motion”) in the above-captioned proceedings. ORDC has today filed a reply to the Petition.

¹ In this pleading, “Board” or “STB” shall mean the Surface Transportation Board, “Petitioner” or “Z&W” shall mean Newark, Heath, & Buckeye Lake Scenic Railway, doing business as the “Zanesville and Western Railroad Company”, and “ORDC” shall mean the Ohio Rail Development Commission, the successor to the Ohio Rail Transportation Authority (“ORTA”). Other terms shall be as defined in the document.

² The filings on June 16, 2025 are materially the same as those originally filed on June 13, 2025, but not accepted by the Board due to minor concerns with regard to conformance to the Board’s regulations. All references herein shall be to the filings made on June 16, 2025.

In the Petition, Z&W primarily argues that in 2023, the Board committed material error in permitting Ohi-Rail to proceed with a discontinuance of service exemption over a segment of railroad without having performed an environmental review. In the Motion, Z&W asks the Board to issue a preliminary injunction prohibiting ORDC from permitting any track removal during the pendency of the Board’s review of the Z&W Petition to reopen. ORDC, in reply to the Z&W Petition to Reopen and Vacate that is filed concurrently with this response, explains why the Z&W Petition is flawed and must be denied. In this response, ORDC addresses the Z&W Motion for Preliminary Injunction.

BACKGROUND

The northeast United States rail system was in trouble, and Congress stepped in to try to save it. Part of the solution was to transfer some lines of various bankrupt and otherwise struggling carriers to Conrail, some of which (including the lines involved here) would be subject to the grant of immediate abandonment authority pursuant to the Northeast Rail Services Act of 1981 (“NERSA”).³ Environmental review was not required for the original authorization for the abandonment of certain Conrail lines pursuant to NERSA. Consummation (and notice of consummation) of the abandonment also was not required to be achieved within any specific time.

In this proceeding, both Z&W’s Motion and Petition concern 14.8 miles of rail line owned by the ORDC, including the Fultonham Running Track from milepost 0.0 to milepost 3.1 (“Glass Rock-East”) and the Z&W Industrial Track from milepost 45.8 to milepost 57.5 (“Glass Rock-West”), in Perry and Muskingum Counties, Ohio (collectively, the “Line” or “Glass Rock

³ See Norfolk S. Ry. – Discontinuance Exemption – In Hudson Cnty., N.J., AB 290 (Sub-No. 212X); CSX Transportation, Inc. – Discontinuance Exemption – In Hudson County, NJ, AB 55 (Sub-No. 584X) (STB served January 25, 2002).

Branch”).⁴ The Line, when it was acquired by ORTA, was authorized for abandonment, but that abandonment had not been consummated.⁵

ORDC first sought guidance from the Board regarding the Line. In 2020, the Board advised ORDC that “the Line remains within the jurisdiction of the Board and thus would be eligible for interim trail use/rail banking pursuant to the Trails Act, provided that the current operator of the Line requests and receives Board authority to discontinue common carrier service.”⁶ The Board’s advice made sense, because, again, based upon the abandonment authority granted, at the time it was granted, the party controlling the Line could have reinstituted common carrier service over the Line, consummated an abandonment of the Line, or filed for discontinuance with the intention of introducing interim trail use/rail banking to keep the Line within the freight rail system while at the same time ensuring a public use.⁷

Subsequently, and in conformance with the Board’s direction, ORDC sought discontinuance authority, and further sought the right to pursue interim trail use/rail banking on the same. Both

⁴ The Line was part of the 40.8 miles of rail line in Zanesville, Ohio, that Conrail was authorized to abandon on March 12, 1982 by the Interstate Commerce Commission (“ICC”), pursuant to section 308 of the Regional Rail Reorganization Act of 1973, as amended by the Northeast Rail Service Act of 1981, 45 U.S.C. 748. See Conrail Abandonment of Lines in Zanesville, Ohio, slip op. at 1 (STB Served April 8, 2024) (“Abandonment NITU Decision”).

⁵ Ohio Rail Development Commission – Petition for Declaratory Order, FD 36387, slip op. at 4 (STB served December 22, 2020) (“Here, the Board finds that ORTA acquired the Line from Conrail under section 308(e)(3)(A) of NERSA before abandonment was consummated”).

