

46666
EB

SERVICE DATE – DECEMBER 21, 2018

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE

Docket No. FD 36137

CITY OF FISHERS, CITY OF NOBLESVILLE, & HAMILTON COUNTY, IND.—PETITION
FOR PARTIAL REVOCATION OF EXEMPTION

Docket No. AB 290 (Sub-No. 117X)¹

NORFOLK & WESTERN RAILWAY—ABANDONMENT EXEMPTION—BETWEEN
INDIANAPOLIS & TIPTON IN MARION, HAMILTON, & TIPTON COUNTIES, IND.

Digest:² The Board issues three notices of interim trail use or abandonment under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 and clarifies the path by which service could be restored over the line at issue.

Decided: December 20, 2018

On August 1, 2017, the cities of Fishers, Ind. (Fishers), and Noblesville, Ind. (Noblesville), and Hamilton County, Ind. (collectively, the Owners), jointly filed a petition in Docket No. FD 36137 to partially revoke their exempt status on a 37.56-mile rail line between milepost I-2.13 at Indianapolis, Ind., and milepost I-39.69 at Tipton, Ind. (the Line). The Line was previously authorized for abandonment in 1991³ and was acquired by the Owners in 1995 subject to Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). The Owners sought to partially revoke their Common Carrier Status of States exemption in order to invoke Section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and the Board's interim trail use regulations, 49 C.F.R. § 1152.29, and ultimately railbank the Line.

¹ These proceedings have not been consolidated but are being addressed in the same decision for administrative convenience.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ Norfolk & W. Ry.—Aban. Exemption—Between Indianapolis & Tipton in Marion, Hamilton, & Tipton Ctys., Ind., AB 290 (Sub-No. 117X) et al. (ICC decided Nov. 4, 1991). In that docket, the Board's predecessor, the Interstate Commerce Commission, granted the Line's former owner, Norfolk and Western Railway, and former operator, the Indiana Rail Road Company, authority to abandon the Line and discontinue operations over the Line, respectively.

On May 31, 2018, the Board issued a decision in Docket No. FD 36137 finding that the Owners could pursue railbanking of the Line without revocation of their exemption authority. City of Fishers—Pet. for Partial Revocation of Exemption (May 2018 Decision), Docket No. FD 36137 (STB served May 31, 2018). Thereafter, the Board received requests for issuance of notices of interim trail use (NITUs) for portions of the Line, one each from Fishers, Noblesville, and the City of Indianapolis, Ind. (Indianapolis). The Board also received a motion for preliminary injunction and motion for clarification from U.S. Rail Holdings, LLC (U.S. Rail), requesting that the Board enjoin the Owners from removing the rail and associated rail assets along the Line and requesting that the Board clarify the path by which U.S. Rail could purchase and operate the Line.

As discussed below, the Board denies U.S. Rail’s motion for preliminary injunction, clarifies the path through which service could be restored over the Line, and issues the three requested NITUs.

BACKGROUND

Since issuing its May 31, 2018 decision, the Board has received several additional filings in both Docket No. FD 36137 and the related abandonment docket, Norfolk & Western Railway—Abandonment Exemption—Between Indianapolis & Tipton in Marion, Hamilton, & Tipton Counties, Ind., Docket No. AB 290 (Sub-No. 117X) et al.⁴

On June 8, 2018, Fishers and the other Owners jointly filed a request in Docket No. AB 290 (Sub-No. 117X) for issuance of a NITU for approximately five miles of the Line, with Fishers as the proposed trail sponsor (the Fishers NITU Request).

On June 11, 2018, U.S. Rail filed a motion for clarification and motion for preliminary injunction. In its motion for clarification, U.S. Rail requests that the Board specify the path via which U.S. Rail could obtain Board authority to purchase and operate the Line. (U.S. Rail Mot. for Clarification 1.) U.S. Rail suggests three possible paths: the feeder line process under 49 U.S.C. § 10907 and 49 C.F.R. § 1151.2; the offer of financial assistance (OFA) process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27; or reactivation of the Line after the issuance of a NITU under 49 C.F.R. § 1152.29(d)(2). (U.S. Rail Mot. for Clarification 7 n.2, 8-11. See also U.S. Rail Rebuttal 9-11.)

