

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

ENTERED
Office of Chief Counsel
January 29, 2026
Part of
Public Record

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

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

REPLY AND OPPOSITION OF RAILS TO TRAILS CONSERVANCY TO PETITION TO
REOPEN FILED BY CSX TRANSPORTATION, INC.

Introduction

For the reasons set forth below, this Board should deny the inexplicably tardy petition to reopen filed by CSX Transportation (“CSX”), which seeks to vacate this Board’s November 14, 2023, decision to revoke the Notice of Interim Trail Use (“NITU”) issued to CSX’s subsidiary Georgia and Highline Railway Company (“GHL”) (hereinafter “2023 Revocation Decision”).

Summary of Argument

CSX fails to explain the delay in submitting its petition to reopen, which it filed more than two years after the 2023 Revocation Decision. Rather than seeking timely administrative reconsideration of the 2023 Revocation Decision, CSX chose to rely exclusively on judicial remedies in the Eleventh Circuit to address its arguments of “material error” in the 2023 Revocation Decision. More than two years later, the Eleventh Circuit case has been fully briefed, and oral argument is scheduled for February 26, 2026. Under the circumstances, CSX’s delay is inexcusable. The Eleventh Circuit is now poised to resolve all the issues of “material error” posed by CSX. It would be unfair to the parties, including intervening respondent Rails to

Trails Conservancy (“RTC”), who have expended time and resources in filing briefs in the Eleventh Circuit, and would, upend established principles of administrative finality and repose.

RTC and this Board and the United States Department of Justice have filed briefs in CSX’s Eleventh Circuit case explaining that there was no material error.¹ We incorporate all the arguments in these briefs herein. CSX now urges the Board to ignore the sound arguments of its own attorneys in a pending judicial proceeding. The Eleventh Circuit is the ultimate arbiter of these issues. Asking this Board to simultaneously revisit these issues is inefficient, would waste of administrative and judicial resources, and justifies the denial of this petition. Alternatively, the Board could defer any further action on CSX’s petition to reopen until after the Eleventh Circuit rules.

More fundamentally, the progress touted by CSX in trail use negotiations with the City touted by CSX would potentially be compromised and even thwarted if this Board vacates the 2023 Revocation Decision, which is the regulatory foundation for the *bona fide* trail use negotiations with the City. The 2023 Revocation Decision, revoking the NITU issued to GHL, was the key factor that allowed negotiations with the City to progress.² Vacating the 2023 Revocation Decision at this late date, years after the City has relied on the revocation in moving forward with *bona fide* trail use negotiations with CSX, would effectively reinstate GHL’s NITU, placing the parties in uncharted territory at the very least creating uncertainties regarding the

¹ A copy of the STB/DOJ brief is attached as Appendix A. Rails to Trails Conservancy filed an intervenor brief also pointing out there was no material error, attached as Appendix B.

² The 2023 Revocation Decision vacated the NITU issued to GHL and gave CSX 60 days to consummate the abandonment or enter into *bona fide* trail use negotiations with the City. Without agreeing to a NITU with a *bona fide* trail user, the abandonment would have been consummated, and CSX would have lost its property interest in the easement.

validity of the NIITU issued to the City and any resulting trail use negotiations or agreement. As CSX acknowledges, the City's limited "support" for CSX's petition to reopen was predicated on the caveat that the petition "will not affect the City's NITU." Petition to Reopen, at 3.

Third, CSX alleges that incremental progress in trail use negotiations with the City of St. Petersburg constitutes a material change in circumstance justifying its petition to reopen. However, CSX acknowledges that no final interim trail use agreement has yet been reached. CSX Petition to Reopen, at 1. Further, filings with this Board suggest that the agreement may not be finalized for many months. In all events, this is not a material change in circumstance but rather, it is the same argument that was raised and rejected by this Board in the 2023 Revocation Decision. The Eleventh Circuit likewise refused to stay briefing of CSX's petition for judicial review based on the same assertions by CSX regarding progress in negotiations with the City. The doctrine of "law of the case" forecloses raising this argument again.

CSX's "concerns" that the 2023 Revocation Decision will impede future trail development activities lack credibility and, in any event, are not ripe for review. As regards CSX's current negotiations with the City, for all the reasons stated above, CSX fails to meet its heavy burden of demonstrating exceptional circumstances necessary to justify the extraordinary remedy of vacatur of the 2023 Revocation Decision. If CSX were to demonstrate that it has finalized an interim trail use agreement and transferred the line to the City for interim trail use, the appropriate consequence is not vacatur of the 2023 Revocation Decision but dismissal of CSX's petition to reopen on the grounds of mootness.

As RTC's brief in Appendix B explains, reopening the 2023 Revocation Decision would permit CSX to again evade an adverse abandonment proceeding by "railbanking" an otherwise unused urban rail line with its own subsidiary in order to continue its lucrative non-trail use of

the property. The 2023 Revocation Decision made future such self-dealing to evade adverse abandonment without institution of trail use more difficult. As STB and DOJ in Appendix A indicate, the 2023 Revocation Decision has a sound basis in the railbanking law and its implementing regulations, and there is no material error in that result. If CSX wishes STB to adopt a different policy, then the proper remedy is a petition for a rulemaking. Accordingly, this Board should deny CSX's petition to reopen or, at the very least, hold it in abeyance until the Eleventh Circuit issues a decision in the pending case.

Discussion

I. CSX's Untimely Petition to Reopen Should Be Denied Or Deferred since the Decision that CSX is Asking this Board to Reopen is Currently Under Active Judicial Review.

The STB regulations provide that a petition to reopen an administratively final decision must be based on a claim that "the proceeding involves material error, new evidence, or substantially changed circumstances. . . ." 49 C.F.R. § 1115.4. This Board approaches petitions to reopen "cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose." *Arizona Pub. Serv. Co. v. Atchison, T. & S.F. Ry. Co.*, 3 S.T.B. 70, 75 (1998) (Arizona II); *see also Arizona Public Service Co., et al. v. The BNSF Ry. Co.*, 6 S.T.B. 851, 855-57 (2003). Here, principles of fairness to other parties and administrative finality and repose strongly weigh against CSX's petition to reopen under the facts of this case.

A. Allowing CSX's Unreasonably Delayed Petition to Reopen Would Waste the Resources of the Parties and this Board And Will Undermine the Finality of This Board's Administrative Decision-making.

This Board is well justified in refusing to reopen a proceeding "where there is evidence a petitioner slept on her rights." *Jost v. STB*, 194 F.3d 79, 85 n.10 (D.C. Cir. 1999). Here, CSX's

arguments of “material error” are precisely the same arguments made by CSX to the Board in 2023 and that are fully briefed and poised for resolution in the Eleventh Circuit. CSX offers no legitimate justification or explanation for waiting more than two years and indeed, until the eve of oral argument before the Eleventh Circuit, to ask this Board to reconsider these issues. Instead, CSX transparently admits that its petition is now being filed to take advantage of the vacancies of two of the five members of Surface Transportation Board asserting that the Board members who dissented in the original decision “now make up that majority” of the Board. CSX Petition to Reopen, at 2.

Allowing CSX’s unjustifiably tardy petition to re-open, the sole purpose of which is admittedly to take advantage of current vacancies on the Board (one of which is subject to a challenge in court), would invite similar petitions to re-open whenever the composition of the Board changes in a manner that one party believes would be more advantageous for reconsideration. There would effectively be no end to administrative decision-making if this opportunism constitutes a valid justification for re-opening a final agency decision that is under active judicial review. One court explained the gamesmanship that granting such a petition would encourage:

If the agency became concerned that a Court of Appeals—or even the Supreme Court—might issue a decision adverse to its interests, it could reopen its proceedings and yank the case out of the courts, regardless of the amount of resources that had already been expended or the advanced stage of the case. Besides being highly inefficient, it would allow the agency to manipulate federal jurisdiction to frustrate litigants by increasing the time and expense required to pursue claims, and prevent or at least postpone into perpetuity unfavorable precedent.

Drs. Nursing & Rehab. Ctr. v. Sebelius, 613 F.3d 672, 679 (7th Cir. 2010).

In any event, the current vacancies on the Board, and CSX’s overly-confident prediction about how the remaining Board members would vote, is not a valid justification for entertaining

this tardy petition. Instead, as noted below, the current vacancies in the Board strongly suggest that CSX's petition should be at the very least deferred until additional Board members are appointed or reinstated.³ CSX is simply engaging in a form of forum shopping that undermines the finality of administrative decision making. These tactics should not be rewarded and encouraged.

It would also be unfair to the parties to entertain this petition and a waste of administrative and judicial resources. Rather than promptly filing a petition to reopen based on material error in 2023, CSX chose to delay this filing for more than two years, holding off until after CSX's appeal to the Eleventh Circuit has been fully briefed and on the eve of oral argument.⁴ By deferring its petition to re-open until the very eve of oral argument, CSX has cavalierly chosen to waste the resources of both RTC and legal counsel for the Board, who are the parties to the Eleventh Circuit case, as well as the Eleventh Circuit. If this Board were to vacate the 2023 Revocation Decision RTC or other aggrieved parties could then petition for review of that decision in the Eleventh (or DC) Circuit. As a result, the only effect of vacating the 2023 Revocation Decision prior to a decision by the Eleventh Circuit would be to delay the ultimate resolution of the legal issues by the courts.

As discussed below, if anything, CSX's representation that the parties have reached an agreement in principle as a result of and in reliance on the 2023 Revocation Decision under the

³ The Board may gain a full complement of members during any deferral period. This may allay concerns about the lawfulness of Board rulings in the absence of Board member Primus, who has challenged his removal from the Board. *Primus v. Trump, et al.*, Case No. 1:25-cv-03521 (DDC, filed 10/01/25).

⁴ CSX sought and obtained a one year stay in the Eleventh Circuit pending negotiations with the City. With no evidence that these negotiations were finalized, the Court of Appeals denied further stays. The current petition to reopen appears to be part of CSX's strategy of delay to avoid judicial review of its own petition.

current law of the case means that the Board should not disrupt a decision fundamental to the advancement of trail development, a result CSX claims to support. CSX’s delaying tactics would disrupt these expectations.

If the Board does not dismiss the CSX petition outright on grounds of tardiness, the interest of efficiency and fairness strongly suggest that the Board should hold this petition in abeyance pending the decision by the Eleventh Circuit. *E.g., N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42144 et al.*, slip op. at 3 (STB served Mar. 31, 2017) (In deciding whether to hold a case in abeyance, the Board considers whether abeyance would promote efficiency and would be fundamentally unfair to any party.) As CSX has acknowledged,⁵ the Eleventh Circuit will “decide independently” the issues that CSX seeks to revisit before this Board. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Any precipitous action by this Board to preempt the Eleventh Circuit’s decision would be highly inefficient. Granting CSX’s petition now, before the Eleventh Circuit resolves the petition, would deprive the Board of reasoning that would “at least, inform the Board’s analysis.” *Atlas Land and Building Corporation (Atlas Land) and Atlas Materials Recycling Corporation – Petition for Declaratory Order – Industrial Spur in Pittsburgh, PA*, FD 36380, at 3 (STB served Aug. 16, 2020). Further, aggrieved parties (such as RTC) would likely then appeal to the Eleventh (or DC) Circuit. The sole result of vacating the 2023 Revocation Decision at this point would be to unnecessarily delay the resolution of the issues in this case. Nor is there any unfairness to CSX in denying the petition pending the Eleventh Circuit’s decision since it is CSX “initiated the court proceeding” that CSX now asks this Board to concurrently revisit. *Id.* (STB Docket. FD 36380). Accordingly,

⁵ CSX Brief, at 21, *CSX Transp., Inc. v. STB*, No. 23-13860 (filed April 14, 2025).

deferring action on the petition until the Eleventh Circuit issues a decision would promote efficiency and would not prejudice any party.

In sum, the balance of the equities in this case as well as the public interest in advancing *bona fide* interim trail use and railbanking strongly support denying CSX's petition to reopen or, in the very least, holding the petition in abeyance until the Eleventh Circuit case is resolved.

B. CSX's Petition Fails to Grapple with the Likelihood that Vacating the 2023 Revocation Decision Could Interfere with and Potentially Jeopardize Bona Fide Interim Trail Use by the City of St. Petersburg.

CSX's petition to reopen is remarkably silent on what would happen to the current efforts by the City of St. Petersburg to create a trail on the line if CSX's petition is granted and the 2023 Revocation Decision is vacated. In fact, such an action could wreak havoc on any efforts on the part of the City to acquire the corridor in reliance on the 2023 Revocation Decision, raising more questions and uncertainties in this already complex proceeding.

For example, the 2023 Revocation Decision put the relevant regulatory rights and/or property interests back in the hands of CSX, enabling issuance of a replacement NITU to the City. If the 2023 Revocation decision is vacated, then GHL's 2020 NITU would be effectively reinstated. If the decision is vacated prior to the transfer of the corridor to the City, how would that affect any "agreement in principle" previously reached between CSX and the City? At that point, CSX may not even be the proper party to such an agreement assuming GHL holds title to the corridor).

As noted above, the 2023 Revocation Decision was the primary if not only incentive for CSX's consent to issuance of a NITU with the City. Would GHL and CSX even agree to a substitute NITU for the City, and to transfer its property interests, if any, to the City under the Trails Act if the 2023 Revocation Decision is vacated? Or, would CSX simply refuse to consent

to further extensions of the City's NITU (which this Board has already indicated it is reluctant to grant absent special showings)? CSX then would be free to continue its lucrative lease of the corridor to Ferg's Bar and Grill, returning to the very circumstances which gave rise to the US DOJ's concerns in the first place.

This does not end the confusion that would result from the relief sought by CSX. If CSX and the City reach a trail use agreement but then the 2023 Revocation Decision is vacated, what happens to the property? The Board will have created a condition under which GHF is the presumptive owner under the reinstated GHF NITU and so evidently is the City under its NITU, without any clarity as to which NITU has precedence. If the 2023 Revocation Decision is vacated after a trail use agreement is finalized and the corridor is transferred to the City under the City's NITU, then GHF may be the NITU holder but without any property, and the City may hold title to the property without any NITU.

Tellingly, there is no representation by CSX or GHF about what would happen to the City's good faith reliance on the 2023 Revocation Decision in entering into trail use negotiations with CSX. CSX's petition to reopen ignores all of these real-world consequences of granting CSX's belated petition to vacate the 2023 Revocation Decision and returning the parties, including the City of St. Petersburg, to the *status quo ante*.

All these possibilities (and more) underscore the fact that vacating the 2023 Revocation Decision would in no way moot or resolve the issues in the case but would instead create complexities that will further delay *bona fide* trail use and/or embroil all the parties in more litigation. The only way to resolve the issues in this case is for CSX to dismiss this petition to reopen. Once the interim trail use/railbanking agreement with the City is finalized and perfected by the appropriate STB filings, dismissal of the Eleventh Circuit case may also be warranted.

II. Ongoing Negotiations with the City of St Petersburg Do Not Constitute Either “Material Error” or “Changed Circumstances” Warranting Reopening the 2023 Revocation Decision.

A. There Are No Changed Circumstances That Warrant Reopening the 2023 Revocation Decision.

CSX also argues that this Board should re-open and vacate the 2023 Revocation Decision because “CSXT and the City [of St. Petersburg] have reached an agreement in principle for the sale of the Line.” CSX Petition to Reopen at 5. While acknowledging that “the transaction has not yet closed” (*id* at 1), CSX argues that this progress toward an interim trail use agreement constitutes “substantially changed circumstances” that warrant vacating the 2023 Revocation Decision. CSX is wrong on all counts.

CSX’s assertions that it has reached an agreement in principle overstates the situation as it exists as of the date of this filing. Contrary to CSX’s representation (CSX Petition to Reopen, at 1-2), the St. Petersburg City Council did *not* approve any “agreement in principle” on January 22, 2026. To the best of RTC’s knowledge, no resolution of approval has, as of the date of this filing, even been scheduled for consideration by the City Council, which must approve the acquisition. Consistent with the absence of official authorization from the City, the City has not filed any notification of any agreement with the Board, as required by this Board’s regulations *See* 49 C.F.R. § 1152.29(h) (“When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached.”)

To the contrary, on December 29, 2025, the City requested an extension of its NITU for one year (until January 12, 2027) asserting that the parties were engaged in due diligence for a purchase “tentatively scheduled for next spring.” Letter, E. Mory (City of St. Petersburg) to C. Brown (STB), filed December 30, 2026, AB 55 (Sub-no. 794X). CSX consented to the

extension, but NARPO objected that the cumulated time exceeded the four years provided for negotiations in 49 C.F.R.1152.29(d) without special showings, given that GHL's first NITU was issued on January 13, 2020. The Board in response granted a NITU extension but only until August 1, 2025, and indicated that special showings will be required for further extension. Decision in AB 55 (Sub-no. 794X) served January 13, 2026.