⁶ Id., slip op. at 1.

⁷ Id., slip op. at 5-6.

requests were granted in 2023.⁸ The Board determined that “because the Line has already been authorized for abandonment, this discontinuance does not require an environmental review.”⁹

Negotiations with regard to interim trail use/rail banking followed, but in 2024, the identity of the trail sponsor changed, and a new certificate of interim trail use (“CITU”) was published.¹⁰ Earlier this year, ORDC and the new prospective trail sponsor, Muskingum Valley Park District (“MVPD” or “Park District”), requested and received an extension of the CITU negotiation period until April 8, 2026.¹¹

Throughout almost this entire process, Z&W was present on the Line but took no action with regard to any of the proceedings discussed above.¹²

In the Petition, Z&W primarily argues that in 2023, the Board committed material error in permitting Ohi-Rail to proceed with a discontinuance of service exemption over a segment of railroad without having performed an environmental review. ORDC, in today’s response to the Petition, demonstrates how that Z&W argument is fatally flawed, and that the Board did not commit material error in permitting the Line, already authorized for (but as yet to be consummated)

⁸ See Ohi-Rail Corporation – Discontinuance of Service Exemption – In Perry and Muskingum Counties, Ohio, AB 1321X (STB served February 1, 2023) (“Discontinuance Proceeding” or “Discontinuance Decision”); see also Conrail Abandonment of Lines in Zanesville, Ohio, AB 167 (Sub-No. 445N), Decision and Certificate of Interim Trail Use or Abandonment (STB served March 13, 2023); Section 8(d) of the National Trails System Act (“Trails Act”), 16 U.S.C. § 1247(d).

⁹ See Discontinuance Decision at n. 4.

¹⁰ The Perry County Board of Commissioners (“Perry County”) on March 13, 2023, was originally issued a CITU by the Board on March 13, 2023, confirming Perry County as the initial trail sponsor. However, on April 8, 2024, the Board granted Perry County/ORDC’s request for Muskingum Valley Park District (“MVPD”) to be the replacement trail sponsor for the Line and issued a replacement CITU. See Conrail Abandonment of Lines in Zanesville, Ohio, AB 167 (Sub-No. 445N), Decision and Certificate of Interim Trail Use or Abandonment (STB served April 8, 2024).

¹¹ Id., STB served March 19, 2025.

¹² See Verified Statement of Matthew Dietrich, at 1 (“VS Dietrich”) (describing interactions with Z&W regarding the line since 2007). See also, Z&W Petition, Exhibit A (a lease agreement between ORDC and Z&W commencing January 1, 2018).

abandonment, to be the subject of a Notice of Exemption for discontinuance authority without an environmental review.

In the Motion, however, Z&W goes a step further, asking the Board to issue a preliminary injunction prohibiting ORDC from permitting any track removal during the pendency of the Board's review of the Z&W Petition to reopen. Specifically, in Z&W's cross-filed Motion, it requests a preliminary injunction "against further removal" of track "[t]o support its relief and prevent further harm—track salvage—that would undermine the purpose of the [National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA")]."

ORDC, here, incorporates its concurrently filed Reply to Z&W's Petition, and contends that Z&W has not met the criteria for a preliminary injunction in the Discontinuance Proceeding.

ARGUMENT

Z&W's Motion for Preliminary Injunction should be denied by the Board as it does not meet the standard for imposition of a preliminary injunction. That standard is succinctly set forth in the Board's December 21, 2018, decision in the City of Fishers proceeding.¹³

Under 49 U.S.C. § 1321(b)(4),¹⁴ the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports granting the preliminary injunction." A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction."

The Board has been clear that the burden on a party seeking a preliminary injunction is a heavy one.

"A preliminary injunction is an extraordinary remedy and the party seeking it carries the burden of

¹³ See City of Fishers – Petition for Partial Revocation of Exemption, FD 36137, slip op. at 6-7 (STB served December 21, 2018) ("City of Fishers") (citations omitted).