U.S. Rail argues that, in its view, the most appropriate path is for the Board to allow U.S. Rail to file a feeder line application because the public convenience and necessity (PC&N) “clearly require the sale of the Line.” (U.S. Rail Mot. for Clarification 8.) Alternatively, U.S. Rail argues that the Board could toll, or exempt it from, the statutory OFA filing period under

⁴ Unless otherwise noted, the filings discussed were submitted in both Docket No. AB 290 (Sub-No. 117X) and Docket No. FD 36137.

49 U.S.C. § 10904(c) to enable U.S. Rail to file an OFA and acquire the Line. (*Id.* at 7 n.2.) Under either the feeder line or OFA processes, U.S. Rail argues that it would qualify as a financially responsible entity and has shown that there is a need for service on the Line. (*Id.* at 5-6 (relying on previously-filed comments as evidence of need for service. *See* Stone Spectrum Comment, Oct. 2, 2017; Crown Technology Comment, Oct. 5, 2017; Kokomo Grain Company Inc. Comment, Oct. 6, 2017; The Quikrete Companies Comment, Oct. 13, 2017.); U.S. Rail Mot. for Clarification 8, V.S. Mitchell.) As a third alternative, U.S. Rail argues that the Board could find that U.S. Rail can seek to reactivate the Line after the Board issues the requested NITUs.⁵ (U.S. Rail Mot. for Clarification 10.) Under 49 C.F.R. § 1152.29(d)(2), if an interim trail use agreement is reached, it is subject to restoration or reconstruction for railroad purposes. Under appropriate circumstances, a bona fide third-party petitioner can request that a NITU be vacated to permit the reactivation of rail service on a railbanked line. *King Cty., Wash.—Acquis. Exemption—BNSF Ry.*, FD 35148, slip op. at 4 (STB served Sept. 18, 2009).

U.S. Rail argues that there must be a path for reactivation of lines acquired under Common Carrier Status of States because that exemption only applies to 49 U.S.C. §§ 10901, 10903, and 11101. (U.S. Rail Mot. for Clarification 11.) U.S. Rail argues that if the Board nonetheless finds that Common Carrier Status of States does exempt the Owners from all three paths suggested by U.S. Rail, the Board should revoke the Owners’ exemption to the extent necessary to allow U.S. Rail to either file a feeder line application or seek to reactivate the Line after NITUs are issued. (U.S. Rail Mot. for Clarification 11-12.) U.S. Rail states that the criteria for revoking the exemption under § 10502(d)—that regulation is needed to carry out the rail transportation policy—would be satisfied by protecting the public’s access to rail service. (*Id.* at 12.)

In its motion for preliminary injunction, U.S. Rail argues that an injunction is necessary to prevent the Owners from removing the track and other rail assets along the Line, and that the requests for NITUs should be stayed pending a Board decision on the motion for clarification. (U.S. Rail Mot. for Prelim. Inj. 1.) According to U.S. Rail, it meets all criteria for issuance of preliminary injunction. (*Id.*) U.S. Rail argues that the removal of the track and other rail assets would cause it irreparable harm because it would then be cost prohibitive to restore service on the Line. (*Id.* at 8-9.) U.S. Rail further argues that it is likely to succeed on the merits of its motion for clarification, as “there must be a path available that would allow [U.S. Rail] to purchase and operate the Line,” and because, U.S. Rail argues, there is a need for rail service on the Line. (*Id.* at 9, 11.) In addition, U.S. Rail argues that the public interest supports an injunction because the public interest is best served by keeping the track in place while the Board decides U.S. Rail’s motion for clarification and by protecting public access to rail, and that the

⁵ When U.S. Rail filed its motions for preliminary injunction and clarification, only the Fishers NITU Request had been filed. As discussed below, two additional NITU requests for other sections of the Line have since been filed, and U.S. Rail filed responses opposing both of those requests and incorporating by reference its previous filings. (*See* U.S. Rail Reply, August 14, 2018; U.S. Rail Reply, Sept. 5, 2018.)