These facts demonstrate that the City has not yet accepted the terms and conditions of the proposed transaction with CSX and no contractual commitment for the transfer the property to the City. In short, the matter is thus still in negotiation, future interim trail use of the corridor by the City is still not a certainty and there has therefore been no legal change in circumstances. A beyond that which was previously found by this Board to be insufficient in the 2023 Revocation Decision. In short, continued trail use negotiations are not a changed circumstance vitiating the rationale for the 2023 Decision but instead are a natural (and publicly beneficial) consequence of it. ⁶

The only real change so far occurred immediately following the 2023 Revocation Decision, at which point CSX agreed to negotiate with the City under a NITU under the Trails Act. But this is not a changed circumstance vitiating the rationale for the 2023 Decision but instead a natural (and publicly beneficial) consequence of it. If and when a trail use agreement with the City is finalized and perfected with the appropriate STB filings, it would presumably be

⁶ Like the STB, the Eleventh Circuit likewise declined to a stay in briefing in its Eleventh Circuit judicial review proceeding due to CSX's negotiations with the City. T. *See* Eleventh Circuit Order, Case 23-1386 (11th Cir., filed Feb. 15, 2025). If CSX's "negotiations" do not warrant holding the appeal in abeyance, they do not warrant reopening the underlying decision. The Eleventh Circuit's action in refusing to stay proceedings in effect constitutes the "law of the case" that precludes a contrary decision by this Board. *See Canadian National Railway Company (CN) and Grand Trunk Company – Control - EJ&E West Company*, Docket No. FD 35087 (Sub-No. 8), slip op. at 15 n. 69 (STB served Nov. 8, 2012) (law of the case precludes a party from again making the same argument in subsequent proceedings to the Board that was rejected by the appellate court).

grounds for mooted CSX's petition to reopen and not grounds for reopening and vacating prior decisions which served as law of the case supporting the negotiations in the first place.

B. There Was No "Material Error" in the Board's Finding that CSX's Belated Initiation Of Negotiations with the City Did Not Adequately Demonstrate Progress in Making the Line Available for Public Use.

It was not "material error" for the Board, in its 2023 Revocation Decision, to fail to "credit[] CSXT and the City's representations that bona fide negotiations were ongoing." CSX Petition to Reopen, at 6. In fact, there was ample evidence before the Board at that time to support its conclusion that, as of November 14, 2023, "no tangible progress appears to have been made to make the Line available to the public." 2023 Revocation Decision at 8. It is undisputed that CSX informed the Board on June 23, 2021 that a Purchase Sale Agreement for the railbanking/interim trail use of line that it reached with its subsidiary GHL was in fact a "placeholder." *Id.* at 5. Nothing in the record contradicts the fact that, more than two years after consummating the so-called "placeholder" trails use agreement with GHL no steps had been taken to provide trail use on the corridor. The 2023 Revocation Decision alluded to many ways that a *bona fide* trail sponsor may explain delays in progress in making a rail line available to the public as a trail, none of which were invoked by CSX. 2023 Revocation Decision at 10 n. 15. Rather, the corridor was still actively being leased to Ferg's bar and grill for non-trail use.

CSX did not provide any actual evidence of being in serious negotiations with a *bona fide* interim trail user in 2023. To the contrary, in its Response to Comments filed March 28, 2023, CSX represented that negotiations with the City had "failed." CSX Response to Comments, Filing 306385, at p 12 (March 28, 2023). While CSX then asserts that, shortly thereafter, it informed the Board on June 15, 2023, that it was "engaged in negotiations" with the City (CSX Petition to Reopen, at 5), the Board was undoubtedly correct in finding that these representations

were “vague.” 2023 Revocation Decision at 8. CSX did not provide any supporting evidence that it had consented to the issuance of a new NITU authorizing interim trail use negotiations with the City under the Trails Act or provide any concrete information about the status of its “negotiations” with the City. It was not until *after* the 2023 Revocation Decision -- three years after this Board had issued a “placeholder” NITU -- that CSX agreed to enter into trail use negotiations with the City under the Trails Act. Accordingly, there is no material error in the 2023 Revocation Decision’s finding that CSX’s vague and last-minute assertion that it was “engaged in negotiations” with the City were “not persuasive given the circumstances and history of the proceeding.” 2023 Revocation Decision, at 8.

In any event, the suggestion in CSX’s petition that there was a “material error” in the Board’s failure to credit negotiations with the City is a tardy as its allegations of material error in the decision itself. CSX has been in trail use negotiations with the City (albeit without consenting to a replacement NITU) by its own admission, commencing around June 2023. *See* Status Report, *CSX Transp., Inc.—Abandonment Exemption—In Pinellas Cnty., Fla.*, Docket No. AB 55 (Sub-No. 794X) (filed June 15, 2023). CSX offers no reason for its delay in raising this allegation of error, other than its apparent belief that its petition will be received more favorably by the current Board. As noted above, revisiting decisions years after numerous parties have in good faith relied on these decisions would encourage and reward parties who intentionally fail to make timely request for reconsideration as a way to engage in forum shopping and would violate core principles of administrative finality and repose.

III. Vacatur of this Board’s 2023 Revocation Decision is Not Justified or Appropriate

CSX cites no legal authority for its request to vacate the 2023 Revocation Decision based on the argument that the issues in that case will be “moot” when the “agreement in principle”

with the City is finalized and closed. As noted above, actual progress in negotiations followed and flows from the 2023 Revocation Decision and is not grounds to revoke it. Vacatur of that decision could instead have the effect of upending that transaction.

CSX also argues that its objective in seeking to reopen the 2023 revocation decision is to eliminate “precedents” that CSX perceives as undesirable to “future trail development” activities. Petition to Reopen, at 4. CSX’s concern, even taken at face value⁷ presents a question of ripeness rather than mootness. Any future actions that potentially implicate this Board’s 2023 Revocation Decision will be judged by this Board based on the facts of the particular case.

In fact, no concerning “precedent” is created beyond the extraordinary facts in this case. The 2023 Revocation Decision specifically pointed to the “repeated concerns raised by the Board, in 2020, about GHL’s and CSXT’s intention regarding the Line *given the combination of unusual circumstances of the case.*” 2023 Revocation Decision, at 8 (emphasis added).⁸ CSX (or any purported trail partner) can avoid the issues giving rise to the 2023 Revocation Decision by actually “making the Line available to the public.” CSX Petition to Reopen, at 8. If CSX does so, this Board can distinguish or clarify the reasoning of the 2023 Revocation Decision to ensure

⁷ It goes without saying that the mission of CSX, a for profit entity, is not focused on trail development. By contrast, RTC, an organization whose mission is to create trails, unequivocally believes, under the facts of this case, that the 2023 Revocation Decision was necessary in order to advance trail development of the corridor at issue. Moreover, it is difficult to square CSX’s purported concern about “future trail use development” with its actions in this case, given “CSXT and GHL’s unexplained failure to make the Line available to the public as a trail in any way,” 2023 Revocation Decision, at 11.

⁸ These “unusual circumstances” include the extraordinary letter written by the U.S. Department of Justice to this Board pointing out that CSX had entered into a lease of the corridor to Ferg’s for the stunning rent of \$50,000 per month, which rental was apparently being subsidized by compensation paid to Ferg’s from the U.S. Treasury for the “taking” of the corridor by virtue of the NITU issued to GHL.

that the purpose of the Trails Act is satisfied. Either way, CSX's purported concerns about the impact of the 2023 Revocation Decision on future trail development are not ripe for review.

Regardless of the status of a trail use agreement with the City, CSX's request for vacatur has no support in the law. The U.S. Supreme Court has held that requests for vacatur will only be granted based on the existence of "exceptional circumstances justifying extraordinary relief," and account for the public interest. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27, 29 (1994). A request for vacatur is appropriate only where the change in circumstances is a result of "happenstance" rather than the voluntary action by the non-prevailing party, such as through settlement. *Id.* at 26. If the action on which a request for vacatur by a losing party is based is that party's own action, "the losing party has voluntarily forfeited his . . . equitable remedy of vacatur." This is true even though the "respondent agreed to the settlement that caused the mootness." *Id.*

Here, vacatur is manifestly inappropriate under the facts of this case. CSX's voluntary action in negotiating an interim trail use/railbanking agreement does not constitute the sort of "happenstance" that warrants vacatur. CSX's actions in finally initiating trail use negotiations with the City were not mere "happenstance." Rather, the negotiations as germane here occurred only *after* the 2023 Revocation Decision. That decision prompted CSX finally to consent to the City's request to negotiate an interim trail use agreement under the Trails Act. The 2023 Revocation Decision was not an obstacle to trail development; the obstacle was the 2020 NITU issued to GHL. The 2023 Revocation Decision, far from being an obstacle to trail development, was the key factor in CSX's decision to enter into interim trail use negotiations under the Trails Act with the City. As explained above, vacating that decision would seriously undermine the preservation of the corridor for interim trail use and future railbanking pursuant to the Trails Act.

If the railroad wants to further address Board policies when railroads enter into Trail Use agreements with their own subsidiaries where neither they nor their subsidiary take any tangible action to make a trail available to the public, then the appropriate mechanism for such remonstrances is a petition for rulemaking.⁹

IV. There is No Material Error in the 2023 Revocation Decision.

For all the reasons stated in the briefs filed by the Surface Transportation Board Office of General Counsel and RTC in the Eleventh Circuit (attached hereto) there was no material error in the 2023 Revocation Decision. To the contrary, that decision was a lawful application of the railbanking statute and regulations and this Board's authority. In any event, as noted above, these legal issues will be dispositively resolved shortly by the Eleventh Circuit. It would be a breathtaking waste of the resources of this Board to re-visit these legal issues without the benefit of the Court's opinion and reasoning.

Conclusion

This Board should deny CSX's petition to reopen. It would be unfair to the parties to revisit the 2023 Revocation Decision at this late date, particularly in light of CSX's unjustified delay in filing the petition until after the issues have been fully briefed in the Eleventh Circuit. Revisiting this decision at this late date would upend principles of administrative finality and repose that are essential to parties who take actions in reliance on final agency decisions. Reopening the proceeding would also be a waste of administrative resources, given that the Eleventh Circuit is poised to make its independent decision on the legal issues raised in the petition. Nor are there any changed circumstances that "moot" the issues that are now before the

⁹ RTC reserves all rights to oppose such a petition if it seeks a result tantamount to what CSX seeks here.

Eleventh Circuit. If CSX believes that any intervening actions “moot” its pending petition in the Eleventh Circuit, it is free to file a motion to voluntarily dismiss its court case. However, neither CSX’s future voluntary action in seeking dismissal of its petition for review or any eventual interim trail use agreement it may reach with the City of St. Petersburg justify vacating the 2023 decision revoking the NITU issued to GHL.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2026, a copy of the foregoing
Reply to CSX's the Petition to Reopen The Proceeding And Vacate The Revocation Decision was
served by email upon all parties of record in this proceeding.

/s/ Andrea Ferster
Andrea Ferster

No. 23-13860-A

**IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

CSX Transportation, Inc. and Georgetown and High Line Railway Company, LLC,

Petitioners,

v.

Surface Transportation Board and United States of America,

Respondents,

and

Rails to Trails Conservancy,

Intervening Respondent

On Petition for Review
from Surface Transportation Board Docket No. AB 55 (Sub-no. 794X)

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CASE NO. 23-13860-A
CSX TRANSP., INC. V. STB

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT
OF RAILS TO TRAILS CONSERVANCY**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.2-1(b), Intervening Respondent RTC certifies that the Petitioner's Certificate of Interested Persons is complete.

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rules 26.1, Intervening Respondent Rails to Trails Conservancy ("RTC") is a non-profit organization incorporated under the laws of the District of Columbia. RTC is without any parent corporation, and no publicly held corporation owns RTC or any portion of RTC.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

RTC believes that oral argument is appropriate in this case and wishes to participate in any oral argument scheduled by the Court.

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INTRODUCTION

This case arises from an attempt by Petitioner CSX Transportation, hereinafter CSX) to avoid an adverse abandonment proceeding brought by the City of St. Petersburg (hereinafter “City”) before the Surface Transportation Board (“STB” or “Board”) to remove federal preemption from a long-unused 0.86 mile long “line” of railroad. The railroad’s mechanism for avoidance was misuse of Section 8(d) of the National Trails System Act, 16 U.S.C § 1247(d) (“the Trails Act”). That statute allows continued federal preemption if, and only if, a trail is intended to be established, and is established, on the premises. Here, CSX purported to enter into an interim trail use agreement pursuant to the Trails Act with a subsidiary (petitioner Georgetown and Highline Railway Company, LLC, hereinafter “GHL”) when in fact CSX and GHL did not intend to establish a trail and but instead used the Trails Act to obstruct the City’s efforts in that regard,.

STB implements the Trails Act in cases such as this one through issuance of a Notice of Interim Trail Use (“NITU”) authorizing negotiations for interim trail use if the railroad consents, if the trail user reaches a voluntary agreement for same with the railroad. CSX declined to negotiate trails use with the City, indicating it would only negotiate with its GHL subsidiary. Although STB (over objections by the City) initially issued a NITU to GHL, GHL, the Board subsequently received a letter from the Department of Justice (“DOJ”) recounting new evidence that

indicated that the railroad's use of the Trails Act was a subterfuge. Among other things, the new evidence presented by the DOJ pointed out that CSX continued to control the property for leasing purposes, and that "[n]either CSX nor GHL has constructed a trail in the right-of-way" or "has any present intention to develop a trail in the right-of-way in the future." Petitioners Appendix ("PA") 0129 (R. 31).

After offering the railroad and its subsidiary (and the public) an opportunity to comment on the DOJ letter and the issues it raised, STB reopened the proceeding and found that in fact the railroad's use of the Trails Act was sufficiently pretextual to require revocation of the NITU. In taking this action, STB left open to CSX the opportunity to enter into a trail use agreement under the Trails Act with some other qualified entity that in fact intended to establish a trail on the premises.

The City of St. Petersburg stepped forward, requesting a new NITU CSX agreed to enter into negotiations with the City for a trail use of the corridor PA0211 (R. 49); PA 0214 (R. 50). Hopefully this will eventually result in the creation of a bona fide public trail. However, CSX and GHL have petitioned for judicial review of STB's revocation of the GHL NITU. Rails to Trails Conservancy ("RTC"), which participated in the STB proceeding below, intervened on the side of respondent STB in this judicial review proceeding. The STB decision revoking the GHL NITU must be affirmed on review.

STATEMENT OF JURISDICTION

This Court has jurisdiction by reason of 28 USC §§ 2321 and 2342(5).

STATEMENT OF ISSUES

In the view of intervenor-respondent RTC, the principal issue in this proceeding is whether the STB has the authority to act to prevent the mis-use of the Trails Act, 16 U.S.C. § 1247(d) as a subterfuge to evade the adverse abandonment process and thereby indefinitely rent its railroad easement to the underlying property owner for purely private non-rail and non-trail purposes, despite the fact that the railroad's easements would revert to the underlying fee owner upon lawful abandonment.

STATEMENT OF THE CASE

RTC adopts the Statement of the Case set forth by Respondent Surface Transportation Board (STB), insofar as consistent with the summary below.

I. Statutory And Regulatory Framework

Federal rail abandonment regulation generally. In order lawfully to abandon a line of freight railroad in the United States, a railroad (like CSX Transportation, hereinafter “CSX”) must first apply for, and obtain, an abandonment authorization from STB. 49 U.S.C. § 10903. There are three basic kinds of authorization processes: application, petition for exemption, and two-year out-of-service notices of exemption (“NOEs or “class exemptions”).

NOE proceedings are governed largely by 49 C.F.R. § 1152.50. This form of authorization is generally very fast compared to statutory application proceedings (governed by 49 U.S.C. § 10903) and petitions for exemption (governed by 49 C.F.R. Part 1121), and it has no provision for shippers to contest the proposed abandonment.

Interim Trail Use remedy. In any abandonment proceeding, a party interested in securing an otherwise-to-be abandoned rail line for public purposes has two basic remedies: (1) a request for a public use condition barring disposition of the property for six months other than for public use (49 U.S.C. § 10905, 49 C.F.R. § 1152.28) and (2) a request for interim trail use and “railbanking.” 49 C.F.R. § 1152.29. Under the latter, STB (if the railroad consents) will authorize negotiations for interim trail use of the right of way, and if the negotiations are successful, the Trails Act provides that the rail line will not be deemed abandoned but may be used as a trail, subject to rail reactivation. In two-year out-of-service class exemption proceedings such as the one at bar, STB implements interim trail use by issuing a NITU instead of a NOE.

II. The proceeding below.

This petition for review arises from an NOE proceeding. The NOE proceeding below was docketed as STB AB 55 (Sub-no. 794X), and involved a 0.86 mile long dead-end line of railroad located roughly directly in front of

Tropicana Stadium (home of the NBA's Tampa Bay Rays). According to the record, the line was last used (by a circus train) in 2004.¹ There are no shippers on the line; track and ties have long since been removed or covered over.² The line is not used for any rail purpose. R.11, at 2. Instead, CSX has leased portions of it out for non-rail uses, like the Ferg's Sports Bar, a major sports bar and grill located on the CSX right-of-way across from Tropicana Stadium, home to the Tampa Bay Rays). *See Collective Edge, LLC v. United States*, 171 Fed. Cl. 736, 744 (2024). The rail corridor is held by CSX only in the form of rail easements with the City as the majority owner of abutting properties (that would benefit from easement extinction). *Id.* Under state law, the CSX railroad easements would extinguish upon cessation of rail use but for continued STB jurisdiction over the property. No one disputes that this corridor would be considered abandoned under state law.³

¹ *See City of St. Petersburg—Adverse Abandonment – CSX Transportation, Inc., – Adverse Aband. – in Pinellas County*, AB 1289, City's Petition for Waiver and Exemption filed July 23, 2019, unnumbered p. 2 (STB document 248242). *See* Addendum. Decisions and filings of the STB are available on the STB's website, <https://www.stb.gov/proceedings-actions/search-stb-records>. Although AB 1289 is a different (but related) proceeding, this Court can take judicial notice of agency records such as the City's Petition for Waivers. *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981).

