

May 30, 2019

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Ms. Cynthia T Brown
Chief - Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

ENTERED
Office of Proceedings
May 30, 2019
Part of
Public Record

Re: Docket No. AB_290_117X, Norfolk and Western Railway Company – Abandonment between Indianapolis and Tipton IN Marion, Hamilton, and Tipton Counties, IN

Dear Ms. Brown,

As a local resident with an interest towards Indianapolis transportation development, I feel compelled to provide the following examples, notes and comments as they relate to the pending motion to vacate NITU's issued on the Line - owned by the Cities of Fishers and Noblesville and Hamilton County - in the above-referenced proceeding.

EXAMPLE #1

Docket Nos. AB_55_726X and AB_290_303X

SUMMARY: CSX, Transportation, Inc. and Norfolk Southern Railway Company successfully petitioned the Surface Transportation Board to vacate NITU's during the 180-day negotiation period, and prior to execution of a trail use agreement.

- February 21, 2013 - Petitioners, CSX and Norfolk, jointly sought discontinuance and abandonment authority for a 1.55 mile railroad line.
- June 6, 2013 - The Board served NITU's authorizing a 180-day period for Virginia DOT and the City of Richmond to negotiate an interim trail use agreement with the petitioners.
- By multiple decisions, the NITU negotiating periods were extended with the City of Richmond and Virginia DOT until July 11, 2015 and May 27, 2015, respectively.
- March 27, 2015 - Norfolk Southern requested, **during the negotiating period and prior to an executed interim trail use agreement**, that the NITU be vacated in order to abandon the line.
- March 31, 2015 - CSX also requested **during the negotiating period and prior to an executed interim trail use agreement**, that the NITU be vacated in order to abandon the line.

- April 15, 2015 - The Board determined, "NSR and CSXT have complied with the requirements of 49 C.F.R. § 1152.29(d)(2) regarding a request to vacate a NITU," and therefore granted their requests to vacate the NITU's.

CONCLUSION: Through its decision in this proceeding, the Board has clearly shown that NITU's can be vacated during the 180-day negotiation period and prior to reaching an interim trail use agreement. Although the circumstances and end objectives are different here, the facts and precedent governing the process of vacating a NITU have been established by the Board's decision and should be applied to the pending motion in AB_290_117X.

EXAMPLE #2

Docket No. AB_389_1X

SUMMARY: The STB decisions listed below describe a negotiating trail sponsor's ability vacate a NITU during the 180-day negotiating period and the spirit of The Trails Act.

- Board Decision April 16, 1999 - Pg. 4 - "Shortly thereafter, we received a letter from Mr. Tom Seegmueller, Chehaw's Chairman, requesting that Chehaw be removed as a negotiating party under the NITU. Although petitioners argue that the Board erred in not revoking the NITU when Mr. Seegmueller's letter was received, RTC's request to be substituted was pending at that point. Moreover, Mr. Seegmueller did not request that the NITU be vacated."

In the situation above, a trail sponsor was substituted during the standard 180-day NITU negotiation period. Later, a third-party objected to the procedure of the substitution. The last sentence in the quote above indicates that Mr. Seegmueller (negotiating trail sponsor) could have requested the NITU be vacated during the negotiating period. If indeed the Board was indicating that Mr. Seegmueller could have chosen to vacate the NITU during the 180-day negotiating period, then presumably so too should a bona fide third party railroad operator that is seeking to reactivate rail service.

- Board Decision May 9, 2003 - Pg. 4 - "*The Trails Act 'is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails.'* *Preseault v. ICC, 494 U.S. 1, 5 (1990).*"

Given the Board's stated characterization of the purpose of the Trails Act as a mechanism to preserve shrinking rail trackage, it would seem logical that the NITU in AB_290_117X be vacated given the fact that a.) trackage is still in place, b.) a railroad operator is willing to operate or purchase the line, and c.) freight customers are expressing a demand for freight service. What better way to preserve shrinking rail trackage than to allow the railroad in AB_290_117X, to continue being a railroad?

CONCLUSION: Fishers, Noblesville, and Hamilton County appear to be arguing that the NITU on their line is still in the 180-day negotiation period - due to the presence of only a partially-executed trail use agreement - and therefore cannot be vacated at this time. I assert that Example #1 and #2 above demonstrate clear precedent that NITU's may be vacated at ANY time after their issuance by the Board.

EXAMPLE #3

Docket No. FD_34750_0 and AB_477_3X

SUMMARY: A long-standing NITU was swiftly and unquestionably revoked under the authority of the STB, following a relatively weak petition by the Browns, Grayville and Poseyville Railway.

- The Browns, Grayville and Poseyville Railway (BGP) successfully petitioned to vacate a NITU.
- BGP provided no detailed company financials.
- BGP provided only a vague reference to freight user demand, but no specifics.

CONCLUSION: Notwithstanding the fact that BGP's level of detail in its argument to vacate the NITU was quite sparse and showed no material evidence that there was demand for freight on the line, its petition to vacate the NITU was granted.

In the case of US Rail Holdings, LLC, financial details and interested freight customers appear to have been provided. If a NITU had been vacated under such loose circumstances previously, then surely the STB will acknowledge the comparative strength of US Rail's argument to vacate the NITU's and reactive rail service on the Line subject to AB_290_117X.

EXAMPLE #4

City's Statement Against Freight

Indianapolis Business Journal - April 2, 2019

SUMMARY: The City of Fishers recently made the following statement in the Indianapolis Business Journal (see last sentence in **Attachment 1**), "To be clear, the city of Fishers does not support any proposal that leads to freight cars traveling through neighborhoods and clogging Fishers' main thoroughfares multiple times a day."