Owners will not be harmed by an injunction. (*Id.* at 14, 15.) U.S. Rail also requests that, if the Board should decide that reactivation of the Line after the issuance of a NITU is the proper path forward for U.S. Rail, the Board should prohibit the Owners from removing the track before U.S. Rail has the opportunity to file a petition to vacate the NITU and an application to purchase the Line. (*Id.* at 13.)

On June 25, 2018, the Owners replied to U.S. Rail's motions for clarification and preliminary injunction. The Owners argue that U.S. Rail's motion for clarification should be denied because the Owners are not, and should not be made, subject to the feeder line provisions of 49 U.S.C. § 10907. (Owners Reply 1, June 25, 2018.) The Owners argue that, under Common Carrier Status of States, they are exempt from the common carrier obligation and that, therefore, it would be impossible for any feeder line applicant to make the showing that the Owners have failed to meet their obligation to provide service upon reasonable request under 49 U.S.C. § 11101(a). (Owners Reply 4-5.) The Owners further argue that U.S. Rail cannot make the required PC&N showing, and that, even if the Board were to revisit the Owners' regulatory status, U.S. Rail has not shown that this would result in a forced sale of the Line to U.S. Rail. (*Id.* at 6-10.)

In response to U.S. Rail's motion for preliminary injunction, the Owners argue that U.S. Rail has not met any of the prongs of the standard for an injunction. In particular, the Owners argue that U.S. Rail's only allegation of potential harm, a lost business opportunity, is too speculative to support an injunction. (*Id.* at 11-12.) The Owners further argue that U.S. Rail is unlikely to succeed on the merits of its case and ultimately be able to acquire the Line because, among other reasons, there is "no persuasive evidence that there is a genuine demand for freight service on the [L]ine" (*Id.* at 12-14.) Furthermore, the Owners argue that the public interest supports denying an injunction, and that doing otherwise would discourage public entities from acquiring lines pursuant to Common Carrier Status of States. (*Id.* at 11-15.)

On July 3, 2018, U.S. Rail filed a motion for leave to file a rebuttal and its rebuttal. U.S. Rail argues in its rebuttal that, because the overriding policy behind both Common Carrier Status of States and the Trails Act is to preserve rights-of-way for railroad use, there must be some path by which U.S. Rail could purchase the Line from the Owners and reinstitute freight service. (U.S. Rail Rebuttal 3-6.) U.S. Rail also argues that the Owners incorrectly apply the PC&N factors in claiming that the feeder line statute is inapplicable here. (*Id.* at 9.) U.S. Rail also expands its argument that the OFA process is a potential path to its acquisition of the Line, arguing that the Board could grant an exemption from the four-month statutory deadline for filing OFAs under 49 U.S.C. § 10904(c) to allow U.S. Rail to file an OFA even though the Line was authorized for abandonment in 1991. (*Id.* at 10-11.) And, though it disfavors the option of allowing reactivation to be sought after issuance of a NITU, U.S. Rail also argues that "[o]nce the Line is railbanked, there can be no dispute that it is subject to reactivation by a willing buyer." (*Id.* at 8.)