² City Petition for Waivers, *supra*, at Addendum A-3.

³ Indeed, as will be seen, the United States Claims Court has awarded over \$17,000,000 to several underlying fee owners because the corridor would be deemed abandoned at state law but for federal rail regulation.

And if it were abandoned, then CSX would have nothing to lease (or sell).

However, federal rail regulation of abandonments preempts state law abandonment until and unless the STB authorizes the abandonment and that authorization is consummated by the railroad.⁴

CSX failed to seek abandonment authority despite requests by the City for CSX to relinquish its easement so the City could develop public projects on property. The reason is apparent: first, since CSX owned the right of way only in easement form, it would have nothing to sell upon abandonment, and second, since the right of way was strategically located across from the Stadium, it was a lucrative source of lease revenue for non-rail use (e.g., Ferg's Sports Bar used the entire width of the line for restaurant purposes). *Collective Edge, LLC v. United States*, 171 Fed.Cl. at 744. By declining to seek abandonment authority, CSX was able to continue to benefit from these revenue streams and to prevent the City use of the right-of-way that it already owned in fee.

Adverse abandonment proceeding. The City of St. Petersburg, which already operates a portion of the 46 mile long Pinellas Trail that crosses in front of the Stadium, has long sought the property at issue in this proceeding for use as a

⁴ Compare 49 U.S.C. § 10501(b) (preemption of abandonment) and 49 U.S.C. § 10903 (STB regulation of abandonments) with 49 C.F.R. § 1152.29(e)(2) (railroad must file a letter consummating abandonment within stated time period or authority to abandon lapses).

park and trail adjacent to the Pinellas Trail, and for other publicly beneficial purposes. PA 0087 and R 11, When railroads improperly refuse to seek abandonment of their unused lines in order to hold up public projects or adjoining landowners for no rail purpose, the remedy is to file a so-called “adverse abandonment proceeding.”⁵ The City accordingly initiated such a proceeding against CSX. *See City of St. Petersburg—Adverse Abandonment CSX Transp. – Adverse Aband. – in Pinellas County*, AB 1289, Petition for Waivers filed July 23, 2019 (Addendum)

CSX files a NOE. CSX preempted the City’s adverse abandonment proceeding by filing its own two-year out of service class exemption proceeding on August 20, 2019. R. 1. STB promptly granted the class exemption in a notice published in the Federal Register on September 9, 2019 (84 Fed. Reg. 47,339), which became effective on Oct. 9, 2019. Since this authorized abandonment of the line, STB dismissed the City’s adverse abandonment proceeding “without prejudice” as moot. *City of St. Petersburg—Adverse Abandonment CSX Transp. – Adverse Aband. – in Pinellas County*, AB 1289, STB decision served January 3, 2020 (STB document 47246).

⁵ E.g., *Modern Handcraft, Inc.--Aban.*, 363 I.C.C. 969 (1981). For a general discussion of adverse abandonment proceedings in an urban setting, *see Consolidated Rail Corp. v. ICC*, 29 F.3d 706, 708-09 (D.C. Cir. 1994).

CSX refuses to negotiate trails use with City but agrees to negotiate with itself, d/b/a GHL. Following issuance of the NOE, the City sought both a public use condition and interim trail use. R.3 However, CSX promptly caused a wholly-owned subsidiary Georgetown and High Line Railway Company (“GHL”) to file for interim trail use. PA 0083; (R. 4). CSX then informed STB that it would not negotiate with the City but would negotiate a trail use agreement with itself d/b/a GHL. PA 0086 (R. 6).

STB issues NITU for GHL. Although the City objected to GHL’s qualifications, STB duly issued a NITU authorizing CSX to negotiate with GHL and denied the City any NITU. PA 0111 (R. 20). The issuance of the GHL NITU thwarted public use in two ways. First, since CSX refused to negotiate with City, the NITU issued by STB disempowered negotiations with the City for trail use. In addition , , since the City is the primary adjoining landowner to the 0.86 mile right of way, CSX’s action circumvented the adverse abandonment proceeding and thus served to indefinitely deprive the City of property it owned in fee and to state law remedies to secure the entire corridor for public purposes. As CSX and its subsidiary GHL admit, the subsidiary had no intent to construct or to operate a trail (PA 0177), nor did GHL make an effort to secure a bona fide substitute trail user until the NITU was revoked. In effect, CSX engineered use of

the Trails Act to thwart rather than accomplish any public use of the premises, including any trail use.

City's administrative appeal. The City of St. Petersburg filed an administrative appeal, strenuously objecting to such abusive use of the interim trail use remedy. R. 23. The City noted it was already a responsible entity for a nearby portion of the Pinellas Trail. *Id.* at (“In combination with Pinellas County, the City maintains an adjacent bike and pedestrian trail that runs for approximately 53 miles through the dense, urban areas of the county (“Pinellas Trail”) via a railbanking agreement (STB Docket No. AB_55_646_X.”; R.11, at 2. In contrast, the City noted (R. 23, at. 5) that it had already showed that the CSX subsidiary (GHL) was made up entirely of CSXT employees apparently acting in their official capacity with the company. *Id.* at 5. As a result, each GHL manager thus had a fiduciary duty to CSX, a for-profit private railroad company for which running a public trail would have been a diversion of resources. IAdditionally, both CSX and GHL were represented by the same attorneys before the Board - Louis E. Gittomer and his daughter Melanie B. Yasbin of the Law Offices of Louis E. Gittomer, LLC.*Id.* at 9; R. 11 (Exhibit “B” and “E”). The City showed that the mailing address for GHL was also identical to CSX - owner of record of the subject line - and the registered agent for the parties was the same. R. 11 at 5.

Based on a review of STB proceedings, the City stated that GHIL had made 24 requests before the Board, 9 of which were for NITUs or the equivalent, and 15 were requests for extensions of the negotiation period. R. 11, at 6; R. 23, at 5. The City indicated that the CSX subsidiary had never heretofore consummated a trail use agreement and had never assumed responsibility for an actual trail. *Id.* at 4. The City complained that the CSX subsidiary was basically serving as a ruse to prevent full abandonment of the corridor and deprive the City of its reversionary interests in the property. As the City further indicated in its administrative appeal, since the railroad's property rights are limited to easement in nature, "the property only has value to CSX as long as it can deny the holders of reversionary rights the ability to reclaim their property." R.23, at 9. The City argued that CSX was using the Trails Act not to foster a trail, but instead to gain "more time to top dollar at the expense of legitimate public interest." *Id.* In essence, the City showed that CSX and GHIL were manipulating government regulations to prevent an effective abandonment in order to extract a "regulatory rent"⁶ over and above what a

⁶ In economics, "regulatory rent" refers to the profits or gains generated by manipulating government regulation, rather than creating new wealth. This type of rent, also known as "rent-seeking," occurs when individuals or businesses utilize government regulations or other regulatory frameworks to extract economic gains. <https://en.wikipedia.org/wiki/Rent-seeking>

property was in fact worth but for STB preemption due to lack of abandonment authority.

In response, argued that the STB did not monitor whether, when, or what kind of trail went onto a railbanked line. It complained that the City “wants to limit the field of potential trail users to itself in order to depress the value that CSXT can receive in negotiations.” R.24, at 12. In short, CSX took the position that under STB precedent the Trails Act was designed not to promote trails and public use, but to allow new opportunities for railroads to extract huge regulatory rents. R. 43, at 4.⁷

The Board nonetheless denied City’s administrative appeal, with the admonition that CSX and GHL are “are expected to operate diligently and in good faith in concluding their interim trail use/rail banking negotiations.” PA 0121 (R. 26). Roughly one year later, CSX filed a notification with STB that it had entered into a “Purchase and Sale Agreement” with GHL which purportedly satisfied STB’s Trails Act requirements. PA 0124 (R. 30).

Federal “Takings” Litigation. In the meantime, Ferg’s Sports Bar and several other adjacent landowners sued the United States for a taking of their underlying

⁷ The scope of the regulatory rent sought by CSXT in this proceeding is actually in the record. The City disclosed that CSXT demanded \$15 million for its rail easement (R. 23, at 9) and CSXT complained that the City had only offered \$100. R.42, at 11 n.8.

property interests by reason of STB's issuance of a NITU to CSX/GHL. This litigation ultimately resulted in the award of \$17,859,000 (plus interest) against the United States and in favor of Ferg's, et al *Collective Edge, LLC v. United States*, 171 Fed. Cl. 736, 775-76 (May 16, 2024). In making this award, the Court of Federal Claims specifically acknowledged but did not address the "games or tactical schemes CSX and GHL allegedly employed to avoid the City of St. Petersburg's efforts to convert the unused rail line into a public trail." *Id.* at 749.

STB Reopens the Abandonment Proceeding. Based on discovery in the *Collective Edge* case, DOJ became alarmed that the United States was facing a substantial takings award ostensibly to establish a major urban trail, but that the railroad and trail sponsor were not establishing a trail. Instead, CSX was merely continuing the collection of rent for private, non-trail use on property that would otherwise revert. Accordingly, DOJ sent STB a letter (R. 31), which STB placed in the record on December 14, 2022 (R. 32), detailing information "not available to the Board" when it issued the NITU in this docket, but which was relevant also to the City's adverse abandonment proceeding. PA 129.

DOJ's letter explained, with references to the *Collective Edge* record, that despite the CSX/GHL Purchase and Sale Agreement (purported trails agreement), CSX retained an "occupancy easement." PA 128. Under that easement, CSX retained for itself essentially full control over all existing leases or encumbrances

on the property, including the power to assign the occupancy easement, and to lease, license or permit third parties to use the corridor. Moreover, the only stated consideration for the quitclaim issued by CSXT to its subsidiary was \$10, and the quitclaim barred the subsidiary from interfering with the occupancy easement. *Id.* The DOJ letter stated that neither CSX nor its subsidiary had constructed a trail, or developed a plan to construct a trail, or had any intention of doing so. PA 129. Moreover, Ferg’s continued to pay rents directly to CSX. *Id.*

In essence, the DOJ letter raised the question of whether CSX used its GHL subsidiary for the purpose of evading the City’s adverse abandonment action, while at the same time retaining full control of the corridor and was continuing to use it for non-rail purposes. In doing so, CSX thwarted the rights of the City of St. Petersburg, which owns a majority the adjacent property and to whom the corridor would therefore have reverted upon full abandonment.

By decision served January 27, 2023 (R. 32), STB invited comments on the DOJ letter, noting that whether GHL was a “qualified trail sponsor” was one of the issues in the case, , and specifically indicated that “[t]he responses from GHL and CSXT must, at a minimum, explain whether, and if so how, the Line is being used as a recreational or historic trail.” PA 131.

CSX and GHL in their response argued that they were not required to use the property as a recreational or historic trail, , and admitted it controlled the leases

under the occupancy agreement. PA 0137-138 (R. 33. CSX and GHL claimed this should be acceptable since STB does not regulate when or how a trail, if any, is ever constructed or used on the property. *Id.*

The City filed comments noting that the DOJ's letter was "new evidence" showing, as the City had previously argued, that CSX "is not using the Trails Act [] for its intended purpose. By their own admission, the agreement between CSXT and GHL is not an agreement to create a trail." R. 35, at 3. The City also noted that the Claims Court views all NITU's as "takings," but the "takings" to be constitutional must be for a public purpose, and CSX's pretextual use of the Trails Act to date obstructed the City's efforts to devote the property to public trail use and thus raised the issue whether the NITU issued in this case was for private purposes rather than public. *Id.* at 5-6. Considerations such as this required the agency to address whether GHL as a CSX subsidiary was qualified to enter into an interim trail use agreement on which a NITU could be based.

RTC in its comments on the DOJ letter pointed out that

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.

PA 0145 (R. 32). RTC concluded that

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.

*Id.*⁸

By decision served November 14, 2023, STB reopened the proceeding on the basis of new evidence and revoked the NITU that had been issued to GHF.

PA 0199 (R. 47). STB noted that it “has recognized an obligation to ensure that the right-of-way will in fact be used as a trail,” PA 0200 (citing *Rail Aband.—Use of Rights-of-Way as Trails – Suppl. Trails Act Procs.*, 4 ICC2d, 152, 156 (1987)).

⁸ Similarly, in RTC’s Motion to Strike, filed April 6, 2023, RTC stated that “CSX/GHL are ‘railbanking’ this property to prevent CSX’s property interest from extinguishing, so that CSX can extract a payment for title which is not marketable (i.e., zero value), a kind of “regulatory rent,” from either St. Petersburg or adjoining landowners or both. This is a perversion of the purposes of the Trails Act, and it is no wonder the Department of Justice is reluctant to see Claims Court award damages to adjoining property owners with fee interests for CSX’s abuse of the statute. The situation is doubly alarming in that CSX appears to be preventing St. Petersburg from use of state and local eminent domain (and from enjoying its own reversion of CSX’s easement insofar as located in a street right of way) due to use of the ‘railbanking’ device.” R. 43, at 4.

The STB explained that under CSX/GHL’s arguments, “any manner of trail-conflicting use on a railbanked line would be permissible as long as the trail sponsor has the right, at some point, to stop that usage and establish a trail” but “[t]hat is not consistent with the Trails Act.” PA 0200. Two of the five members of the Board dissented. CSX and GHL filed the pending petition for judicial review.

Although STB revoked the NITU issued for GHL, the Board indicated that the City could reapply for a NITU to be issued for it to negotiate with CSX. PA 0201.⁹ The City duly reapplied. R.49. CSX this time agreed to negotiate with the City, R. 50.

SUMMARY OF ARGUMENT

STB, like its predecessor the Interstate Commerce Commission (“ICC”), has long recognized that STB/ICC abandonment jurisdiction preempts state law easement extinguishments and base fee reversions. STB (and ICC) have likewise long recognized that this can lead to abuse. A railroad may decline to pursue an abandonment authorization for an unused line to prevent owners of the underlying fee interest from enjoying that interest unless and until they meet the railroad’s

⁹ Under STB practice, a NITU is issued for a particular Trails Act applicant with whom a railroad agrees to negotiate. The initial NITU was issued only for negotiations with GHL, as CSX refused to negotiate with City.

demands for compensation. Alternatively, the railroad may prevent a local government from using eminent domain to secure an unused right-of-way for public use by refusal to seek abandonment authorization until the railroad's demands for compensation are met.

In response, the ICC developed and STB still employs the so-called adverse abandonment remedy, in which a third party (usually the underlying fee owner or a government) can file an application for abandonment of a railroad's line. *See Modern Handcraft, Inc.--Aban.*, 363 I.C.C. 969 (1981). City of St. Petersburg's effort to use this remedy so it could enjoy its own fee interest in the property and also establish a park and trail on the property was forestalled by CSX's purported negotiation of, and entry into, a "trails use agreement" with its GHL subsidiary allegedly in compliance with the Trails Act. To avoid abuse of the Trails Act process by railroad's contriving to use interim trail use to evade the adverse abandonment remedy, the STB must have the authority to revoke or withhold NITU's when the railroad's invocation of the Trails Act process is a subterfuge. *Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, 4 I.C.C. 2d 152, 156 (1987).

Revocation of a NITU is appropriate when the alleged interim trail user (here GHL) has no intention to establish a trail, has not established a trail, and has accepted the property subject to an occupancy easement held by CSX which in

effect disempowers GHIL from establishing a trail. The subterfuge is even more destructive here, where the purpose of the NITU is to allow CSX to continue to extract rent from the underlying landowner, who is then in turn effectively reimbursed by the U.S. taxpayers in the form of compensation for the STB's alleged "taking" of their land when it issued the NITU. *See Collective Edge, LLC v. United States, supra.*

CSX's argument that it lacked the notice required by the Administrative Procedures Act ("APA"), 5 U.S.C. § 558 has no merit. First, CSX/GHL waived this argument by failing to raise it before the agency in the first instance. Second, the record demonstrates that CSX understood that revocation of the NITU was a possible outcome of the re-opened proceeding and advocated against doing so in response to the commenting opportunity afforded by the Board.

ARGUMENT

The CSX/GHL arguments have no merit, and RTC will address them in the order they are presented in the Argument section of the CSX/GHL brief.

- I. CSX/GHL's Claim that the Trails Act Limits STB Authority to Revoke NITUs Lacks Merit.
 - A. Issuance of a Trail Use Condition is Not Mandatory Under the Plain Language of the Trails Act Where No Trail Use of the Rail Line Is Contemplated.

CSX/GHL claim that STB's role in implementing the Trails Act is limited to mandatory issuance of a NITU if (a) an entity is prepared to assume

management of, legal liability for, and payment of taxes on a right of way and (b) the railroad consents. This is, at best, a misleading and incorrect summation of the Trails Act. In particular, it ignores the first two sentences of the statute completely.