¹⁴ Z&W cites to 48 U.S.C. § 721 (b)(4); however, this code has since been transferred to 49 U.S.C. § 1321(b)(4).

persuasion on all of the elements required for [such] extraordinary relief.”¹⁵ Z&W has not carried its heavy burden in this case.

A. Z&W Is Not Likely To Prevail On The Merits Of Its Petition To Revoke And Vacate The Discontinuance.

Z&W is not likely to prevail on the merits of its Petition to have the Discontinuance on the Line reopened and revoked. ORDC adopts herein its Reply to that Petition in its entirety, but notes the following for consideration.

The Director of Proceedings followed Board precedent in issuing the decision authorizing the discontinuance of the Line. Z&W has presented no evidence or argument to rebut the long-held understanding that neither the Board, nor the ICC before it, had any discretion to conduct environmental review of NERSA abandonments or discontinuances of lines subject to NERSA abandonments. Z&W has presented no evidence that there is a timeline for consummation of a NERSA abandonment, and has not even attempted to present evidence contrary to the fact that an abandonment has never been consummated for the Line. The initiation of trails use and rail banking is not a federal action subject to environmental review.

There is simply no reason, in law or in fact, for the Board to reopen and revoke the Discontinuance Decision. It was properly reasoned, grounded in the law, and in no way reached in an arbitrary or capricious manner.

¹⁵ See Union Pacific R. – Petition for Declaratory Order and Preliminary Injunction, FD 36197, slip op. at 3, (STB served June 29, 2018) (“UP Petition”) (citations and internal quotation marks omitted).

B. The Board Does Not Need To Reopen The Proceeding To Explain Why It Is Not Required To Reopen The Proceeding.

In any event, Z&W presents an interesting fallback position, should its first argument fail (as it should). Z&W asserts that the Supreme Court case of Baltimore Gas & Electric v. Natural Resources Defense Council, Inc.¹⁶ *requires* the Board to reopen the proceeding because, according to Z&W, the Board must explain why it did not need to make an environmental inquiry in this individual case.

Z&W misreads the Supreme Court precedent. In that BG&E case, the Supreme Court was reviewing a Court of Appeals determination that rules promulgated by the Nuclear Regulatory Commission were arbitrary and capricious based upon an assumption that the NRC had made in promulgating the rule. The assumption was, as to licensing any particular nuclear plant, that reference to the rule, and a particular table embedded therein, was sufficient and that no further discussion of the environmental effects was required. The Court of Appeals thought that mere reference to the underlying table was insufficient. The Supreme Court *reversed* the Court of Appeals and found that the underlying rule (like the assumptions made by the Board in the discontinuance notice of exemption proceeding) was sufficient and not arbitrary and capricious, and that individual environmental decision-making is not required for each and every licensing proceeding. “NEPA does not require agencies to adopt any particular internal decision-making structure. Here, the agency has chosen to evaluate generically the environmental impact of the fuel cycle and inform individual licensing boards, through the Table S-3 rule, of its evaluation. * * *

The environmental effects of much of the fuel cycle are not plant-specific, for any plant, regardless of its particular attributes, will create additional waste that must be stored in a common long-term

¹⁶ Baltimore Gas & Electric v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983) (“BG&E”) (cited in the Motion at 6).

repository. Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings....”¹⁷

For this fallback position, Z&W cites, and similarly misreads, a second case as well, that being the Citizens’ Commission to Save Our Canyons case from the 10th Circuit Court of Appeals.¹⁸ Z&W argues that if the Board decides (as it must) that “it did not need to make an environmental inquiry, it owes the public an explanation as to why,” and, “[t]o forgo such an explanation would be arbitrary and capricious.”¹⁹ Z&W argues that the only way for the Board to explain its position would be to reopen the underlying proceeding.

But there are two very fundamental flaws with this argument. First, in the Citizens’ Commission decision, in fact on the very page cited by Z&W, the court explains that administrative agencies have the ability to determine what can be categorically excluded from NEPA review, as the Board has in this case:²⁰

In certain circumstances, however, an agency need not follow the detailed NEPA procedures described above. Under regulations promulgated by the Council on Environmental Quality (CEQ), an agency is not required to prepare either an EIS or EA if the proposed action does not ‘individually or cumulatively have a significant effect on the human environment. By and large, the federal regulations delegate to individual agencies the responsibility of defining what type of actions may be categorically excluded from NEPA review.