On July 13, 2018, the Owners replied in opposition to U.S. Rail's motion for leave to file a rebuttal and rebuttal.⁶ The Owners argue that U.S. Rail's motion should be rejected as its rebuttal is unnecessary, prejudicial, and presents new arguments in favor of its motion for clarification. (Owners Reply 1, 4-5, July 13, 2018.) The Owners request, however, that if the Board accepts U.S. Rail's rebuttal, the Board should also accept the Owners' reply arguments, which they included with their filing. In their reply arguments, the Owners claim that U.S. Rail's interest is not in resuming freight service on the Line, but rather, to operate excursion trains. The Owners further argue that U.S. Rail only fully presents the OFA process as a possible path to acquisition for the first time in its rebuttal and that a 27-year extension of the OFA filing deadline is "beyond the pale." (Id. at 10-12.) Additionally, the Owners argue that U.S. Rail's proposal to acquire the Line through the post-NITU reactivation process is not ripe, as there is no NITU in place, and that U.S. Rail has not presented "a case for economically viable freight service." (Id. at 12.) The Owners also note that "it is unlikely that the Board would sanction a taking as an outgrowth of interim trails use." (Id. at 13.) The Owners further state that, should the Board consider the option of reactivation following issuance of the NITU, the Owners will "have to consider whether to simply effectuate abandonment of the [L]ine now . . . and then go about preserving the corridor through applicable state law processes instead." (Id.)

On July 31, 2018, Save the Nickel Plate, Inc., filed a comment in Docket No. AB 290 (Sub-No. 117X) raising concerns about Fishers' plans to construct a tunnel in the process of converting the Line to a trail. (Save the Nickel Plate Comment 1, July 31, 2018.) On August 6, 2018, Noblesville and the other Owners jointly filed a request in Docket No. AB 290 (Sub-No. 117X) for issuance of a NITU for approximately four miles of the Line, with Noblesville as the proposed trail sponsor (the Noblesville NITU Request).⁷ On August 14, 2018, U.S. Rail responded in opposition to the Fishers and Noblesville NITU Requests, incorporating by reference its earlier pleadings. Also on August 14, 2018, the Owners filed a letter in Docket No. AB 290 (Sub-No. 117X) responding to Save the Nickel Plate's comment, arguing that the comment is part of a "new round of obstructionist filings." (Owners Comment 1, August 14, 2018.)

On August 17, 2018, Indianapolis and the Owners jointly filed in Docket No. AB 290 (Sub-No. 117X) a request for issuance of a NITU for approximately 11.87 miles of the Line, with Indianapolis as the proposed trail sponsor (the Indianapolis NITU Request).⁸

⁶ In the interests of a complete record U.S. Rail's motion for leave to file a rebuttal will be granted and its rebuttal accepted into the record, as will the Owners' reply in opposition.

⁷ This segment of the Line connects with the north end of the segment over which Fishers has requested a NITU.

⁸ This segment of the Line connects with the south end of the segment over which Fishers has requested a NITU.

On August 22, 2018, Indianapolis City-County Councillor Jared Evans filed a comment arguing that “there exist some questions of ownership of the corridor and Indianapolis’ right to participate in the decisions concerning the railroad” and requesting that the Board suspend the proceeding “until issues of ownership, representation, and authorization can be resolved.” (Evans Comment 1, Aug. 22, 2018.) On August 23, 2018, Indiana State Senator Michael Crider filed a comment urging the Board to put appropriate emphasis on restoring rail use on the Line. On August 30, 2018, the National Association of Reversionary Property Owners (NARPO) filed a comment requesting the Board revisit its determination in the May 31, 2018 decision that the abandonment of the Line authorized in 1991 was not consummated. See May 2018 Decision, FD 36137, slip op. at 5-6.

On August 31, 2018, the Owners and Indianapolis replied in Docket No. AB 290 (Sub-No. 117X) to Councillor Evans, Senator Crider, and NARPO, arguing that their comments are “meritless” and are “new attempts by excursion train advocates to delay agency action” on the NITU requests. (Owners & Indianapolis Reply 1, Aug. 31, 2018.) The Owners and Indianapolis also argue that the Indianapolis NITU Request was “duly authorized by City leadership through the office of the Mayor of the City of Indianapolis,” and that NARPO has shown no basis for the Board to revisit whether the abandonment of the Line approved in 1991 was consummated. (Id. at 2, 3.)