In its first sentence, the Trails Act declares that the Chairman of the STB “shall encourage State and local agencies and private interests to establish appropriate trails...” 16 U.S.C. § 1247(d) (emphasis added). This sentence renders trail establishment paramount, not irrelevant, to STB’s administration of the statute.

According to the second sentence of the statute, if “such interim use” is made of an otherwise-to-be abandoned railroad “right-of-way,” but is subject to rail reactivation (the railbanking concept), then there is continued federal preemption of state law abandonment laws. *Id.* In the words of the statute, interim trail use subject to rail reactivation “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” *Id.* The converse of this concept is that if there is no interim trail use, then the party occupying the right-of-way is not entitled to claim the benefits of preemption. The plain meaning of the statute is that the party operating under the NITU must have a bona fide intention of establishing a trail.,

The third sentence of the statute provides that if a “state, political subdivision, or qualified private organization is prepared to assume full

responsibility for management of [an otherwise-to-be abandoned right-of-way] and for any legal liability arising out of *such transfer or use*, and for the payment of any and all taxes levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer of conveyance for *interim use* ... and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.” 16 U.S.C. § 1247(d) (emphasis added.) This clearly indicates that STB is under no obligation to impose any conditions or to preclude abandonment if the party in question does not intend to engage in trail use, or to establish a trail on the premises.

In *Preseault v. United States*, 494 U.S. 1 (1986), which upheld the Trails Act against claims it was an unconstitutional taking, the Supreme Court recounted the substantial history behind the statute indicating it was to facilitate the preservation of more other-wise-to-be abandoned railroad rights-of-way for trails. 494 U.S. at 6-8. In doing so, the Court emphasized that Congress decided to treat trail use as equivalent to a discontinuance of rail service rather than abandonment, thus preserving preemption of state law reversions and easement extinctions. The Court quoted the legislative history as follows: “The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes.” *Id.* at 8. In short, the

key to implementation of the Trails Act (i.e., continued federal preemption) hinges on a trail sponsor who actually intends to establish a trail use. The purpose of the Trails Act is perverted when it is used by a railroad's wholly owned subsidiary to thwart bona fide trail use and the property rights of the underlying land owners to facilitate the continued collection of rent from tenants on the unused railroad right-of-way, ultimately at the expense of the U.S. taxpayers, who must reimburse the underlying landowners for the resulting deprivation of their property but without any public purpose being served.

In sum, reading the statute on its face, STB must afford some mechanism to ensure that a purported railbanking entity is in fact establishing an interim trail. Otherwise the agency is allowing abuse of (among other things) the federal preemption arising from use of the Trails Act regulation. An obvious mechanism to prevent abuse is to revoke the NITU if a purported "interim trail user" has no meaningful intention to establish a trail. Contrary to CSX/GHL's assertions, this does not conflict with STB precedent that it will not regulate when or how a trail is established. Rather, it simply reinforces the STB's inherent authority to prevent a misuse of the preemptive power of the Trails Act to actively thwart trail use.

B. Decisions Referencing The "Ministerial" Role of the STB Are Inapplicable Under The Facts of this Case.

CSX/GLT cite cases declaring the STB's role to be ministerial in implementing the Trails Act. CSX/GHL Brief, at 21 (citing *Goos v. ICC*, 911 F.2d

1283, 1295 (8th Cir. 1990)). However, *Goos* makes clear that the ministerial nature of the STB’s role is to further the statutory command that the STB “shall encourage State and local agencies and private interests to establish appropriate trails...” and “shall impose such terms and conditions as a requirement of any transfer of conveyance for interim use.” 16 U.S.C. § 1247(d). Thus, the statutory command is served if the parties intend to establish an “appropriate trail.” This precedent does not in any way undercut the Board’s authority to revoke a NITU (or to issue a NITU) where the railroad and the party essentially admit they do not intend to establish a trail and are not doing so. In all events, STB in its decision below provided a reasonable explanation for overruling any precedent that might permit pretextual use of the Trails Act to preempt state law for purposes other than establishing an interim trail.¹⁰

C. The STB Has the Authority to Revoke CSX/GHL’s NITU In order to Prevent an Abuse of the Trails Act.

STB precedent does not preclude the STB from considering whether invocation of the Trails Act was improper because the railroad and its purported interim trail use partner did not have a bona fide intent to establish a trail, as

¹⁰ See, PA 0203 at n.14 (finding that aspects of *T&P Railway – Aban. Exemption – in Shawnee et al Counties*, 2 STB 36 (1997) (on which CSX relies) “no longer reflects the position of the Board to the extent it suggests that trail use is not a requirement of railbanking”)

CSX/GHL claim CSX/GHL Brief, at 22-23. To the contrary, as the DOJ explained in its, the regulatory history of the STB’s Trails Act procedures make clear that the Board would entertain a “serious challenge to the applicability of the [16 U.S.C. 1247(d)] where the purported trail use offer “was a subterfuge (i.e., that the right-of-away would not in fact be used for a trail.” R. 37 at 3 (citing *Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, 4 I.C.C. 2d 152, 156 (1987)). DOJ explained that STB’s authority is thus not so limited that it must ignore the facts, and that CSX/GHL “admit in their response that GHL did not intend to build a trail at the time of the NITU” and still does not. R. 37, at 3-4. DOJ noted that although CSX/GHL claimed that unknown parties¹¹ were interested in a trail, the only known entity that was interested in actually “being a trail sponsor and building a trail is the City of St. Petersburg, with whom CSXT refused to negotiate.” *Id.* at 4.

The STB’s power to prevent abuse of the statutes it administers is well demonstrated by the STB’s decision in *The Land Conservancy of Seattle and King County – Acq. and Op. Exemption* –BNSF, STB F.D. 33389, served Sept. 25,

¹¹ CSX/GHL’s vague references to another unknown “potential trail manager (CSX/GHL Brief, at 9) is unsupported by the equally conclusory citation to the record. *See* PA 0105 (R. 17); R. 9, at 3). RTC is unaware of any bona fide public agency or trail sponsor other than the City that is prepared to establish a trail on the premises.

1997, which provides a case in point and parallels what happened in this case. In *The Land Conservancy* case, The Land Conservancy (“TLC”) obtained authority to acquire an “active”¹² but unused rail line pursuant to STB’s exempt acquisition regulations. Two months later, it filed for abandonment and interim trail use authority. STB revoked TLC’s acquisition authorization and ordered reconveyance of the line back to BNSF, concluding that TLC did not intend to operate a railroad but instead intended to convert it into a trail upon receipt of abandonment authority. STB stated that “this constitutes a misuse of our procedures, which envision that a party that acquires an active rail line does so to continue to provide rail service. Manifestly, TLC never had any such intent. To protect the integrity of our processes, we will revoke the [acquisition] exemption and order TLC to reconvey the line to BNSF.” F.D. 33389, served Sept. 26, 1997, slip op. at 3. In a similar manner, STB revoked GHL’s NITU because the acquiring party did not intend to establish a trail.

Here, as DOJ notes in its CSX’s retention of an occupancy easement allows it to administer the Ferg’s lease and collect rentals. *Id.* The occupancy easement as described by DOJ appears to encumber the entire right-of-way and amounts to retention by CSX of exclusive control of the surface estate. This is hardly

¹² Lines are considered active if they are subject to STB jurisdiction and not yet authorized for abandonment, even if unused for rail purposes.

consistent with GHL establishing a trail on the premises, or with GHL's alleged assumption of management responsibility for the corridor.

Since GHL has no intent to establish a trail, the only management responsibility on this property is the leases and leasing of the surface estate. But CSX retained that responsibility via its occupancy easement and the provision in the quitclaim deed to GHL in effect precluding GHL from acting contrary to CSX's retained rights. GHL in effect has not assumed any meaningful management responsibility for the corridor, let alone "full" responsibility as asserted by the CSX attorney in advising STB that CSX and GHL had entered into a trail use agreement complying with Trails Act requirements. PA 0124 (R. 30). To the contrary, GHL lacks contractual authority actually to manage the corridor in terms of surface uses. But assumption of management responsibility is a mandatory requirement for issuance of a NITU even under CSX's strained argument that trails are irrelevant to NITU's. In conclusion, revocation of the NITU is not just appropriate but compulsory in the circumstances.

II. CSX/GHL's Contention that STB's Revocation of the GHL NITU Violated 5 U.S.C. § 558 Has No Merit

CSX/GHL contend that STB failed to provide notice required by the APA, 5 U.S.C. § 558(c) prior to revoking the GHL NITU. This claim is not properly before this Court and, in any event, has no merit.

A. CSX/GHL Waived Their APA Argument By Failing to Raise it Before the Agency in the First Instance.

This Court cannot consider this APA argument because CSX/GHL never raised this argument at STB. Indeed, the record appears bereft of any reference to that statute, either in the first instance or by filing a petition for administrative rehearing or reopening. CSX/GHLT have accordingly waived this argument. See, e.g., *Vidiksis v. EPA*, 612 F.3d 1150, 1158–59 (11th Cir. 2010) (petitioner waived argument that he failed to raise in the first instance before the agency). As this Court explained in the *Vidiksis* case,

Under ordinary principles of administrative law, a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency.” . . . “[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” . . . We cannot disregard the importance of permitting the agency to exercise its expertise in the subject matter or ignore the administrative process that has been established below. . . . This rationale is particularly pertinent when the below proceeding maintained an adversarial nature, as it did here, because the parties are given the opportunity to fully develop their arguments at the agency level.

Id. at 1158-59 (citations omitted).¹³ This principle applies to STB proceedings subject to direct appellate review, as in the present case. *See City of Riverview v.*

¹³ The “policy reasons” served by requiring parties to raise their issues before the agency if they wish them entertained on appeal are: “ (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources,

Surface Transp. Bd., 398 F.3d 434, 444 (6th Cir. 2005); *United Transp. Union v. ICC*, 43 F.3d 697, 701 (D.C.Cir.1995); *United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1244 (D.C. Cir. 1997).

B. CSX/GHL Had Sufficient Notice that the STB Contemplated Revocation of the NITU Issued to GHL

In any event, the STB proceeding provided ample notice of the “facts or conduct which may warrant” revocation of the GHL NITU. In particular, STB filed the DOJ letter in the record of this case, which discussed evidence from the *Collective Edge* proceeding and specifically invited comment on the letter. P.A. 0130 (R.32). The letter articulated a variety of facts that suggested that CSX and GHL were using the Trails Act to evade an abandonment authorization for the improper purpose of perpetuating the CSX rail easement so that CSX could continue to collect rent from tenants like Ferg’s, and also thwart the City’s adverse abandonment proceeding (which among other things sought to secure the City’s own property in the corridor for park and trail use). STB’s request for comments expressly directed that CSX/GHL “must, at a minimum, explain whether, and if so

since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Johnson v. Meadows*, 418 F.3d 1152, 1156 (11th Cir. 2005) (citations omitted)

how, the Line is being used as a recreational or historic trail.” PA 0131. As noted in the Statement of the Case, *infra*, RTC filed comments explaining that CSX and GHL were abusing the NITU process and specifically calling for the entire abandonment proceeding to be vacated, and the City’s adverse abandonment proceeding to be reinstituted. CSX and GHL were on ample notice that revocation of the NITU was on the table should STB reopen the proceeding, as it did, and the reasons for that revocation.

III. The CSX/GHL Argument that STB Acted Arbitrarily Or Capriciously Has No Merit

As noted above, the regulatory history of the STB’s rules make clear, STB’s revocation of the GHL NITU is fully consistent with the Trails Act. As the ICC (now STB) explained, fundamentally, the agency must “be assured that the Trails Act has been properly invoked....” and that if a serious challenge to the applicability of the statute is made in a particular case, the full Commission would entertain it. *In Rail Abandonments – Use of Rights-of-Way as Trails –Supplemental Trails Act Procedures*, 4 ICC2d at 156. The STB then stated that an example of such a “serious challenge” was if the invocation of the Trails Act “was a subterfuge (*i.e., that the right-of-way would not in fact be used for a trail*).” *Id* (emphasis added).

Here there are two serious challenges of record: first, the DOJ evidence indicated that CSX and GHL did not intend to establish a trail. Second, GHL

lacked the authority to manage the facility for trail purposes because CSX retained an easement over the surface estate that disempowered GHF from interfering with existing lease, and evidently with any additional encumbrances CSX decided to place on the property. This agency and its predecessor have long explained that “we will not allow our jurisdiction to shield a railroad, or any other party seeking relief before us, from the legitimate processes of Federal, state, or local law.”

Modern Handcraft; *Kansas City Pub. Ser. Frgt. Operation--Exempt.--Aban.*, 7 I.C.C.2d 216, 224- 226 (1990); and *Chelsea Property Owners--Aban.--The Consol. R. Corp.*, 8 I.C.C.2d 773, 778 (1992) *See also The Land Conservancy, supra*, F.D. 33389, served May 13, 1998, slip op. at 14. It is hardly arbitrary and capricious for the agency to prevent use of its Trails Act regulations in a fashion that shields a railroad (here CSX) from legitimate processes of Federal, state and local law when the regulations are not being used to establish a trail but in effect to defeat trails use so the railroad can continue to extract rent from non-rail and non-trail tenants..

The *Modern Handcraft* case is especially germane here. In *Modern Handcraft*, the ICC granted an adverse abandonment over the railroad’s objections. The ICC found that a de facto abandonment had already taken place: there had been no rail service over or rail maintenance to the track for twelve years; the line was being used as a parking lot and for billboard purposes; and the railroad objected to the abandonment apparently only in order to inflate the sale price of the line. *Modern*

Handcraft, 366 ICC at 971. The ICC stated that it would “not allow [its] jurisdiction to be used to shield a carrier from the legitimate processes of State law.” *Id.* at 972.

In this case, the line in question had last been used (by a circus train) in 2004. Track and ties were removed or covered. The line was leased out for non-rail (e.g., restaurant and parking) purposes, and the railroad was avoiding abandonment in order to inflate the sale price of its line (which it held only as an easement which would not command any value on abandonment). The City of St. Petersburg duly brought an adverse abandonment proceeding, similar to that in *Modern Handcraft*, to prevent the railroad from using STB jurisdiction to shield itself “from the legitimate processes of State law.”

CSX responded by filing its own NOE proceeding, which resulted in dismissal of the adverse abandonment proceeding. CSX then agreed to negotiate trail use with its GHL subsidiary and refused to negotiate with the City, which is the only entity identified in the record interested in being responsible for establishment of a trail. Since GHL (among other things) had no intention of establishing a trail or any public use and instead entered into an agreement that empowered CSX to continue to control the right-of-way, the NITU was a mere ruse for CSX to continue to extract rent from non-rail use and “to inflate the sale price of the line.” *Modern Handcraft*, 366 ICC at 971. In light of the principles in

Modern Handcraft and its progeny, and the new evidence presented by DOJ in its letter, it would have been arbitrary and capricious for STB to allow its jurisdiction – including its Trails Act jurisdiction -- to be used to shield the railroad from the adverse abandonment proceedings and easement extinctions under State and local law. In order to avoid abuse of the Trails Act process and its preemptive jurisdiction generally, the STB properly acted to revoke a NITU.

CONCLUSION

For the reasons stated, the STB decision below must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) or 32(a)(7)(B) because:

[X] this brief contains 7,782 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *and*

[] this brief uses a monospaced typeface and contains [] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: June 13, 2025

/s/ Andrea C. Ferster
Counsel for Intervening Respondent

CERTIFICATE OF SERVICE

I, Andrea C. Ferster, hereby certify that on June 13, 2025, I electronically filed the Brief of Intervening Respondent with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered participants as identified in the CM/ECF electronic filing system for this matter.

/s/ Andrea C. Ferster
Andrea C. Ferster

ADDENDUM

ENTERED

Office of Proceedings
July 23, 2019
Part of
Public Record

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

STB Docket No. AB-1289

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

PETITION FOR WAIVER AND EXEMPTION

The City of St. Petersburg, FL (the “City” or “Petitioner”), by and through the undersigned counsel, petition the Surface Transportation Board (“the Board”) for the waiver of certain of the Board’s abandonment regulations in 49 C.F.R. Parts 1152 and 1105, and for exemption from certain provisions of Subtitle IV of Title 49 of the U.S. Code. Because the City is a local government entity, it is entitled to a waiver of filing fees pursuant to the provisions of 49 CFR § 1002.2(e). In support thereof, Petitioner state as follows:

I. INTRODUCTION

In the late 1880’s the City of St. Petersburg, Florida, was founded contemporaneously with the installation of a rail line providing service to the core, downtown area of the City. But over the subsequent century-and-a-half, the City has grown exponentially to become the 5th most populous City in the state. Concurrently, the downtown has flourished into a residential and commercial hub in which certain sections of the rail line have become both functionally useless,

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and an impediment to growth. This was reflected in the Board's 2006 decision (STB Docket No. AB_55_646_X) to approve a trail use agreement for a large section of rail line through the City.