But more fundamentally, perhaps, is the simple fact that, should the Board decide to address the environmental treatment of discontinuances of operating rights, it is free to do so. It need not have to reopen the proceeding to do so, though. The Board may explain its actions in any decision it

¹⁷ Id. at 101.

¹⁸ See Citizens’ Commission to Save our Canyons v. U.S. Forest Service, 297 F.3d 1012 (10th Cir. 2002) (“Citizens’ Commission”).

¹⁹ Z&W Motion at 6 (citing BG&E and Citizens’ Commission).

²⁰ Citizens’ Commission, 297 F.3d at 1023 (cited on page 6 of the Motion).

makes to deny the Petition or the Motion. Reopening the Board's decision is not a necessary prerequisite for the Board to explain why it is not reopening the Board's decision.

C. Track Salvage will not Irreparably Harm Z&W.

"A party seeking a preliminary injunction must establish that * * * (2) *it* will suffer irreparable harm in the absence of a preliminary injunction...."²¹ Z&W has not demonstrated that Z&W will suffer irreparable harm in the absence of the preliminary injunction. Z&W misconstrues this element of its required showing.

First, Z&W claims that the Board would be impaired in determining the environmental effect of track salvage if that track salvage has already happened, citing the Board's policy statement published April 23, 2008 in Ex Parte 678,²² and apparently indicating that Z&W would be hampered in progressing its arguments to reopen and revoke. The referenced policy statement is completely inapplicable to the proceeding at hand given that the policy statement deals, by its very terms, on consummation of an *abandonment* of a rail line, thus "remov[ing] it from the national transportation system" (the issue before the Board in this proceeding being a *discontinuance* on a line that has already been authorized for abandonment, with the hope that the line could eventually be placed in trail use/rail bank and thus *keep* the line in the national transportation system).

Setting that aside, though, Z&W has not presented evidence that allegedly irreparable harms (in this case, Z&W's inability to argue for reopening and revocation of the discontinuance authority) "have actually occurred or are likely to occur."²³ Thus, Z&W has failed to make the requisite showing to support the imposition of a preliminary injunction.²⁴

²¹ City of Fishers, slip op. at 6 (emphasis added).

²² See Z&W Motion at 4-5 (citing Consummation of Rail Line Abandonments that are Subject to Historic Preservation and Other Environmental Conditions, EP 678, slip op. at 3 (STB served April 23, 2008)).

²³ UP Petition at 4.

²⁴ Id.

Z&W complains about three prior track removals, claiming that “[r]eplacement of track that should never have been removed will artificially drive up the subsidy amount under an offer of financial assistance by inflating the cost of meeting Federal Railroad Administration standards,” and citing 49 C.F.R. § 1152.27(a)(3).²⁵ That CFR section involves an applicant’s offer of financial assistance to continue existing rail service. Z&W does not imply that it intends to take advantage of that provision to ensure a continued common carrier obligation on the Line. Instead, it presents a hypothetical about someone else taking over freight operations on the Line, and stops there.²⁶ Z&W does not represent to the Board that, if the Board were to impose a preliminary injunction against further salvage, Z&W has the intention, and the ability, to make an offer of financial assistance.²⁷ Instead, Z&W must live with the fact that it has been involved with the line at various times since 2007, through short-term and long-term leases, and throughout the entire time has failed to maintain the lines as required under those leases.²⁸ Each of those leases involved both Z&W’s knowledge of the condition of the Line, as well as Z&W’s obligation to maintain the portions of the Line that Z&W occupied.²⁹

It is difficult to parse the concerns that are involved in Z&W’s discussion on how *further* track removal would prejudice the track removal when it focuses on the “3 pre-discontinuance track

²⁵ Motion at 5.

²⁶ Offers of financial assistance in discontinuance proceedings subsidize the existing operator’s continuation of service for up to a year to existing shippers and are intended to give existing on-line shippers a year to relocate or make alternative transportation arrangements.