On September 5, 2018, U.S. Rail replied to the NITU request filed by Indianapolis, incorporating by reference its earlier pleadings and joining Councillor Evans’ August 22 comment. On September 14 and 26, 2018, Cody Phipps filed comments in Docket No. AB 290 (Sub-No. 117X) in favor of commuter train service over the Line. On September 25, 2018, Save the Nickel Plate and Richard Vonnegut filed a comment in Docket No. AB 290 (Sub-No. 117X) requesting the Board stay any action in that docket until two lawsuits alleging that the municipalities’ decisions to authorize submission of the three NITUs violated Indiana law are resolved. (Save the Nickel Plate & Vonnegut Comment 2, Sept. 25, 2018.) On October 9, 2018, the Owners filed a response in Docket No. AB 290 (Sub-No. 117X) to Save the Nickel Plate’s and Mr. Vonnegut’s filing, arguing that the lawsuits filed by Save the Nickel Plate and Mr. Vonnegut are “time-barred and unfounded,” and that their request for a stay is an attempt to frustrate the interim trail use process and does not even address the standard for issuance of a stay. (Owners Reply 2-3, Oct. 9, 2018.)

PRELIMINARY MATTERS

Petition for Preliminary Injunction

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not

be substantially harmed by a preliminary injunction, and (4) the public interest supports granting the preliminary injunction. See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc. (Holiday Tours), 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958); see also Union Pac. R.R.—Pet. for Declaratory Order & Preliminary Injunction, FD 36197, slip op. at 3 (STB served June 29, 2018); Richard Best Transfer, Inc. v. Union Pac. R.R., NOR 42149, slip op. at 4 (STB served Dec. 22, 2016). A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction. Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012).

To show irreparable harm, the requesting party must demonstrate both the imminence and the irreparable nature of any purported harm. “Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.” Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The harm alleged “must be both certain and great; it must be actual and not theoretical. Injunctive relief ‘will not be granted against something merely feared as liable to occur at some indefinite time’” Id. (quoting Conn. v. Mass., 282 U.S. 660, 674 (1931)); see also Va. Petroleum Jobbers, 259 F.2d at 925 (“Mere injuries, however substantial . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”). Although economic loss is not generally considered irreparable harm, where it “threatens the very existence of the movant’s business,” such a loss may be considered irreparable. Wis. Gas Co., 758 F.2d at 674.

Here, U.S. Rail has not met its burden of showing that it faces irreparable harm in the absence of a preliminary injunction, and therefore the request for preliminary injunction will be denied. U.S. Rail argues that the irreparable harm it will suffer in the absence of a preliminary injunction is the removal of the track and other rail assets along the Line, which will make the reinstitution of rail service cost-prohibitive. (U.S. Rail Mot. for Prelim. Inj. 8.) However, a lost business opportunity alone does not qualify as irreparable harm.⁹ See Wis. Gas Co., 758 F.2d at 674. In addition, U.S. Rail’s interest in the line is at this point speculative: only if the Owners had a common carrier obligation and refused to provide service could U.S. Rail seek to acquire the Line.

Because U.S. Rail has failed to demonstrate that it will suffer irreparable harm in the absence of a preliminary injunction, the Board need not address its arguments regarding the other requirements for a preliminary injunction. Union Pac. R.R., FD 36197, slip op. at 5; N. Coast

⁹ Cf. Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140, slip op. at 4-5 (STB served May 7, 2015) (finding bad faith on the part of the respondent and irreparable harm where “substantial and unrecoverable costs” would be required to replace approximately 60 miles of track, though noting that economic injury, by itself, may be insufficient to qualify as irreparable harm).