The instant action concerns a portion of former rail line running south from 5th Ave. N and curving east along 1st Ave. S and ending at 9th St. N, in downtown St. Petersburg, FL. ("Segment Property"). The Segment Property has been described by CSX Transportation Inc. ("CSX"), the owner listed by the Pinellas County Property Appraiser, as between mileposts ARE 897.57 and ARE 898.43 – a length of approximately 0.9 miles.

The Segment Property is not in active use, nor are there actual rails for much of its length. The street crossings have been paved over, and for much of the Segment Property running over privately held lands the rails and ties have either been removed or buried. To the City's knowledge, freight trains have not run on the property for several decades, and the last documented use found by the City was by the Ringling Bros. Circus in 2004. Since that time, CSX has entered into multiple agreements for other uses above and across the areas that previously contained railroad tracks.

The City, as the majority owner of abutting properties, intends to utilize any portion of the Segment Property made available by this action to create a public park and extension of the existing Pinellas Trail. Though the City has approached CSX with requests for trail use agreements for several years, an agreement has yet to be reached. Accordingly, the City is pursuing an adverse abandonment to be able to put the property into more productive use, and to facilitate the use of the Segment Property by the public.

II. WAIVERS

In an adverse abandonment action, current and prior Board precedent shows unambiguously that many of the requirements of the Board's governing regulations are largely inapplicable or irrelevant to the issues in an adverse abandonment case. *See CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment—Canadian National Railway Company and Grand Trunk Western Railroad Inc.*, STB Docket No. AB-31 (Sub-No. 38) (served March 2, 2001); and *City of Rochelle, Illinois Adverse Discontinuance—Rochelle Railroad Company*, STB Docket No. AB-549 (served June 5, 1998).

Accordingly, the City respectfully requests a waiver of the following provisions:

Waiver of filing fees.

The City, as a local government entity, is entitled to a waiver of the filing fees for the application and for the waiver request pursuant to 49 CFR § 1002.2(e).

Notice of Intent.

The City, in reviewing Board precedent, believes many of the requirements of the notice prescribed by 49 CFR § 1152.21 are typically waived in adverse abandonment actions, as they tend to be inapplicable or inappropriate for such. *See Seminole Gulf Railway, L.P. Adverse Abandonment—In Lee County FL*, STB Docket No. AB-400 (Sub-No. 4) (served June 9, 2004). Board precedent and 49 C.F.R. 1152.24(e)(5) shows waivers should be requested and obtained before an adverse application is filed. As the City is preparing the notice for filing and publication, a draft of which is attached as Exhibit "A" it respectfully requests the following waivers of the applicable code:

49 CFR §1152.20(a)(2): The City requests a waiver of notifying significant users of the Segment Property because the City does not believe there to be any for at least the last ten years.

49 CFR § 1152.20(a)(2)(xii): The City requests a waiver of the requirement to notify “duly certified labor organizations that represent employees on the affected rail line” for the same reason as the previous waiver request – the City believes there is not active rail service on the Segment Property. Furthermore, Board precedent shows that protections for employees are not generally applicable to complete abandonments. *See Northhampton and Bath R. Co.—Abandonment*, 354 I.C.C. 784, 785-787 (1978); *Wellsville, Addison & Galeton R. Corp.—Abandonment*, 354 I.C.C. 744, 745-746 (1978).

49 CFR § 1152.20(a)(3): The City requests a waiver of the requirement to post notices at each of the railroad’s stations, as the City does not believe there to be any such stations on the Segment Property, and that this provision is intended to apply to carriers only. *See, Napa Valley Wine Train, Inc.—Adverse Abandonment—In Napa Valley, CA*, STB Docket No. AB-582 (served March 30, 2001).

49 CFR § 1152.20(c), 1105.7, 1105.8, and 1152.22(f): The City requests a waiver of the requirement to serve copies of the Environmental and Historic Report and the requirements associated with the report and other environmental disclosures because, due to the lack of use of the Segment Property for railroad services, there would be no change in the environmental impact on the area. This makes 49 C.F.R. 1105.6(c) applicable, which waives environmental or historical documentation in actions that do not have a significant impact on carrier operations. *See, e.g., Salt Lake City Railroad Company, Inc.—Adverse Abandonment—Line of Utah Transit Authority in Salt Lake City, UT*, STB Docket No. AB-520 (served August 24, 1999).

Furthermore, the City does not believe there to be any historic structures on the Segment Property, making the historic impact negligible and making the waiver available in 1105.8(e) applicable. Furthermore, because the Segment Property has not been used for over a decade,

noise and air pollution would not be impacted. Finally, the proposed action would only have a positive impact on safety, allowing any remaining rails to be removed from the downtown core and would facilitate a more compatible use for pedestrians and vehicles by removing unnecessary physical obstacles,

49 CFR § 1152.22(a)(4)and (5), and 1152.24(e)(1): The City requests a waiver of the requirement to provide a detailed map of the line. Board precedent has consistently shown this requirement is not possible or practical for a third-party applicant. *See Napa Valley, The Western Stock Show Association—Abandonment Exemption—In Denver, CO*, STB Docket No. AB-452 (Sub-No. IX) (served October 19, 1995); *Grand Trunk Western Railroad Incorporated—Adverse Discontinuance of Trackage Rights Application—A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH*, STB Docket No. AB-31 (Sub-No. 30) (served February 12, 1998).

49 CFR § 1152.22(i): The City requests a waiver of the requirement to utilize the format provided for, as, due to the number of applicable waivers, such form would be inappropriate in this instance. The City respectfully requests the form of the notice be as set forth in Exhibit “B”.

All such waivers are consistent with Board precedent. *See, e.g., Seminole Gulf Railway, L.P.—Adverse Abandonment—In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (served June 9, 2004); *Napa Valley Wine Trains, Inc.—Adverse Abandonment-In Napa Valley, CA*, STB Docket No. AB-582 (served March 29, 2001); *CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment—Canadian National Railway Company and Grand Trunk Western Railroad Inc.*, STB Docket No. AB-31 (Sub-No. 38) (served March 2, 2001); *Salt Lake City Railroad Company, Inc.—Adverse Abandonment-Line of Utah Transit Authority in Salt Lake City*,

UT, STB Docket No. AB-520 (served August 24, 1999). Accordingly, Petitioners respectfully request that their waiver requests be granted.

Contents of Abandonment Application.

Should the requested waivers be granted, the abandonment application will include as follows (references as to 49 CFR § 1152.22):

(a) General

(1) Exact name of applicants

(2) Whether applicants are common carriers by railroad Subject to 49 U.S.C. Subtitle IV, chapter 105;

(3) Relief sought;

(4) General map of the subject line;

(6) Statement of reasons for filing application

(7) Name, title, and address of applicants' representatives;

(8) List of all Postal Service ZIP Codes that the line traverses

(b) General statement of property condition

(e) Rural and community impact;

(h) Additional information; and

(i) Draft Federal Register notice.

III. CONCLUSION

For the reasons stated above, the City respectfully requests the Board grant the requested waivers and exemptions in anticipation of the City's filing of a petition for adverse abandonment.

Respectfully submitted this 22nd day of July, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail service via CM/ECF to Kim Rice Bongiovanni, Esq. and Catherine Adkins, CSX Transportation, Inc., 500 Water Street, J150, Jacksonville, FL 32202, and R. Eric Bilik, Esquire, R. Patrick Dover, Esquire, Sean P. Walsh, Esquire, McGuireWoods, LLP, 50 N. Laura Street, Suite 3300, Jacksonville, Florida 32202, kim_bongiovanni@csx.com, Catherine_Adkins@CSX.com, ebilik@mcguirewoods.com, jaiken@mcguirewoods.com, rdover@mcguirewoods.com, bchassereaucook@mcguirewoods.com, swalsh@mcguirewoods.com this 22nd day of July, 2019.

OFFICE OF THE CITY ATTORNEY
FOR THE CITY OF ST. PETERSBURG

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

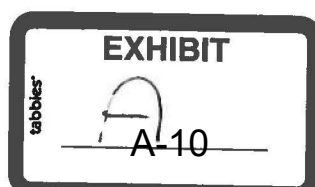
STB Docket No. AB-1289

CSX TRANSPORTATION INC. ADVERSE ABANDONMENT
IN PINELLAS COUNTY, FL

NOTICE OF ADVERSE ABANDONMENT OF THE CITY OF ST. PETERSBURG, FL

The City of St. Petersburg, Florida, a municipal corporation, (the “City” or “Applicant”) gives notice that on or about September 1, 2019, it intends to file with the Surface Transportation Board, Washington, DC 20423, an application seeking the adverse abandonment of approximately 0.9 miles of railroad between mileposts ARE 897.57 and ARE 898.43 in Pinellas County, Florida. The affected railroad lines are in U.S. Postal Service Zip Codes 33701, 33705, and 33713. The effected lines are not believed to contain any stations. The City is not a common carrier. The reasons for the proposed abandonment are (i) the line has been *de facto* abandoned, (ii) there is no present or foreseeable use of the lines, and (iii) the public would be served by abandonment through an increase in available use and public safety.

The application will include the City’s entire case for abandonment, based on the physical abandonment of use and the public policy concerns favoring such abandonment. The rail line in question is not in active use, nor are there actual rails for much of its length. The street crossings have been paved over, and for much of the Segment Property running over privately held lands the rails and ties have either been removed or buried. To the City’s knowledge, freight



trains have not run on the property for several decades, and the last documented use found by the City was by the Ringling Bros. Circus in 2004. Since that time, CSX has entered into multiple agreements for other uses above and across the areas that previously contained railroad tracks.

It is anticipated the residents of the City of St. Petersburg will benefit from the proposed abandonment by an improvement in safety to the area, by virtue of removing the remaining vestiges of the railroad to allow for easier traffic, and by the improved opportunity to develop the area. As the rail line is located in the flourishing downtown, the rail line has become both functionally useless, and an impediment to growth. This was reflected in the Board's 2006 decision (STB Docket No. AB_55_646_X) to approve a trail use agreement for a large section of rail line through the City. The City intends, as able, to convert any property acquired by virtue of the abandonment and post-abandonment actions into public park and trail use.

Any interested person, after the application is filed on September 1, 2019, may file with the Surface Transportation Board written comments concerning the proposed abandonment or protests to it. These filings are due 45 days from the date of filing of the application. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (§ 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (§ 1152.29 of the Board's rules) must also be filed within 45 days from the date of filing of the application. Persons who may oppose the abandonment or discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or

discontinuance that do wish to participate actively and fully in the process should file a protest.

Protests must contain that party's entire case in opposition (case in chief) including the following:

(1) Protestant's name, address and business.

(2) A statement describing protestant's interest in the proceeding including:

(i) A description of protestant's use of the line;

(ii) If protestant does not use the line, information concerning the group or public interest it represents; and

(iii) If protestant's interest is limited to the retention of service over a portion of the line, a description of the portion of the line subject to protestant's interest (with milepost designations if available) and evidence showing that the applicant can operate the portion of the line profitably, including an appropriate return on its investment for those operations.

(3) Specific reasons why protestant opposes the application including information regarding protestant's reliance on the involved service [this information must be supported by affidavits of persons with personal knowledge of the fact(s)].

(4) Any rebuttal of material submitted by applicant.

In addition, a commenting party or protestant may provide a statement of position and evidence regarding:

(i) Intent to offer financial assistance pursuant to 49 U.S.C. 10904;

(ii) Environmental impact;

(iii) Impact on rural and community development;

(iv) Recommended provisions for protection of the interests of employees;

(v) Suitability of the properties for other public purposes pursuant to 49 U.S.C. 10905; and

(vi) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and § 1152.29.

A protest may demonstrate that: (1) the protestant filed a feeder line application under 49 U.S.C. 10907; (2) the feeder line application involves any portion of the rail line involved in the abandonment or discontinuance application; (3) the feeder line application was filed prior to the date the abandonment or discontinuance application was filed; and (4) the feeder line application is pending before the Board.

Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear. A supplemental EA of EIS may be issued where appropriate.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed abandonment should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to § 1152.25.

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB ____ (Sub-No. ____) and must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation

Board, Washington, DC 20423-0001, no later than 45 days after September 1, 2019.

Interested persons may file a written comment or protest with the Board to become a party to this abandonment proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant, Bradley Tennant, Assistant City Attorney for the City of St. Petersburg, Florida, One 4th St. N, St. Petersburg, FL 33701. Every comment or protest shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment, in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis.

FEDERAL REGISTER NOTICE
Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

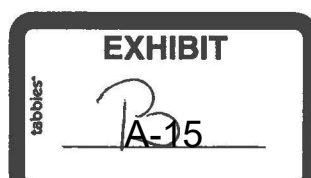
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The public records of the Board contains a system diagram map (SDM) for CSX Transportation Inc. (“CSX”).

Based on the information in possession of the Applicant, it is unclear if the line contains any federally granted right-of-ways. Any documentation related to this abandonment in the Applicant’s possession will be made available promptly to those requesting it. The application can be viewed on the Board’s webpage, www.stb.gov, or a copy can be obtained from the Applicant’s representative, whose name and address appear below. The applicant’s case for abandonment was filed with the application.



Any interested person may file with the Surface Transportation Board written comments concerning the proposed abandonment or protests to it. These filings are due 45 days from the date of filing of the application. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (§ 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (§ 1152.29 of the Board's rules) must also be filed within 45 days from the date of filing of the application. Persons who may oppose the abandonment or discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the following:

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(v) Suitability of the properties for other public purposes pursuant to 49 U.S.C. 10905;

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(vi) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and § 1152.29.

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Interested persons may file a written comment or protest with the Board to become a party to this abandonment proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant, Bradley Tennant, Assistant City Attorney for the City of St. Petersburg, Florida, One 4th St. N, St. Petersburg, FL 33701. Every comment or protest shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment, in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to

the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis.

No. 23-13860

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CSX TRANSPORTATION, INC. and
GEORGETOWN AND HIGH LINE RAILWAY COMPANY, LLC, *Petitioners*,

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA, *Respondents*,

and

RAILS TO TRAILS CONSERVANCY, *Intervening Respondent*.

Petition for Review from the Surface Transportation Board,
Docket No. AB 55 (Sub-No. 794X)

BRIEF OF RESPONDENTS

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June 13, 2025

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, Respondents add the following interested persons and entities to the Certificate of Interested Persons submitted with Petitioners' Brief on April 14, 2025:

1. Brabender, Allen – Counsel for United States of America
2. Gustafson, Adam R.F. – Acting Assistant Attorney General
3. Rackson, John A. – Counsel for Surface Transportation Board

STATEMENT REGARDING ORAL ARGUMENT

Although this case is relatively straightforward, Respondents the Surface Transportation Board and the United States of America would be pleased to participate in oral argument to answer any questions the Court may have.

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INTRODUCTION

Some rail lines subject to the jurisdiction of the Surface Transportation Board are operated pursuant to easements on property the railroad does not own. That easement remains in place so long as the line remains within the Board's jurisdiction and thus part of the national rail network. The National Trails System Act (Trails Act) provides a process to keep railroad rights-of-way that might otherwise be removed from the Board's jurisdiction within the national rail network when they are used as trails, thereby preserving these corridors for future rail use.

Petitioner CSX Transportation, Inc. (CSXT) operates a rail line that has not been used in active rail service for decades. Beginning in 2019, the City of St. Petersburg, Florida (the City), an underlying property owner, came to the Board seeking to remove the line from the Board's jurisdiction and to enable the City to turn the right-of-way into a trail under state law. CSXT blocked this effort by submitting a request to railbank the line under the Trails Act through its wholly-owned subsidiary, Georgetown and High Line Railway Company (GHL). Ultimately, more than four years after the City first began its efforts to establish a trail and after years of inaction by CSXT and GHL, the Board terminated CSXT's permission to use the Trails Act through GHL.

CSXT and its subsidiary recognize, as they must, that the Trails Act is to be used “for the creation of a recreational trail.” Pet. Br. 1. And they accept the Board’s authority to permit railroads to preserve lines under the Trails Act. *Id.* at 26. But, noting the Board’s ministerial role in administering the Trails Act—the agency does not micromanage the details of trails it authorizes—CSXT argues that, as long as the railroad’s chosen “trail sponsor” accepts responsibility for taxes and maintenance and agrees that the right-of-way may return to rail use in the future, the Board lacks the authority to revoke its permission or otherwise address any railroad or trail sponsor conduct during the trail use period.

That argument distorts the Trails Act. It is certainly correct, as the Board’s regulations require, that a trail sponsor is responsible for managing a trail that it is authorized to administer, and it must agree to return the property to rail service if it is needed for that purpose. But that is not the issue here. Rather, there is no trail and there has been no genuine effort to establish one in the years since CSXT sought the benefits of the Trails Act, despite consistent scrutiny from the Board regarding CSXT and its subsidiary’s intentions. Far from “assert[ing] new authority to police the development of a former railroad right-of-way into a recreational trail for public use” (Pet. Br. 1), the Board’s decision reflected its longstanding precedent that it can revisit its Trails Act authorizations if the Board concludes the Trails Act is not properly being utilized, as was the case here.