²⁷ Indeed, Z&W admits that “it is highly unlikely that Z&W (a modest excursion operation with equipment trapped on part of the Line) could afford the one-year subsidy that replacement to FRA specifications would require.” See Motion at 5. Further, although it is not clear who authored the handwritten comment, Z&W itself introduced into the record a document emphasizing the fact that “Z&W Scenic is NOT a common carrier” and apparently not willing to petition and receive freight rights from the STB. See Z&W Petition, Exhibit B

²⁸ See VS Dietrich at 1-3.

²⁹ See, e.g., Z&W Petition, Exhibit A, Lease, Article V (lessee, having inspected the Line, accepts the Line in its current condition, and commits to maintain the leased premises in good order and safe condition).

removals.”³⁰ A preliminary injunction is forward-looking and “will generally not be granted unless the requesting party can show that it faces *unredressable actual and imminent harm that would be prevented by an injunction*.”³¹ But even if Z&W were to somehow tie harm arising from any continued salvaging action (which it has not done), it has had nearly two decades involvement with the line to be able to take its own action (as permitted under the various leases to which it was/is a party) to prevent the tracks from becoming a safety risk or by raising the issue with the Board before today. Z&W’s claim of irreparable economic harm is speculative and unsubstantiated.³²

If Z&W wanted to present an OFA, it could have done so during the discontinuance proceeding. The Board’s decision in the Discontinuance Proceeding was clear: “Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will be effective on March 3, 2023, unless stayed by pending reconsideration.”³³ Z&W took no action to provide a formal expression of intent to file an offer of financial assistance then, and it does not do so now. Thus, Z&W’s claim of irreparable economic harm is purely speculative.

Further, the economic loss related to a potential person subsidizing an OFA for the Line does not relate to the movant Z&W’s economic loss. “Although economic loss is not generally considered irreparable harm, where it threatens the very existence of the *movant’s business*, such a

³⁰ Id.

³¹ See City of Fishers, slip op. at 7 (emphasis supplied).

³² If one were to speculate, one could envision that the true motivation behind the Petition and the Motion was the fact that, given Z&W’s repeated failures under its leases, that it has gotten to the point where Z&W’s occupation of portions of the Line have come to an end and Z&W must take action to remove its equipment from certain portions of the Line that Z&W is not authorized to occupy and that are subject to salvage. See, Exhibit E to the Petition. Not even Z&W, however, is able to argue that to the Board, and instead Z&W relies of other, amorphous arguments of the “administrative process” in this proceeding.

³³ Discontinuance Decision at 2 (footnote omitted).

loss may be considered irreparable.”³⁴ Clearly, it is incumbent upon Z&W to tie the alleged harm in not proceeding with the preliminary injunction to harm that Z&W will incur, not harm that allegedly would be felt by others.

D. Z&W Fails To Demonstrate That A Preliminary Injunction Would Be In The Public Interest.

Z&W bears the burden of demonstrating that the public interest supports granting the preliminary injunction. It has failed to carry that burden.

Z&W states that “the Board has concluded its processes require an environmental and historic report as a predicate for a discontinuance that would permit salvage,” citing a BNSF discontinuance decision.³⁵ But that decision does not support Z&W’s claimed assertions. The BNSF Discontinuance proceeding involved a full application for discontinuance of operations over a rail line that had a significant amount of lead contamination, leading to health concerns and dangers for employees and other persons present on the line. It involved a line that was embargoed for nearly 10 years to comply with remediation orders and public safety. “BNSF met with the Board’s Office of Environmental Analysis and was informed that, since BNSF was only discontinuing rail service, there was no need for BNSF to prepare and file an Environmental Report and Historic Report.”³⁶ Further, BNSF made the representations, in its application, that “[n]o traffic will be diverted as a result of the proposed discontinuance and BNSF will not salvage the Line until BNSF obtains authority to abandon the Line at which time BNSF will prepare and file an Environmental Report and an Historic Report.”³⁷ Therefore, the BNSF Discontinuance decision was merely reiterating

³⁴ See City of Fishers, 2018 STB LEXIS at *18; citing Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

³⁵ BNSF Railway – Discontinuance – in Iron and Crawford Counties, Mo., AB 6 (Sub-No. 476) (“BNSF Discontinuance”), slip op. at 6 [sic] (STB served August 17, 2011). Z&W apparently meant to cite to page 5 of the Board’s BNSF Discontinuance decision.