R.R. Auth. v. Sonoma-Marín Area Rail Transit Dist., NOR 42148, slip op. at 4 (STB served Oct. 21, 2016); Am. Chemistry Council, NOR 42129, slip op. at 5.

Request to Stay Docket No. AB 290 (Sub-No. 117X)

As the Owners point out, Save the Nickel Plate and Mr. Vonnegut do not address or meet the stay criteria. See, e.g., Holiday Tours, 559 F.2d at 843; Va. Petroleum Jobbers Ass’n, 259 F.2d at 925. Furthermore, Save the Nickel Plate and Mr. Vonnegut have not shown how the alleged violations of Indiana law are relevant to the Board’s analysis of the NITUs requested here, which simply allow the parties to negotiate for interim trail use. Therefore, the stay request of Save the Nickel Plate and Mr. Vonnegut will be denied.

DISCUSSION AND CONCLUSIONS

Motion for Clarification

In its motion for clarification, U.S. Rail asks the Board to clarify the path via which U.S. Rail could obtain Board authority to purchase and operate the Line. U.S. Rail proposes three possible paths: the feeder line process under 49 U.S.C. § 10907 and 49 C.F.R. pt. 1151; the OFA process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27; or reactivation of the Line after the issuance of a NITU or NITUs under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29(d)(2) and entry into a Trails Act agreement. (U.S. Rail Mot. for Clarification 7 n.2, 8-11; U.S. Rail Rebuttal 9-11.) The Board addresses each in turn.

The Board finds that the feeder line process is not appropriate under the circumstances here. Under 49 U.S.C. § 10907(c)(1)(A), a feeder line applicant must show that “the rail carrier operating [the] line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line.” See also 49 C.F.R. § 1151.3(a)(11)(i)(A). However, the Owners are exempt from the common carrier obligation to provide service on reasonable request under 49 U.S.C. § 11101(a) because they acquired the Line subject to Common Carrier Status of States.

U.S. Rail argues that the Board should “revoke the exemption for the purposes of its request to purchase the Line under the feeder line provision.” (U.S. Rail Mot. for Clarification 11.) U.S. Rail argues that an exemption revocation is required to carry out the overriding rail transportation policy that calls for the “development and continuation of a sound rail transportation system . . . to meet the needs of the public,” 49 U.S.C. § 10101(4). (U.S. Rail Mot. for Clarification 12.) It claims that revocation would serve this aspect of the rail transportation policy “by protecting the public’s access to rail service.” (*Id.*) In contrast, the Owners argue that that policy objective is not met here, because the Line was long ago authorized for abandonment and has remained inactive for freight service since at least 2005. (Owners Reply 8.)

The intent of Common Carrier Status of States is to encourage governmental entities to maintain local rail service on lines that would otherwise be abandoned by exempting those entities or their operators from Board regulation. The circumstances described on the record do not demonstrate a need to override this policy goal through an exemption revocation.

With regard to the OFA process, the Line was authorized for abandonment in 1991 and the time period for filing an OFA has long passed. The record presents no basis to now exempt the Line from the four-month statutory OFA filing period under 49 U.S.C. § 10904(c). Accordingly, the OFA process is inappropriate here.

Because NITUs have been requested, if U.S. Rail wishes to seek to restore service on the Line, the appropriate path is by seeking to vacate a NITU or NITUs to reactivate service, after a NITU or NITUs has or have been issued and the Board is notified a Trails Act agreement has been reached.¹⁰ The Board has previously laid out the process and standard for third-party reactivation of a railbanked line:

[A] bona fide third-party petitioner, under appropriate circumstances, can request that a NITU be vacated to permit the reactivation of rail service. A bona fide petitioner is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation. Whether a petitioner is bona fide is a fact-bound determination.