CONCLUSION: It seems apparent that the City (and presumably the other owners) will resist rail freight at every turn - both now and in the future - contrary to their statements acknowledging that railbanking is subject to rail reactivation at any time.

RECAP

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| Example #1 | - Multiple NITU's were vacated during the 180-day negotiation period. |
| Example #2 | - A trail sponsor could have vacated a NITU during the negotiating period
- The Trails Act is intended to preserve shrinking rail trackage. |
| Example #3 | - NITU revoked by a railroad with little-to-no evidence of freight demand or financial status |
| Example #4 | - "...the city of Fishers does not support any proposal that leads to freight..." |

All of these examples appear to strongly support an existing path to restored rail service along the Indianapolis to Tipton rail line that is subject of Docket# AB_290_117X.

In order to avoid contradiction of STB policy, precedent and material facts in this case, I respectfully request and urge the Surface Transportation Board to grant US Rail's motion for a Preliminary Injunction and motion to Vacate the NITU's on the railroad line so that rail service may be restored to an existing trackage presently under the board's jurisdiction.

Thanks to all members of the Board for their significant and diligent efforts in deciding this complex case.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Davis", written in a cursive style.

Gary Davis
Resident
Plainfield, Indiana

I certify that these comments have been provided to all Parties of Record. /S/ Gary Davis

Attachment #1



Railroad operator revives effort to restore trains on Nickel Plate line

[Samm Quinn](#)
April 2, 2019

A railroad operator is making another attempt to thwart a plan by leaders in Hamilton County to convert part of the Nickel Plate Railroad corridor running from Noblesville to Indianapolis into a recreational trail.

Ohio-based U.S. Rail Holdings on Friday filed two new motions with the Federal Surface Transportation Board. The first would vacate the Notices of Interim Trail Use that allow the corridor to be converted into a trail. The second seeks a preliminary injunction to keep Fishers from ripping out the tracks on the corridor.

U.S. Rail Holdings argues the line could be used for freight and passenger rail purposes, and said the railway could eventually be used to transport passengers to Union Station in Indianapolis, where Amtrak operates the Hoosier State train, which transports passengers from Indianapolis to Chicago.

U.S. Rail Holdings in July [filed a preliminary injunction](#) to prevent Fishers, Noblesville and Hamilton County from removing the tracks and asked for guidance from the board on purchasing the line.

The board denied the first motion for preliminary injunction in December when it [agreed to issue Notices of Interim Trail Use](#). Those notices, which were issued to Fishers, Noblesville and Indianapolis, ended a lengthy process to rail-bank the line, which protects the right-of-way for future transportation uses, but also paved the way for the cities to move forward with their plans for a recreational trail.

Fishers, Noblesville and Hamilton County leaders announced in February 2017 they would convert part of the corridor into a 9.2-mile pedestrian trail. Fishers has already lined up financing for the first phase within the city's limits, and it [unveiled a master plan](#) for 4.5 miles of the trail in February. The trail's first segment is expected to cost about \$9 million.

In its December ruling, the board told U.S. Rail if it purchased the line, it could seek to vacate the Notices of Interim Trail Use.

"A bona fide third-party petitioner, under appropriate circumstance, can request that a NITU be vacated to permit the reactivation of rail service," the board wrote. "A bona fide petitioner is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation."

By rail-banking the line, Fishers, Noblesville and Hamilton County opened the opportunity for the line to be reactivated by the FSTB should a "genuine need for service" arise, the board said.

In the 68-page petition filed March 29, U.S. Rail contends it has sufficient funding to purchase the railroad and said there is a clear need for rail transportation on the line. U.S. Rail said it has a line of credit to pay the purchase price of the line from Noblesville to Indianapolis. It estimates the net liquidation value of the rail assets and the underlying property on the line at slightly more than \$1 million.

The petition also lays out how the reactivated line would be used.

The operator said three businesses with operations along the line have expressed need for rail service: Indianapolis-based specialty chemical maker Crown Technology Inc., Arcadia-based supplier Stone Spectrum and the Indianapolis operations of the Quikrete Cos. Altogether, the companies could require 3,800 railcar loads of rail service a year, U.S. Rail said.

The line also could also be used for passengers, U.S. Rail said. The railroad was previously used by excursion trains and could be utilized that way again, it said, or it could provide interstate passenger rail service.

U.S. Rail said First Transit has agreed to work with the operator to provide passenger service that could eventually connect to Union Station in Indianapolis, where Amtrak operates the Hoosier State train.

If U.S. Rail is given the opportunity to purchase the line, it wouldn't completely ditch plans to build a trail. In its petition, the operator mentions that it would work with the Hoosier Rails to Trails Council to establish a trail adjacent to the line. Fishers, Noblesville and Hamilton County nixed that idea, citing higher costs.

Save the Nickel Plate, a not-for-profit fighting to keep the tracks in place, applauded U.S. Rail's petition, saying it presents a significant challenge to Fishers' plan.

Save the Nickel Plate has long argued that the trail should run alongside the tracks and that the cities left residents out of the decision-making process while pursuing plans to convert the railroad.

"This is quite a welcome surprise," Save the Nickel Plate president Ty Mendenhall said in written comments. "Thankfully, a railroad company has stepped up with a solution that truly capitalizes on the value that the Nickel Plate has to offer to our community."

Fishers on Tuesday called the latest legal filings by U.S. Rail Holdings "merely an attempt to re-litigate its failed position before the Surface Transportation Board."

"Despite this latest attempt, this order still stands and the city of Fishers will continue its efforts to develop a world-class amenity for its residents," the city said in an emailed statement. "To be clear, the city of Fishers does not support any proposal that leads to freight cars traveling through neighborhoods and clogging Fishers' main thoroughfares multiple times a day."