CSXT argues that the Board acted improperly by failing to give adequate notice under the Administrative Procedure Act (APA) before revoking its Trails Act authorization, and by giving “no meaningful guidance on how quickly and to what degree a trail sponsor must make a trail available to the public.” Pet. Br. 5. Those arguments are makeweight. CSXT has known from the start that the Board was concerned about its intention in this case. And as early as 1987, the agency made it clear that a party’s Trails Act authorizations could be revoked for failure to use the right-of-way as a trail. The Board’s termination of its Trails Act authorization after continual stonewalling from CSXT and the trail sponsor is consistent with the APA, and the Board’s finding that, given all the facts and circumstances, CSXT had not acted in accordance with the Trails Act, was reasonable.

STATEMENT OF THE ISSUES

Whether the Surface Transportation Board acted lawfully in revoking a railroad’s authorization to use the Trails Act when, after years of prodding, the railroad had made no efforts to establish trail use and indeed argued that it has no obligation to do so.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

The Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers, including the construction, acquisition, and operation of lines within the national freight rail network, and the removal of lines from the rail network. 49 U.S.C. § 10501(b). But the ownership of the property over which those lines operate is determined by state law: some rail lines are owned by the rail carrier in fee simple; others are operated pursuant to easements; and of those easements, some are perpetual while others expire upon the cessation of railroad use, in which case the underlying owner would regain unencumbered fee. *Preseault v. ICC*, 494 U.S. 1, 8, 16 (1990); *see also Ohio River P’ners LLC—Acquisition & Operation Exemption—Hannibal Dev., LLC*, No. FD 35984, 2016 WL 1273364, at *3 (STB served Apr. 1, 2016) (potential rail carrier must “obtain the necessary rights [to the land] under state property and/or contract law”). However, given the national interest in rail service, no such easements may expire—state law cannot operate to extinguish an easement—while the line remains within the Board’s jurisdiction. *Preseault*, 494 U.S. at 8.

Licensed rail lines—including the one at issue here—may be removed from that jurisdiction only with authority from the Board. 49 U.S.C. §§ 10502(b), 10903. The process for removing these lines from the Board’s jurisdiction is

called “abandonment.” When a rail line is abandoned for purposes of the STB’s regulatory jurisdiction, the underlying right-of-way becomes “ordinary real property,” and its disposition becomes subject to the application of state property law. *Hayfield N. R.R. v. Chi. & N.W. Transp.*, 467 U.S. 622, 632 (1984).

The Trails Act was adopted to “institut[e] a national system of recreation, scenic and historic trails.” 16 U.S.C. § 1241(b). In 1983, Congress amended the Trails Act to provide for the retention of unused railroad rights-of-way through their use as recreational trails. This scheme not only contributes to the national system of trails, but also preserves (or railbanks) these corridors for potential future rail service. *Preseault*, 494 U.S. at 17-18.

In essence, the Trails Act enables railroads to transfer rights-of-way no longer presently needed for rail service, and which they might otherwise seek to remove from the Board’s jurisdiction, to states, municipalities, or private groups for establishing trails. 16 U.S.C. § 1247(d); *Preseault*, 494 U.S. at 6. It works by providing that “use” of the right-of-way as a trail pursuant to such transfer may not be “treated, for purposes of any law or rule of law, as an abandonment,” of the right-of-way so long as the trail use is “subject to restoration or reconstruction for railroad purposes.” 16 U.S.C. § 1247(d); *see also Preseault*, 494 U.S. at 8-9 (citing S. Rep. No. 98-1, at 9 (1983)). The Trails Act also explicitly directs the Board to impose trail-use terms “for interim use in a manner consistent with [the

Trails Act]” and says that the agency “shall not permit [activities] inconsistent or disruptive of such use.” 16 U.S.C. § 1247(d). These provisions ensure that the Trails Act is properly invoked and that lines used for trails under the Trails Act remain within the Board’s jurisdiction, thereby keeping the corridor intact and preventing the vesting of “whatever reversionary interests may exist in the property under state law.” *Preseault*, 494 U.S. at 4.

Under Board regulations implementing the Trails Act, only a rail line authorized for abandonment, and hence no longer needed for rail service, may be railbanked.¹ 49 C.F.R. § 1152.29(a). To invoke the Trails Act, a prospective trail sponsor (*i.e.*, an entity seeking to turn the line into a trail) must file a request with the Board stating its willingness to assume responsibility for the right-of-way and acknowledging that its “interim trail use” is subject to restoration for rail purposes at any time. *Id.*; *see also* 16 U.S.C. § 1247(d). If the railroad indicates its willingness to negotiate with the prospective trail sponsor, the Board will, depending on the nature of the underlying abandonment proceeding, issue either a Certificate of Interim Trail Use or Abandonment (CITU) (for abandonments

¹ Because abandonment authority is permissive, a railroad is not required to abandon a line even if abandonment is authorized. *Birt v. STB*, 90 F.3d 580, 589 (D.C. Cir. 1996); *see also* 49 C.F.R. § 1152.29(e) (requiring the filing of a “notice of consummation” to “signify that [the carrier] has exercised the authority granted”).

subject to the full application process) or a Notice of Interim Trail Use or Abandonment (NITU) (for abandonments considered under the Board's streamlined exemption process). 49 C.F.R. § 1152.29(c)(1), (d)(1).

A CITU or NITU authorizes the rail carrier to discontinue its rail operations and salvage its track (subject to any other Board orders on the line). *Id.* It also permits the railroad and its prospective trail sponsor to negotiate for one year to reach an interim trail use agreement, which railbanks the line. *Id.* Upon agreement of the parties, the Board may grant up to three one-year extensions of the negotiating period, with additional extensions permitted only under “extraordinary circumstances.” 49 C.F.R. § 1152.29(c)(1), (d)(1); *see also Limiting Extensions of Trail Use Negotiating Periods*, 84 Fed. Reg. 66320, 66323 (Dec. 4, 2019) (limiting extensions to “improve the efficiency, clarity, and finality of the Trails Act process”).²

During the pendency of the CITU or NITU, the railroad cannot abandon the line. 49 C.F.R. § 1152.29(c)(1), (d)(1). The railroad and the prospective trail

² Prior to the 2019 rulemaking, the initial term for a NITU was 180 days, but the Board could issue an unlimited number of extensions. *See* Final Rule, EP 749 (Sub-No. 1) (STB served Dec. 4, 2019). The NITU in this case was governed by the initial 180-day term because it was issued before the effective date of the rule amendment.

sponsor must notify the Board if they reach an interim trail use agreement. *See* 49 C.F.R. § 1152.29(c)(1), (d)(1). It is only when a railroad and trail sponsor enter a trail use/railbanking agreement that trail use may occur. But if the CITU or NITU negotiating period expires without the parties agreeing, then conversion and trail use do not take place and the railroad may either abandon the line without further action from the Board or keep the line active within the railroad's interstate rail network. *Id.* § 1152.29(e)(2).

The Court of Appeals for the Federal Circuit has found that the Trails Act process may result in the United States owing just compensation for the taking of property under the Fifth Amendment, depending on, among other things, the nature of the rail carrier's underlying property interest. *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996). When a trail use agreement is reached, and the rail carrier operates pursuant to an easement limited to rail purposes, a second easement for trail purposes is created, with the original rail easement preserved. *Hornish v. King County*, 899 F.3d 680, 696-97 (9th Cir. 2018); *Preseault*, 100 F.3d at 1550. Under those circumstances, the Federal Circuit has found the execution of a trail use agreement and resulting imposition of a new easement to effect a permanent physical taking. *See, e.g., Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010).

II. Proceedings Before the Board

A. CSXT Receives Authority to Negotiate for Interim Trail Use with GHL.

On July 23, 2019, the City of St. Petersburg initiated a so-called “adverse abandonment,” asking the Board to require CSXT to abandon an approximately 0.86-mile rail line in St. Petersburg, Pinellas County, Florida (the “Line”). Petition for Waiver & Exemption, *CSX Transp., Inc.—Adverse Aban. in Pinellas Cnty., Fla.*, AB 1289, slip op. at 1-2 (STB served July 23, 2019). The City stated that the Line had not been used for freight rail in decades. *Id.* at 2. It explained that it was the majority owner of the property abutting the Line and said that, upon abandonment, it would use that property to create a public park that would connect to an existing network of trails in Pinellas County. *Id.*

The process contemplated by the City, had it been approved by the Board, would have removed the property from the Board’s jurisdiction and could have resulted in the right-of-way’s use as a trail under state rather than federal law. CSXT, though, promptly brought the potential trail process back under federal law by seeking its own authority to abandon the Line pursuant to a streamlined abandonment process for “out of service” lines at 49 C.F.R. § 1152.50. R.1 at 4-6. And indeed, once CSXT received abandonment authority, the Board dismissed the City’s adverse abandonment proceeding as moot. *City of St. Petersburg, Fla.—*

Adverse Aban.—CSX Transp. Inc. in Pinellas Cnty., Fla., No. AB 1289 (STB served Jan. 3, 2020).

In the CSXT abandonment proceeding, both the City and GHL requested a NITU permitting negotiations with CSXT for interim trail use. *See* R.3, R.4. After CSXT agreed to negotiate with GHL but not with the City (the entity that wanted a trail from the start), the Board issued a NITU permitting negotiations between CSXT and its subsidiary GHL, consistent with the voluntary nature of the Trails Act. R.20.

In permitting negotiations to move forward under the NITU, the Board credited GHL’s representation that, even though it was owned by CSXT, it was “ready, willing, and able” to negotiate for trail use. R.20 at 2; R.26 at 5, 6. The Board also noted that its new rule limiting extensions of the NITU negotiating period “will prevent carriers and trail sponsors from keeping rail lines ‘in limbo,’” as the City had alleged would happen here. R.26 at 7. But the Board also acknowledged the “unusual circumstances” of the case, which included CSXT’s and GHL’s corporate affiliation, the City’s spurned efforts to establish a trail itself, and GHL’s claim to be a “placeholder” for a third-party’s acquisition of the Line. *Id.* at 1 n.2 & 3-7. And it shared concerns raised by the City about the “intent of CSXT and GHL to actually engage in negotiations.” *Id.* at 7. The Board cautioned that “implicit in the Trails Act is an expectation that the parties intend to use the

NITU negotiating period to actively pursue interim trail use/rail banking,” and the agency took the unusual step of requiring GHL to describe the progress of its negotiations in any future extension requests it might seek. *Id.* at 7-8.

At CSXT’s and GHL’s request, the Board extended the NITU negotiating period for a one-year period. R.29 at 2. In that decision, the Board reiterated the concerns noted in its prior decision and required that any future extension request include even more specific detail about the progress of negotiations. *Id.* at 2. On June 23, 2021, CSXT and GHL notified the Board that they had entered an agreement for rail banking/interim trail use for the Line. R.30.

B. DOJ Raises Concerns About CSXT’s and GHL’s Use of the Trails Act.

Shortly after the Board issued the NITU, certain landowners abutting the Line sued the United States in the United States Court of Federal Claims, alleging that the conversion of the Line for (purported) trail use resulted in a Fifth Amendment taking of their property. *See Collective Edge, LLC v. United States*, 171 Fed. Cl. 736, 740-41 (2024). Because the interim trail use agreement between CSXT and GHL was found to have created a new trail easement and thus a permanent taking, the Court entered judgment for the plaintiffs on liability and the parties focused their remaining litigation efforts on determining just compensation. *Id.* at 745, 749.

As that process unfolded, DOJ submitted a letter (DOJ Letter) to the Board that included certain information it had obtained through discovery. R.31 at 1-3. Notwithstanding the Board's June 2020 admonition that CSXT demonstrate progress toward trail creation, the letter stated that "[n]either CSX[T] nor GHL has constructed a trail in the right-of-way," and that they had no "plan" or "present intention" to develop a trail in the right-of-way in the future. *Id.* at 3. DOJ also revealed that CSXT had been leasing portions of the right-of-way to Ferg's Sports Bar and Grill (Ferg's), one of the plaintiffs in *Collective Edge*, whose occupancy could obstruct CSXT's ability to create a trail. *Id.* Based on this information, DOJ questioned CSXT's "reliance on the Trails Act to railbank this right of way." *Id.*

The Board directed CSXT to respond to the DOJ Letter, stating that the response "must, at a minimum, explain whether, and if so how, the Line is being used as a recreational or historic trail." R.32 at 2. In its reply, CSXT acknowledged 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." *Id.* at 6. It claimed, without elaboration, that it had "received interest from other parties and hope[d] to replace GHL with another trail user." *Id.* at 5. Finally, it acknowledged that CSXT retained certain interests in the Line, including the lease to Ferg's, and that it

“should be expected to honor the lease . . . and collect the rent as the landlord.” *Id.* at 7.

The City, DOJ, and Rails to Trails Conservancy (RTC) filed responses to CSXT’s response. R.34, R.35, R.36. DOJ argued that the Trails Act had not been properly invoked because CSXT and GHL did not, and still do not, intend to build a trail. R.36 at 4. It noted the Board’s responsibility for administering the Trails Act and cited agency precedent indicating that the Board may revoke a NITU based on a “serious challenge to the applicability of the statute,” such as evidence that the “right-of-way would not in fact be used for a trail.” *Id.* at 3 (citing *Rail Abans.—Use of Rights-of-Way as Trails—Suppl. Trails Act Procs.* [1987 Rule], 4 I.C.C.2d 152, 156 (1987)). RTC and the City alleged that CSXT invoked the Trails Act pretextually—not to create a trail but to prevent a trail and thereby continue collecting rent from Ferg’s. R.34 at 3-4; R.35 at 5-6. RTC requested that CSXT’s abandonment authority, which was the predicate for the NITU, be vacated and that the City’s adverse abandonment proceeding be reinstated. R.34 at 5.

CSXT and GHL were given a chance to reply to those filings, including RTC’s request to disallow railbanking between CSXT and GHL. Their reply did not address the predicate to invoking the Trails Act: that the Trails Act process is to be engaged for development of a trail. Instead, it asserted that the Board’s role under the Trails Act is ministerial and that the statute has only “two requirements”:

(1) the trail sponsor's willingness to assume legal and financial responsibility for management of the right-of-way, and (2) an acknowledgment that the use of the right-of-way as a trail is subject to restoration or reconstruction for railroad purposes. R.39 at 5. As long as these requirements are met, CSXT and its subsidiary argued, the Board must issue a NITU, and there is no requirement that the trail sponsor construct a trail within any particular time frame or in any specific manner. *Id.* at 5-9.

In addition, CSXT and GHL claimed that they “continue[d] to seek trail users so that the property may be retained for future rail use” (despite having already entered into their own trail use/railbanking agreement), and noted their willingness to negotiate with the City to that end. *Id.* at 12; *see also* R.46 (CSXT letter telling the Board that it was in discussions with the City “concerning” the Line). CSXT and GHL further stated that they were also “considering” hiring a third party to operate a trail, “especially in light” of a new professional baseball stadium that could be built near the Line. R.39 at 12.³ And CSXT dismissed the commenters’ concerns regarding Ferg’s by touting its ability to terminate the

³ The Tampa Bay Rays have since announced that they will not proceed with development of a new baseball stadium in St. Petersburg. *See Tampa Bay Rays not moving forward with new stadium plans*, ESPN.com (May 13, 2025), https://www.espn.com/mlb/story/_/id/44236578/tampa-bay-rays-not-moving-forward-new-stadium-plans.

Ferg’s lease with 30 days’ notice should GHL decide to implement “future trail use.” *Id.* at 9-11 & n.6.

C. The Board Revokes the NITU.

On November 14, 2023, the Board reopened the proceeding and revoked the NITU. R.47 (with two members dissenting)⁴ (“Revocation Decision”). For starters, the Board confirmed that its role under the Trails Act is “essentially ministerial.” *Id.* at 9. It emphasized that it does not determine whether trail use is desirable for a particular line, require that a railbanked line be developed in a certain way for trail use, or impose a time limit for developing a trail “to its intended level of use.” *Id.* at 8. The Board also acknowledged that a trail sponsor invoking the Trails Act must be willing to assume responsibility for the right-of-way and must recognize that the right-of-way is subject to reactivation for future rail service. *Id.*

But the Board also explained that the essence of the Trails Act is a requirement that the right-of-way be made available to the public for some kind of trail use after it has been railbanked. *Id.* at 10. Looking to the statutory text, the

⁴ The Board’s composition has changed since the Revocation Decision, with one member that joined the 3-2 majority (then-Chairman Oberman) having left the Board in May 2024. Although the current Board has authorized the submission of the brief, the brief does not reflect the views of the dissenting members (Chairman Fuchs and Vice Chairman Schultz).

Board emphasized that “it is the use of a railroad right-of-way as a trail that prevents the right-of-way’s abandonment.” R.47 at 7. The Board also cited agency precedent in which it had “recognized [its] obligation to ensure that the right-of-way will in fact be used as a trail.” *Id.*

Based on the “totality of the circumstances,” the Board concluded that CSXT was not meeting the fundamental “trail use” requirement of the Trails Act. *Id.* The Board described the circumstances giving rise to its decision here, including:

- CSXT had made no “tangible progress” in making the right-of-way available to the public as a trail two-and-a-half years after reaching a trail use agreement (and over four years after the City first sought the ability, which CSXT blocked, to acquire the Line for trail conversion);
- CSXT’s filings lacked any explanation for this absence of progress;
- CSXT’s argument that it was seeking another “trail user” and “considering” hiring a trail operator were non-responsive to DOJ’s allegations that CSXT and GHL had made no progress toward using the corridor as a trail;
- CSXT continued to lease a portion of the right-of-way to a sports bar and had not explained why such an arrangement is consistent with current trail use, despite concerns in the record about whether the railroad was using the Trails Act pretextually; and

- Prior Board warnings in this case that CSXT’s affiliate GHL must properly utilize the Trails Act, and previously-stated concerns about its lack of intention to do so.