Ballard Terminal R.R.—Acquis. & Operation Exemption—Woodinville Subdivision, FD 35731 et al., slip op. at 4-5 (STB served Dec. 30, 2014); see also GNP Rly, Inc.—Acquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision, FD 35407 et al., slip op. at 5 (STB served June 15, 2011) (“a bona fide petitioner, under appropriate circumstances, could request that the NITUs be vacated to permit reactivation of the line segments for continued rail service in the future”).

The Owners are correct that, under Common Carrier Status of States, they are not currently subject to the common carrier obligation under 49 U.S.C. § 11101(a). However, the Owners would be voluntarily placing themselves and the Line back under the Board’s jurisdiction to the extent necessary to invoke the Trails Act. An essential part of the Trails Act and the Board’s implementing regulations is the requirement that a railbanked line be subject to potential reactivation should a genuine need for service over the Line arise. See 16 U.S.C. § 1247(d) (a railbanked line shall not be considered abandoned “if such interim use is subject to restoration or reconstruction for railroad purposes”); 49 C.F.R. § 1152.29(d)(2) (requiring that a NITU in an exemption proceeding “indicate that interim trail use is subject to future restoration

¹⁰ As the Owners note, pursuing reactivation of all or part of the Line would not guarantee that U.S. Rail would be able to purchase the Line for continued rail service. Rather the Trails Act is the appropriate process through which U.S. Rail could seek to provide evidence of a genuine need for rail service on the Line and its financial responsibility to provide that service.

of rail service”); see also Sunflower Rails-Trails Conservancy, Inc.—Pet. for Declaratory Order—Sale of Railbanked Right-of-Way, FD 36034, slip op. at 4 (STB served Feb. 23, 2017) (once a trail use agreement is reached “the Board’s chief concern . . . is that the statutory railbanking conditions not be compromised and that nothing occur that would preclude a railroad’s right to reassert control over the right-of-way at some future time to revive active service”). The Owners cannot avoid the statutory reactivation requirement in the Trails Act because they acquired the Line subject to Common Carrier Status of States. In addition, contrary to the Owners’ assertions that the future disposition of the Line is solely “the Owners’ prerogative,” (Owners Reply 10, July 13, 2018), Board precedent is clear that “the right to reactivate a rail-banked line is not an exclusive right” and that a request to reactivate a railbanked line may come from a third party. Ballard Terminal R.R., FD 35731 et al., slip op. at 4-5; see also GNP Rly, Inc., FD 35407 et al., slip op. at 5; King Cty., Wash., FD 35148, slip op. at 3-4

In light of the Owners’ comments in this proceeding indicating a potential resistance to requests to reactivate the Line in the future, (see Owners Reply 10, 13, July 13, 2018), the Board reiterates that any use of the right-of-way for trail purposes under the Trails Act would be subject to possible future reconstruction and reactivation of the right-of-way for rail service. If the Owners or prospective trail sponsors are unwilling to allow future reactivation of the Line, should there be a legitimate showing of need made, they are not eligible to railbank the Line under the Trails Act and should not seek to reach a non-conforming trail use agreement.

The Board further notes that, despite the clear establishment of a right to reactivate railbanked lines by third-parties, as discussed above, the third-party petitioner must demonstrate that it has sufficient financing and that there is sufficient shipper demand to warrant the proposed reactivation. The Board has previously held that demand for freight rail service must be supported by “credible evidence” and must include more than just “vague support.” See Ballard Terminal R.R., FD 35731 et al. at 7. Moreover, as the Owners state, even if U.S. Rail can demonstrate evidence of a genuine need for rail service on the Line and its financial responsibility to provide that service, there is no guarantee that U.S. Rail would be able to purchase the Line for continued rail service. Only if the Owners refused to provide service could U.S. Rail seek to acquire the Line.