³⁶ BNSF Discontinuance, AB-6 (Sub-No. 476), Application at 19, submitted April 29, 2011.

³⁷ Id.

what BNSF sought and represented with regard to the application. Citing that line from the BNSF Discontinuance decision implies that salvaging the affected line was at issue in the proceeding when it was not.

In fact, the entirety of Z&W's Petition and Motion runs counter to the public interest. ORDC has taken significant steps over the past couple of years to negotiate a trails use agreement with two different trail sponsors.³⁸ Z&W seeks to have the Board's Discontinuance Decision reopened and revoked, thus setting back significant efforts that have gone towards interim trail use/rail banking, and ensuring the Line remains a part of the national rail system. As noted in ORDC's Reply to Z&W's Petition, requiring environmental review at this juncture would effectively cancel out nearly two years of negotiations to railbank the Line, which, *arguendo*, would deter future railroads and trail sponsors from seeking to railbank lines for future reactivation under 16 U.S.C. § 1247(d), a deterrence that goes against Rail Transportation Policy ("RTP") under 49 U.S.C. § 10101.

E. ORDC And MVPD Will Be Significantly Harmed By A Preliminary Injunction and/or Lengthy Delays in the Board Ruling on the Petition.

ORDC pursued a discontinuance exemption as directed by the Board as the first step in railbanking the Line under the Trails Use Act. Therefore, ORDC will be significantly harmed by a preliminary injunction in the Discontinuance Proceeding as it will delay the salvaging and removal track to allow the trail sponsor, MVPD, to proceed with the Board-authorized trail use. ORDC and MVPD reached a trail use agreement on April 4, 2025, and were in final discussions with contractors to begin salvaging the rail line between August 2025 and October 2025.

Because a trails use agreement has been reached, Z&W's claims (like much of its evidence) that "[t]here is therefore no harm apparent to either the Commission or the Park District are simply

³⁸ See FN 10.

unfounded.”³⁹ Similar to the rest of Z&W’s arguments, the statement is not only faulty but also based entirely on demonstrably incorrect statements of asserted facts.

In a similar vein, Z&W claims that ORDC and MVPD would “need to show their interest and apparent harm in an intervention petition in AB 1321.”⁴⁰ That is an incorrect statement of the law, even as much as it is based on an incorrect statement of fact. The burden is on *Z&W* to meet each of the elements for its request that the Board take the extraordinary action of imposing a preliminary injunction. It is not for Z&W to shift the burden of proof or persuasion. Moreover, ORDC and MVPD have already demonstrated their intentions, while Z&W has not, and argues against the demonstrated facts. Z&W has failed to carry its burden of demonstrating that the injunction would not harm other parties.

CONCLUSION

The Board’s issuance of a preliminary injunction is an “extraordinary remedy.” It is not justified here. Z&W fails to carry its burden to meet any of the criteria set forth by the Board to justify the imposition of a preliminary injunction. Z&W fails to demonstrate that it is even close to likely to carry the underlying argument for reopening and revocation of the Discontinuance Decision. Z&W has failed to demonstrate that it will suffer irreparable harm in the absence of a preliminary injunction. Z&W does not address how it will be harmed by further track removal and only contends that the prior track removal was not done in compliance with the Acts. It claims speculative economic harm to a person desiring to file an OFA but makes no move toward claiming that it would be that person. A preliminary injunction at this late stage will cause harm to both ORDC and MVPD, who successfully negotiated a trails use agreement after a year of negotiations.

³⁹ Z&W Motion at 7.

⁴⁰ Id.

Late last week, ORDC agreed to refrain from proceeding with salvaging the trackage at issue until the Board issues a decision on the Petition. While ORDC has established its case for denying the injunction sought, this also in effect moots the need for the Board to issue an injunction. ORDC hopes that eliminating the burden on the Board to rule on the injunction will speed up its decision on the petition to reopen. Therefore, for all of the foregoing reasons, ORDC requests that the Board deny Z&W's Motion for Preliminary Injunction.

Respectfully submitted,

/s/ *Crystal M. Zorbaugh*

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**Special Counsel for the Ohio Rail Development
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July 7, 2025