Id. at 7-9, 11.

In revoking the NITU, the Decision also reinstated CSXT’s abandonment authority, which meant that CSXT could either “consummate the abandonment,” or keep the property in the rail system, subject to possible abandonment (and possible Trails Act proceedings) in the future. *Id.* at 11.

D. Post-Revocation Developments.

Both the takings litigation before the Court of Federal Claims and proceedings before the Board continued after the Revocation Decision. Following a trial on just compensation, the Court of Federal Claims awarded the three plaintiff landowners almost \$18 million, plus interest, including \$12.9 million for Ferg’s, for the permanent taking of a new easement, notwithstanding the Board’s vacatur of the NITU. *Collective Edge*, 171 Fed. Cl. at 775-76. Meanwhile, in CSXT’s abandonment proceeding, the Board issued a new NITU authorizing interim trail use negotiations between CSXT and the City, as the Board indicated could happen in the Revocation Decision. R.47 at 8 n.9; *see also CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla.*, AB 55 (Sub-No. 794X) (STB served Jan. 12, 2024) (ECF 23 at Ex. A). The Board extended that NITU a year

later, thereby authorizing negotiations until January 2026. *See CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla.*, AB 55 (Sub-No. 794X) (STB served Jan. 10, 2025) (ECF 38-3 (Ex. B)). In the most recent substantive update submitted to the Board, the City explained that it has offered CSXT \$5 million for the right to operate a trail, including on the City’s own property. City Trail Use Extension Request, Jan. 7, 2025 (ECF 38-2 (Ex. A)).

SUMMARY OF THE ARGUMENT

Under the Trails Act, the Board has an obligation to ensure that a railbanked right-of-way will be used “in a manner consistent with this chapter.” 16 U.S.C. § 1247(d). And a necessary predicate to continued applicability of the Trails Act is the use or development of the corridor as a public trail. *See Preseault*, 494 U.S. at 17 (Congress intended to “encourage the development of additional trails” and to “assist recreation[al] users by providing opportunities for trail use on an interim basis.”) (citing H.R. Rep. 98-28 at 8, 9 (1983); S. Rep. No. 98-1 at 9, 10 (1983), U.S. Code Cong. & Admin. News 1983, p. 119); *see also* 16 U.S.C. § 1241(a) (Trails Act “promote[s] the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation”).

Where a right-of-way is used as a public trail, then the other goal of the Trails Act—preservation of the right-of-way for possible future rail use—is also

served. *See Preseault*, 494 U.S. at 18 (“Second, Congress intended ‘to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.’”) But if a trail sponsor takes no discernable steps toward trail use, and it fails to make a railbanked right-of-way available to the public after years of admonition and inaction, then the right-of-way is not being used “in a manner consistent” with the Trails Act, and the congressional purpose behind preventing the application of state law on abandonment is not being served.

Relying only on the secondary statutory purpose of future reactivation, and ignoring the first purpose of trail use, CSXT insists that the Board may not revoke a NITU even when, as here, a right-of-way is not being used in a manner consistent with the statute. CSXT’s position—that a trail is simply not essential to a Trails Act authorization—is contrary to Board precedent and to the express language of the statute, which requires movement toward “interim [trail] use” as a necessary component of railbanking and the preclusion of state law. Agency decisions make clear that the Board may revoke a NITU when the interim use of a right-of-way is inconsistent with the Trails Act. While the Board has appropriately said that it is not responsible for deciding the timing and level of development of a trail, this case is not about management of the right-of-way. It is about whether the Trails

Act can continue to apply under circumstances like those present here, where the Trails Act is not being properly utilized.

The Board evaluated the totality of the circumstances and concluded that CSXT's "interim use" of the right-of-way (or lack thereof) did not comport with the statute. Approximately four-and-a-half years after the City's first attempt to pursue a trail on CSXT's unused line, and two-and-a-half years after CSXT entered an interim trail use agreement with its own subsidiary, no meaningful progress had been made to make the right-of-way available to the public for use as a trail, nor did CSXT even attempt an explanation. Rather, CSXT's implicit position before the Board, which its brief to this Court has now made explicit, is that it never has to take a concrete step under the Trails Act and actually move toward trail use as long as it has filed Trails Act paperwork at the Board. Or, that even if CSXT does have to take concrete steps, CSXT can just ignore that obligation because the Board is powerless to act. Both contentions are incorrect.

CSXT's other arguments that the Decision violates the APA are without merit. The Board provided CSXT with ample notice of the conduct giving rise to the Revocation Decision. Indeed, in its last filing with the Board, CSXT argued against revocation. And the Revocation Decision is consistent with the Board's precedent, in which the agency has repeatedly stated that evidence that the trail

sponsor did not intend to convert the right-of-way into a trail would call into question the continued application of the Trails Act.

ARGUMENT

I. Standard of Review

Under 5 U.S.C. § 706(2)(A) of the APA, a court may set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Courts exercise “independent judgment” when considering the scope of an agency’s statutory authority. *See Diez-Arellano v. U.S. Atty. Gen.*, 120 F.4th 722, 725 (11th Cir. 2024) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)). Review under the arbitrary-and-capricious standard is otherwise “‘exceedingly deferential’ and provides the reviewing court with limited discretion to reverse an agency’s decision.” *City of North Miami v. FAA*, 47 F.4th 1257, 1266 (11th Cir. 2022) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009)). A court will ask not whether it agrees with the agency decision, but rather only whether the agency action was “reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

II. The Board Acted Within Its Statutory Authority.

A. Trail Use is a Predicate for Railbanking.

Trail use is a requirement for railbanking, as the Trails Act itself makes clear. It provides:

[I]n the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter [i.e., Chapter 27 of the United States Code], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

16 U.S.C. § 1247(d) (emphasis added). Chapter 27 of the United States Code is titled “National Trails System.” And the express purpose of that Chapter is the “preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation” through the “establish[ment]” of trails. 16 U.S.C. § 1241. Accordingly, it is the “interim use of any established railroad rights-of-way” as a trail that qualifies for preclusion of state law on abandonment. 16 U.S.C. § 1247(d) (emphasis added); *see also Preseault*, 494 U.S. at 17 (explaining that Congress enacted § 1247(d) to “‘encourage the development of recreational trails’ and to ‘assist recreation[al] users by providing opportunities for trail use on an interim basis.’” (citing H.R. Rep. 98-28, at 8, 9 (1983); S. Rep. No. 98-1, at 9, 10 (1983))).

CSXT concedes that the Trails Act provides for the “creation of [] recreational trail[s].” Pet. Br. 1. But it continues to maintain that use of rail property as a trail is not required to engage the Trails Act, saying that the *only* “basic statutory requirements” of the Trails Act are trail sponsor responsibility for the right-of-way and preservation of the corridor for future rail use. *Id.* at 4; *see also id.* at 24, 26. To be sure, the statute assigns a trail sponsor the responsibility to maintain the property. And every trail sponsor, *e.g.*, a city that wants more open space and alternative transportation corridors for the use and enjoyment of members of its community, must recognize that it might have to return the property to rail use someday. *Preseault*, 494 U.S. at 17-18 (citation omitted) (explaining that a benefit of interim trail use, one recognized in the statute, is the preservation of railroad rights-of-way for potential future rail reactivation).

None of this, however, changes the fact that it is the right-of-way’s use as a trail that allows for railbanking and preserves the corridor’s use for future rail service by blocking the operation of the state law of abandonment, if necessary. That a trail sponsor is willing to accept responsibility for the line and acknowledges that it is subject to reactivation is not enough: “interim *use* shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” *Id.* (emphasis added). CSXT provided

no meaningful response in its opening brief to this basic observation in the Revocation Decision. *See* R.47 at 7, 9-10.⁵

B. The Board has Authority to Revoke a NITU for Activity Inconsistent with Trail Use.

CSXT argues that, in any event, the Board lacks statutory authority to revoke a NITU for failure to take steps toward creating a trail. *See, e.g.*, Pet. Br. 25-26. The argument lacks merit. For starters, while the Trails Act itself “nowhere” expressly authorizes the Board to revoke a NITU, Pet. Br. 22, 26, the Board’s authorizing legislation does provide such express authority. The Board’s powers include reopening a proceeding and changing an action of the Board. 49 U.S.C. § 1322(c). The Board may also reconsider any of its actions “at any time”—here the NITU—based on new evidence (among other grounds). *Id.* The Revocation Decision describes in detail the evidence raised post-NITU that supported revocation. *See* R.47 at 6-11.

Moreover, when a statute gives an agency authority to grant permission to do something, it also confers the power to revoke that permission unless there is

⁵ Noting a trail sponsor’s legal maintenance/tax payment responsibilities for the trail, and its obligation to recognize the possibility of reactivation to rail service, the Board said: “But none of this is to say that a trail sponsor is under no obligation to make a right-of-way available to the public for some kind of trail use after it has been railbanked.” R.47 at 10.

some contrary indication in the statute. *See, e.g., China Unicom (Americas) Operations Ltd. v. FCC*, 124 F.4th 1128, 1143-45 (9th Cir. 2024); *Haig v. Agee*, 453 U.S. 280, 290-91 (1981); *see also* Pet. Br. 26 (“assuming such an implied power.”). The Trails Act gives the Board express authority to impose terms and conditions on transfers of rights-of-way for interim trail use, which it accomplishes through the NITU. 16 U.S.C. § 1247(d). Indeed, CSXT acknowledges that the NITU is the “vehicle by which the Board authorizes or permits a rail carrier” to transfer its property interests to a trail sponsor. Pet. Br. 31. The statute also contains “no contrary indication” that the Board lacks authority to revoke its decision once issued, nor does CSXT identify anything that says otherwise.

Characterizing the power to revoke a NITU as “the converse of the power to grant,” Pet. Br. 26, CSXT appears to argue that, as with a NITU grant, the Board may revoke a NITU only where the “terms and conditions” required under 16 U.S.C. § 1247(d) have been violated, *id.* at 21-22, 26. According to CSXT, even if it becomes apparent that a trail sponsor has no intention of ever establishing a trail (and presumably, even in cases where railbanking is demonstrated to be a complete sham), a NITU may be revoked only if the trail sponsor no longer commits to

“full” responsibility for the right-of-way, or if it fails to acknowledge the potential for return to rail use. *Id.* at 26.⁶

CSXT’s assertion that the Board is powerless, when considering revocation, to look at evidence that the right-of-way will not be used as a trail is wrong.

“[S]uch [trail] use” is what expressly prohibits the Board from “permit[ting]” abandonment, making that question unavoidable. 16 U.S.C. § 1247(d). The Trails Act also contemplates that the Board will only authorize the transfer or conveyance of a right-of-way for use in a manner “consistent with this chapter”—*i.e.*, for trail use. Indeed, the Board’s NITU regulation makes clear that the Trails Act may be invoked only by an entity “interested in acquiring or using a right-of-way of a rail line for interim trail *use*.” *See, e.g.*, 49 C.F.R. § 1152.29(a) (emphasis added). And if a carrier is not interested in trail use or abandonment, but nonetheless wishes to be relieved of its common carrier obligation, it has another option: it

⁶ The Board and CSXT agree that the Board may revoke a NITU where the trail sponsor no longer commits to the line being “subject to restoration or reconstruction for railroad purposes.” Pet. Br. 26. Restoration, however, is not one of the specific “terms and conditions” that the Board is required to impose under 16 U.S.C. § 1247(d). “[S]uch terms and conditions,” as enumerated in the statute, refer only to the trail user assuming “full” responsibility and liability for the right-of-way. *Id.* CSXT seeks to have it both ways by conceding revocation authority for some railbanking requirements (restoration) but not others (trail use).

may seek to authority to temporarily discontinue its operations under separate Board procedures. 49 U.S.C. § 10903; 49 C.F.R. § 1152.50.

Moreover, under CSXT's interpretation, the Board presumably would have to issue a NITU, and would be barred from revoking it, even if an entity informed the Board at the outset that it had no intention of ever making the right-of-way available for trail use. Such an interpretation would read the words "in a manner consistent with this chapter" out of the statute and cannot be reconciled with the language or purpose of the Trails Act. It would also enable a purported trail sponsor with no intention of ever creating a trail to reap the benefits of the Trails Act without accepting the basic bargain of trail use. To avoid the potential for misuse of the statute, the Board necessarily must be able to revoke a NITU when the right-of-way is not being used in a manner consistent with the Trails Act.

C. The Revocation Decision was Consistent with Agency Precedent.

A major theme of CSXT's brief is that the Revocation Decision disregards agency precedent providing that the Trails Act "does not require that a trail be developed in any particular way, and there is no time limit for how quickly a trail must be developed to its intended level of use." Pet. Br. 24 (quoting *Wheeler—Pet. for Declaratory Ord.—Rail Line in Erie Cnty., Pa.*, FD 35082, 2008 WL 3971090, at *8 (STB served Aug. 27, 2008)); *see also id.* at 24-25 (citing other decisions with similar statements). CSXT contends that this "longstanding

consistent precedent is persuasive evidence” that the Board lacks power to “regulate trail development.” Pet. Br. 21, 25.

But this case is not about the “regulation” of trail development. Other federal or state agencies—the ones CSXT discusses at length, Pet. Br. 27-30—or the trail sponsor may determine whether a trail should be 16 or 20 feet wide, or if it should contain water fountains or restrooms. The Board has no interest in those matters. Here, its interest is more fundamental: whether use of the Trails Act is proper when, as here, the right-of-way is not being used in a manner consistent with the statute.

As to *that* question, the agency’s “longstanding consistent interpretation” of the Trails Act is that it may revoke or decline to issue a NITU if it becomes apparent that an entity will not use the right-of-way as a trail. In an early rulemaking regarding the Trails Act, the Board’s predecessor—the Interstate Commerce Commission—confirmed the agency’s responsibility for considering “serious challenge[s] to the applicability of the statute.” *Rail Abans.—Use of Rights-of-Way as Trails—Suppl. Trails Act Procs. [1987 Rule]*, 4 I.C.C.2d 152, 156 (1987). In this *1987 Rule*, the agency specifically noted that one such challenge could arise when the evidence shows that that the right-of-way “*would not in fact be used for a trail.*” *Id.* (emphasis added).

The Board has reiterated in other decisions that inconsistent or non-use of the right-of-way as a trail may be a basis for denying or revoking a NITU. *See, e.g., Owensville Terminal Co.—Aban. Exemption—in Edwards & White Cntys., Ill. [Owensville Terminal]*, AB 477 (Sub-No. 3X), 1998 WL 830417, at *7 (STB served Dec. 2, 1998) (“[A]fter a Trails Act request is made by a trail group, landowners can submit evidence that a trail offer is a subterfuge (i.e., that the right-of-way will not in fact be used as a trail).”); *CSX Transp., Inc.—Aban. Exemption—in Monroe & Owen Cntys., Ind. [Monroe & Owen Cntys.]*, AB 55 (Sub-No. 514X), slip op. at 1, 2 (STB served Sept. 30, 1997) (reopening proceeding where evidence that trail sponsor had “no intention to convert the right-of-way into a recreational trail” called into question the “continued application of the Trails Act”); *SF&L Ry., Inc.—Aban. Exemption—in Ellis & Hill Cntys., Tex.*, No. AB 448 (Sub-No. 1X), 1996 WL 422279, at *8 n.12 (STB served July 30, 1996) (stating that a party “can petition for reconsideration in the future should hard evidence develop that the right-of-way is not being used as a trail”), *vacated on request of the trail sponsor*, 1999 WL 1268222 (STB served Dec. 30, 1999); *see also Wheeler*, 2008 WL 3971090, at *8 (“We can revoke a trail condition only if it is shown that the statutory requirements are not being met . . . i.e., the Trails Act was not available . . .”).

CSXT ignores the *1987 Rule* despite the Board’s express reliance upon it in the Revocation Decision (R.47 at 7). And its suggestion that *Monroe & Owen Counties* was wrongly decided because “[n]othing in the Trails Act gives the Board authority to hear and determine whether the property is currently being used in a manner consistent with interim trail use,” Pet. Br. 26-27, is baseless.⁷ The Trails Act expressly prohibits the Board from “permit[ting] abandonment or discontinuance inconsistent or disruptive of [interim trail] use.” 16 U.S.C. § 1247(d). The Board cannot measure its own compliance with the Trails Act without considering the law’s continued applicability in the first instance.