Save the Nickel Plate and Mr. Vonnegut seek a stay during the pendency of their lawsuits alleging that the municipalities violated Indiana state law. However, as the Owners point out, Save the Nickel Plate and Mr. Vonnegut have not met the stay criteria. Furthermore, Save the Nickel Plate and Mr. Vonnegut have not shown how the alleged violations of Indiana law are relevant to whether the Board should impose the NITUs requested here. NITUs simply allow the parties to negotiate for interim trail use.¹¹

¹¹ The Board does not interpret state or local law to determine if a potential trail sponsor is complying with such law. See Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind., AB 290 (Sub-No. 168X), slip op. at 12 (STB served May 4, 2005).

Requests for Issuance of NITUs

As noted, the Board has received three requests for issuance of NITUs in Docket No. AB 290 (Sub-No. 117X): the Fishers NITU Request, filed June 8, 2018; the Noblesville NITU Request, filed August 6, 2018; and the Indianapolis NITU Request, filed August 17, 2018. The three segments of the Line over which the NITUs have been requested connect but do not overlap.

Specifically, on June 8, 2018, Fishers and the other Owners jointly filed the Fishers NITU Request for approximately five miles of the Line between approximately milepost I-14 and milepost I-19, with Fishers as the proposed trail sponsor. Pursuant to 49 C.F.R. § 1152.29, Fishers also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In the jointly-filed request, the Owners indicate that they are willing to negotiate an agreement for interim trail use with Fishers.

On August 6, 2018, Noblesville and the other Owners jointly filed the Noblesville NITU Request for approximately four miles of the Line between approximately milepost I-19 and milepost I-23, with Noblesville as the proposed trail sponsor. Pursuant to 49 C.F.R. § 1152.29, Noblesville also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In the jointly-filed request, the Owners indicate that they are willing to negotiate an agreement for interim trail use with Noblesville.

On August 17, 2018, Indianapolis and the Owners jointly filed the Indianapolis NITU Request for approximately 11.87 miles of the Line between approximately milepost I-2.13 and milepost I-14, with Indianapolis as the proposed trail sponsor. Indianapolis and the Owners requested expedited consideration of their NITU request. Pursuant to 49 C.F.R. § 1152.29, Indianapolis also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In the jointly-filed request, the Owners indicate that they are willing to negotiate an agreement for interim trail use with Indianapolis.

Because the three NITU requests comply with the requirements of 49 C.F.R. § 1152.29 and the Owners are willing to negotiate for trail use with all three proposed sponsors, all three NITUs will be issued. The parties may negotiate Trails Act agreements for the subject rights-of-way during the 180-day period prescribed below. If any interim trail use agreements are reached (and thus, interim trail use is established) the parties to each agreement shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2)

and (h). If no agreement is reached within 180 days over any of the subject rights-of-way, the Owners may fully abandon those portions of the Line. 49 C.F.R. § 1152.29(d)(1).

It is ordered:

1. U.S. Rail's motion for a preliminary injunction is denied.
2. U.S. Rail's motion for clarification is granted, as discussed above.
3. U.S. Rail's motion for leave to file a rebuttal will be granted and its rebuttal accepted into the record. The Owners' reply in opposition to U.S. Rail's motion will also be accepted into the record.
4. Save the Nickel Plate's and Mr. Vonnegut's motion to stay is denied.
5. The three NITUs requested by Fishers, Noblesville, and Indianapolis are granted to permit Fishers, Noblesville, and Indianapolis to negotiate with the Owners for trail use for their respective portions of the Line for a period of 180 days from the service date of this decision, until June 19, 2019.
6. If any interim trail use/railbanking agreements are reached, those agreements must require the trail sponsor to assume, for the term of the agreement, full responsibility for:
(i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the Owners against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
7. Interim trail use/railbanking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 6 above.
8. If any interim trail use agreements are reached (and thus, interim trail use is established), the parties to the agreement shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).
9. If any interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
10. If any agreements for interim trail use/railbanking are reached by June 19, 2019, for the portion of the right-of-way subject to the NITU, interim trail use may be implemented. If no

agreement is reached over any portion of the subject right-of-way, the Owners may fully abandon those portions of the Line.

11. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.