CSXT’s argument that the Revocation Decision “encroach[es]” on the “regulatory authority of other federal agencies and the states” also wrongly frames the Revocation Decision as one that “regulate[s] trail development.” Pet. Br. 26-30. Irrespective of how a trail might be constructed, only the Board can determine whether and how the Trails Act applies in a particular case before it. That question

⁷ As explained in the Revocation Decision, the Board’s statement in *T&P Railway—Abandonment Exemption—in Shawnee, Jefferson, and Atchison Counties, Kansas*, 2 S.T.B. 36 (1997) that it will not “involuntarily revoke a NITU on grounds other than a failure to continue to meet the financial and liability conditions of the statute,” was inconsistent with the Trails Act and agency precedent discussed above. R.47 at 10 n.14. It was also dicta insofar as the Board there did in fact address, and reject, arguments that the trail sponsor’s salvage activities within the right-of-way would make “construction of a trail more difficult or ‘next to impossible.’” *T&P*, 2 S.T.B. at 45-47.

(of proper application) is different from whether trail use complies with “State and local land use plans, zoning ordinances, and public health and safety legislation,” which the Board has consistently left to “state, regional, and local entities.” *Union Pac. R.R.—Aban.—between Echo & Park City and between Keetley Junction & Phoston, in Summit and Wasatch Cntys., Utah*, AB 33 (Sub-No. 5), 1990 WL 288348, at *2 (STB July 6, 1990).

For these reasons as well, the Revocation Decision also comports with the Board’s otherwise “essentially ministerial role” under the Trails Act. Pet. Br. 21 (citing *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990)). CSXT claims that the Board imposed novel trail development and timing requirements. Pet. Br. 24. The Board did no such thing. The Board revoked the NITU based on substantial evidence that the Trails Act was not “being properly utilized.” R.47 at 11. This evidence included CSXT’s unexplained failure to make the Line available to the public as a trail in any way in the over four years since the City first sought to convert the unused corridor to trail use; its apparent commitment to continue leasing a portion of the corridor on which the trail would sit to a sports bar; and repeated warnings that CSXT needed to “actively pursue interim trail use/railbanking” and “[Board] reservations about [CSXT’s] intentions regarding the Line.” *Id.*

The Board did not revoke the NITU because CSXT failed to meet a development deadline or because its plans for a trail were unsatisfactory. The Board revoked the NITU because the evidence showed that CSXT was not taking steps to make the corridor available to the public for use as a trail—that continued application of the Trails Act was no longer appropriate for that and the numerous other reasons articulated in the Revocation Decision. R.47 at 11 (summarizing the “totality of the circumstances” justifying revocation). That the Board’s role in administering the Trails Act is “essentially ministerial” does not preclude it from revoking a NITU under extreme facts like those presented here.

III. The Revocation Decision Did Not Violate APA Requirements for Revoking a “License.”

CSXT’s next argument, that the Board failed to give it the notice required under the APA, 5 U.S.C. § 558, is contradicted by the record in the Board proceeding. Section 558(c) requires that an agency seeking to revoke a license must provide: “(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.” The purpose of this provision is to “give wrongdoers an opportunity to correct their transgressions before actual termination or suspension of their licenses.” *Lawrence v. Commodity Futures Trading Comm’n*, 759 F.2d 767, 773 n.13 (9th Cir. 1985). Notably, 5 U.S.C. § 558(c)

“does not . . . require that a [license holder] be apprised precisely of what action the agency will take because of his conduct,” but rather “only requires” notice of the facts or conduct that may warrant the action. *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1254 (10th Cir. 2010). Even if one were to assume that a NITU can be construed as a license for purposes of 5 U.S.C. § 558(c), the Board amply gave CSXT such notice and an opportunity to cure.

From the get-go, the Board told CSXT of its “concerns about [CSXT’s] intent” with respect to railbanking the Line with GHL. R.26 at 7; *see also id.* at 7-8 (reminding CSXT to “operate diligently and act in good faith”). Indeed, it should have been obvious to CSXT that its conduct after entering into an interim trail use agreement put the Line in the very state of “limbo” that the Board hoped would be avoided. *Id.* Since that time, CSXT had done nothing to establish trail use, had no explanation for its lack of activity, and was instead “continu[ing] to seek” to transfer its trail rights to a “third-party trail sponsor” and “considering hiring a third party to operate the trail.” R.39 at 12.

In any event, the DOJ Letter on behalf of the United States alleged the “facts and conduct” that warranted revocation: that CSXT and GHL had not “constructed a trail in the right-of-way[,] . . . developed a plan to construct a trail in the right-of-way, . . . present[ed] [any] intention to develop a trail in the right-of-way in the future,” and were in fact leasing a portion of the right-of-way to a sports bar. R.31

at 2. The DOJ Letter further questioned CSXT’s continued “reliance on the Trails Act to railbank this right of way.” *Id.* The Board specifically directed CSXT and GHF to respond to the DOJ Letter, and to “explain whether, and if so how, the Line is being used as a recreational or historic trail,” and it invited replies to their explanation by other parties. R.32.

DOJ’s subsequent filing implored the Board not to “ignore” evidence indicating that the Trails Act was not being “properly invoked.” R.36 at 3. And it discussed at length the *1987 Rule*, in which the agency explained that it would consider “serious challenge[s] to the applicability of the statute,” including claims that the “right-of-way would not in fact be used for a trail.” *Id.* Moreover, RTC (the Rails to Trails Conservancy) specifically asked the Board to revoke CSXT’s abandonment authorization, which, as a predicate to railbanking under the Board’s regulations, would necessarily mean revocation of the NITU. R.34 at 5; *see also* 49 C.F.R. § 1152.29(c)(1), (d)(1). RTC and the City also challenged CSXT’s trail use agreement as a fiction solely put in place to maintain the Ferg’s lease. R.34, R.35.

Accordingly, all the relevant facts, conduct, and potential consequences were raised in the record. The Board also gave CSXT a final chance to respond to the filings by DOJ, RTC, and the City, and thus reply to RTC’s argument for revocation. *See* R.47 at 6 (accepting CSXT’s March 28, 2023 filing into the record

despite replies to replies not being permitted under the Board's rules). CSXT took full advantage of its opportunity and in its final filing specifically asked the Board not to "reopen and revisit its decision to issue a NITU." R.39 at 5. This evidence flatly contradicts CSXT's current suggestion that it had no "notice of the fact that revocation was possible." Pet. Br. 31.

CSXT had the "second chance" provided under 5 U.S.C. § 558(c).⁸

IV. The Revocation Decision Does Not Otherwise Violate the APA.

Finally, all three of CSXT's arguments that the Revocation Decision was arbitrary or capricious lack merit. The Revocation Decision speaks for itself: it was well-reasoned, grounded in agency precedent, and tailored to the facts of the case. It is owed deference under the APA standard of review.

⁸ In the three cases cited by CSXT that found § 558 violations, the affected parties had far less notice and opportunity to respond or comply than the Board provided here. *Clarke v. CFTC*, 74 F.4th 627, 641-42 (5th Cir. 2023) (finding that the agency provided no notice before withdrawing a no-action letter); *Green v. Brantley*, 719 F. Supp. 1570, 1580 (N.D. Ga. 1989) (finding a § 558 violation occurred because plaintiff was not notified of the basis for revocation "prior to the hearing at which he was supposed to defend his actions"); *Pillsbury Co. v. United States*, 22 C.I.T. 769, 773 (1998) (finding a § 558 violation occurred because "the revocation letter itself constituted the first appraisal by Customs to Pillsbury that its privileges were in jeopardy" and in any event "did not provide . . . any details of alleged misconduct").

A. The Revocation Decision Did Not Depart from Board Precedent.

CSXT first argues that the Revocation Decision departed from agency precedent. Pet. Br. 36-38. But as discussed above, since the agency began administering the Trails Act, it has expressed willingness to entertain “serious challenge[s] to the applicability of the [Trails Act],” including allegations “that the right-of-way would not in fact be used for a trail.” *1987 Rule*, 4 I.C.C. 2d at 156. That statement could not be any clearer. And it has been invoked multiple times. *See Owensville Terminal*, 1998 WL 830417, at *7; *Monroe & Owen Cntys.*, AB 55 (Sub-No. 514X), slip op. at 1, 2; *SF&L Ry.*, 1996 WL 422279, at *8 n.12.

CSXT simply ignores the *1987 Rule* and barely addresses *Monroe & Owen Counties*, despite the Board’s reliance on both in the Revocation Decision. *See* R.47 at 7 (citing *Monroe & Owen Cntys.*, AB 55 (Sub-No. 514X), slip op. at 1, 2, and *1987 Rule*, 4 I.C.C.2d at 156). CSXT focuses instead on decisions in which the Board said that there can be different levels of trail development and that there is no time limit for development. Pet. Br. 36-37 (citing *Wheeler*, 2008 WL 3971090, at *8, and *Idaho N. & Pac. R.R.*, 3 S.T.B. 50, 59 (STB served April 1, 1998)). But those cases are inapposite. The Revocation Decision was not about trail management or the imposition of trail development and timing requirements. It was about the “continued application” of the Trails Act where “serious” concerns had been raised, and “hard evidence” presented, that the right-of-way was

“not being used as a trail.” *1987 Rule*, 4 I.C.C. 2d at 156; *Owensville Terminal*, 1998 WL 830417, at *7; *SF&L Ry.*, 1996 WL 422279, at *8 n.12. Accordingly, the *1987 Rule* and its progeny apply. Under that authority, the Board properly revoked the NITU because the “totality of the circumstances”—CSXT’s unexplained and years-long failure to establish any trail use and its unabashed maintenance of the lease to Ferg’s in the face of repeated warnings from the Board—demonstrated the “Trails Act [was] not being properly utilized.” R.47 at 10-11.

In any event, the Revocation Decision is consistent with the precedent cited by CSXT. The Board confirmed that its role in administering the Trails Act remains “essentially ministerial,” that it does not dictate the type or level of trail development, and that there is no timeline to develop a trail to “its intended level of use.” R.47 at 9-10. It also emphasized that CSXT could use its newly-minted trail easement (paid for by the United States) to allow the public to use the right-of-way in a “variety” of ways that do not require the “corridor be developed in a particular way or to a certain degree.” *Id.* (citing *Mo. Pac. R.R. Co.—Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnston, Atoka, & Bryan Cntys., Okla.*, AB 3 (Sub-No. 63), 1990 WL 300662, at *3 (ICC served Jan. 4, 1991)). Such uses include “walking, hiking, bird watching, and viewing

wildlife.” *Id.* And it made clear that there might be valid reasons why immediate public use of the right-of-way is not possible.⁹ *See id.* at 10 & n.15.

CSXT says that, in this regard, the Board merely “paid lip service” to its precedent. Pet. Br. 37. In its telling, *any* criticism from the Board that a railbanked corridor is not being properly used as trail amounts to dictating how and when a trail must be built. *Id.* That is obviously wrong and not what happened. As noted above, the Board determined that CSXT was not properly utilizing the Trails Act based on a full analysis of the “totality of the circumstances” presented—not through imposition of a firm development requirement or deadline.

B. The Revocation Decision was Crystal Clear.

CSXT next criticizes the Revocation Decision for being “vague and unclear.” Pet. Br. 38-39. But the Revocation Decision speaks for itself. The Board thoroughly and carefully explained the facts supporting its conclusion that “CSXT and GHL have not sufficiently advanced the ‘interim use’ of the Line as a trail as required for continued railbanking.” R.47 at 11. It is exactly the type of decision afforded deference under the APA.

⁹ CSXT offered no reasons—valid or otherwise—for the non-use of the right-of-way as a trail in this case.

CSXT’s claim that the Board failed to adequately articulate so-called “new requirements for trail development,” Pet. Br. 38, is yet another misread of the Revocation Decision, which set no such requirements. It is also a subvariant of CSXT’s argument that, through the Revocation Decision, the Board attempted to manage the right-of-way when what it really did was determine that the Trails Act could no longer apply based on the particular facts of the case.

CSXT argues that the Board’s decision is unsustainable because it did not explain “how much of the [L]ine must be made available to the public.” Pet. Br. 39. But the size of the trail was not at issue because there was no evidence or argument in the record that *any* portion of the right-of-way was open for use by the public as a trail. CSXT and GHL instead stated without equivocation (or explanation) that the “the Line is not being used as a recreational or historic trail.” R.33. And CSXT continued to lease a portion of the right-of-way to one of the underlying property owners, to whom the United States has since paid almost \$13 million as compensation for taking its property for use as a trail, with no explanation of how the lease allowed for concurrent trail use. The issue in the Revocation Decision was whether these facts supported revocation of the NITU, not how much of the Line should be open to the public.

Nor did the Board have to decide “how quickly” a trail sponsor in every circumstance should have to “open the rail line to the public as a trail.” Pet. Br. 39.

Again, the question in the Revocation Decision was whether CSXT’s use of the corridor was consistent with the Trails Act. As to that question, CSXT articulated no plans for trail use and no reason for the absence of progression toward trail use in the 4.5 years since the City first sought such conversion and the 2.5 years since it purported to do so itself. And CSXT’s claim that it was not legally required to implement trail use, vague statements that it was seeking “other trail users” and “considering” perhaps operating the trail itself, and its continued lease of a portion of the corridor, further indicated a failure to properly use the Trails Act.

As noted above, the Revocation Decision acknowledged that there may be good, valid reasons to delay trail development. R.47 at 10 & n.5. But CSXT offered no reasons, good or bad, for its doing nothing. *Id.*¹⁰

¹⁰ CSXT’s invocation of the renowned High Line of New York City to demonstrate how long it can take to put a trail into place, Pet. Br. 2 n.1, is inapt. The High Line is on an elevated rail line on the west side of Manhattan. *See Chelsea Property Owners—Aban.—Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY*, STB Docket No. AB-167 (Sub-No. 1094)A, 2005 WL 1389354, at *1 (STB served June 13, 2005). That it took some years to construct a trail suspended in mid-air in one of the busiest cities in the world is hardly surprising. And unlike this case, there was never any doubt in *Chelsea Property Owners* about the trail sponsor’s interest in establishing trail use. *See id.* (emphasizing that the trail sponsor, New York City, was acting to support efforts by “local residents, businesses and civic groups” to “preserve the High Line”).

C. The Board Has Not Applied Differing Standards.

Finally, CSXT claims that the Board violated the APA by disallowing railbanking here, while allowing it in what the railroad contends was a “factually similar” case, *New York Central Lines, LLC—Abandonment Exemption—in Middlesex Cnty., Mass.*, AB 565 (Sub-No. 1X), 2023 WL 8436019 (STB served Dec. 4, 2023). Pet. Br. 40-42. In *New York Central Lines*, the Board issued a NITU authorizing interim trail use negotiations between CSXT and its affiliate GHL, which entered a trail use agreement and railbanked the Line. 2023 WL 8436019, at *2. The Board subsequently substituted the City of Framingham for GHL as trail sponsor some two years and seven months later, upon the parties’ request. 2023 WL 8436019, at *2-5. Apparently CSXT’s position is that the Board has not acted consistently, and that it made “no effort” to explain why it treated the cases differently. Pet. Br. 41.

This argument is simply wrong and ignores the Board’s discussion in *New York Central Lines*. There, the Board discussed how the cases were different, noting that the Revocation Decision was “[b]ased on the information provided and the totality of circumstances particular to that proceeding—including, among other things, GHL’s unexplained statement that the railbanked line was not being used as a trail, CSXT’s prior unwillingness to negotiate with another potential trail sponsor, and GHL’s stated view that it was acting as a ‘placeholder.’” *N.Y. Cent.*

Lines, 2023 WL 8436019, at *4 n.5. As the Board explained, the “same types of third-party objections,” Pet. Br. 41, were not present in *New York Central Lines*. 2023 WL 8436019, at *2 (noting challenges based merely on GHF’s affiliation with CSXT and the fact that DOJ had raised concerns in this proceeding).

Moreover, the substitution to a non-CSXT-affiliated trail sponsor in *New York Central Lines* was in line with the Revocation Decision. The Revocation Decision explained that, notwithstanding revocation of the NITU between CSXT and GHF, the City (of St. Petersburg) could submit “a renewed request for a NITU authorizing interim trail use/rail banking negotiations between it and CSXT.” R.47 at 8 n.9. That is exactly what the City did, and it and CSXT have been negotiating under a NITU ever since. *CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla.*, AB 55 (Sub-No. 794X) (Jan. 12, 2024) (ECF 23 at Ex. A). The Board’s acceptance of NITUs involving CSXT/Framingham and CSXT/St. Petersburg should not be surprising: many of the concerns raised by GHF’s trail sponsorship are less likely to be present when the entity is a state, municipality, or non-profit negotiating at arms’ length and with a stated and consistent interest in actual trail use. *See* R.47 at 8; *see also* City Trail Use Extension Request, Jan. 7, 2025 (ECF 38-2 (Ex. A)).

New York Central Lines involved substantially different circumstances, and the fact that the Board did not undertake an independent investigation in that case

to consider the line's use while railbanked by GHL—when it would be transferred to a municipality anyway—has no bearing on whether the Board's decision here was arbitrary or capricious. It was not.

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John A. Rackson, hereby certify the following:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 32-4 because it contains 10,327 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, using the Microsoft 365 version of Microsoft Word, in 14-point Times New Roman font.

/s/ John A. Rackson

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Surface Transportation Board

June 13, 2025

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I certify that on June 13, 2025, this brief was filed with the Clerk of the Court through the appellate CM/ECF system, which will send notice to all registered CM/ECF users.

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