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SERVICE DATE – JULY 31, 2019

SURFACE TRANSPORTATION BOARD

DECISION

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 denies as premature a request from US Rail Holdings, LLC (US Rail), for the Board to vacate three notices of interim trail use or abandonment and to permit rail service to be reactivated over portions of a rail line in Indiana. The Board also denies US Rail’s motion for preliminary injunction to prohibit the removal of track and other rail assets along the line.

Decided: July 29, 2019

On December 21, 2018, pursuant to Section 8(d) of the National Trail Systems Act (Trails Act), 16 U.S.C. § 1247(d), and the Board’s interim trail use regulations, 49 C.F.R. § 1152.29, the Board issued three notices of interim trail use or abandonment (NITUs) covering three connected segments of a 37.56-mile rail line that extends between milepost I-2.13 at Indianapolis, Ind., and milepost I-39.69 at Tipton, Ind. (the Line). The Line is jointly owned by the cities of Fishers, Ind. (Fishers) and Noblesville, Ind. (Noblesville), and Hamilton County, Ind. (Hamilton County) (collectively, the Owners).³ On March 29, 2019, US Rail Holdings,

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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ As explained further in the Board’s May 31, 2018 decision in Docket No. FD 36137, slip op. at 5, the Owners’ purchase of the Line in 1995 was not subject to licensing authority from the Interstate Commerce Commission, the Board’s predecessor agency, pursuant to

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LLC (US Rail), moved to vacate the NITUs and reactivate rail service. Also on March 29, 2019, US Rail filed a motion for preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4) seeking to prohibit the Owners from removing track and other rail assets along the segments of the Line subject to the NITUs. As discussed below, the Board will deny both motions.

BACKGROUND⁴

By decision served December 21, 2018, the Board explained the path by which US Rail could obtain the Board's authority to purchase and operate the Line. See City of Fishers—Pet. for Partial Revocation of Exemption (December 2018 Decision), FD 36137 et al. (STB served December 21, 2018). The Board further explained that, because NITUs had been requested, if US Rail wished to seek to restore service on the Line, the appropriate path would be “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 that a Trails Act agreement has been reached.” Id. at 9. The Board also noted that a bona fide third-party petitioner for reactivation of rail service “is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation.” Id. (quoting Ballard Terminal R.R.—Aquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision, FD 35731 et al., slip op. at 4-5 (STB served Dec. 30, 2014)).

In the December 2018 Decision, the Board also denied US Rail's motion for preliminary injunction, which sought to enjoin the Owners from removing track and other rail assets along the Line and to stay the trail use process. In that decision, the Board issued three NITUs covering three contiguous segments, for a total of approximately 20.87 miles of the 37.56-mile Line, between milepost I-2.13 and milepost I-23 (the NITU Line).⁵

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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). Under that precedent, where a state entity acquires a line approved for abandonment and the abandonment has not been consummated, the acquisition is exempt from agency regulation, as is the state entity after the acquisition has taken place.

⁴ A more detailed history of these proceedings is contained in the Board's May 31, 2018 decision in Docket No. FD 36137 and December 21, 2018 decision in Docket Nos. FD 36137 and AB 290 (Sub-No. 117X), respectively.

⁵ The Board received three requests for issuance of NITUs in Docket No. AB 290 (Sub-No. 117X): (1) Fishers and the other Owners jointly requested a NITU between milepost I-14 and milepost I-19, with Fishers as the proposed interim trail sponsor; (2) Noblesville and the other Owners jointly requested a NITU between milepost I-19 and milepost I-23, with Noblesville as the proposed interim trail sponsor; and (3) the City of Indianapolis (Indianapolis) and the Owners jointly requested a NITU between approximately milepost I-2.13 and milepost I-14, with Indianapolis as the proposed interim trail sponsor.

On March 29, 2019, US Rail filed a motion to vacate the NITUs and reactivate rail service on the NITU Line.⁶ According to US Rail, on January 14, 2019, the City of Fishers Board of Public Works & Safety approved a resolution providing that the Hoosier Heritage Port Authority (HHPA),⁷ acting on behalf of the Owners, would enter into an interim trail use/railbanking agreement with Fishers in its individual capacity as trail sponsor (Fishers Trail Use Agreement). (US Rail Mot. to Vacate 6.) US Rail asserts that the Fishers Trail Use Agreement was consummated the same day. (*Id.*) US Rail contends that the Fishers Trail Use Agreement states that the HHPA has decided to remove all trackage and other rail assets on the NITU Line. (*Id.*; see also *id.* at Ex. B, Res. City of Fishers Bd. Pub. Works & Safety.) In addition, US Rail asserts that it has sufficient financing to purchase and operate the NITU Line and that there is sufficient shipper demand on the NITU Line to warrant reactivation. (US Rail Mot. to Vacate 7-9.)

Along with its motion to vacate, US Rail also filed a motion for preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4), seeking to enjoin the Owners and their agents, including the HHPA, from removing track and other rail assets along the NITU Line. (US Rail Mot. for Prelim. Inj. 1, Mar. 29, 2019.) US Rail argues that it would be irreparably harmed if the Board denies the motion for preliminary injunction because, if the Owners remove track and other rail assets, reactivating service along the NITU Line would become prohibitively expensive. (*Id.* at 5, 7.) Moreover, US Rail asserts that the harm is imminent, since the Fishers Trail Use Agreement has been reached and provides for removal of the track and other rail assets along the entire NITU Line. (*Id.* at 7.) US Rail also argues that there is a strong likelihood that it will succeed on the merits of proving that it is a bona fide third-party petitioner, by demonstrating that it has sufficient financing and that there is sufficient shipper demand to warrant reactivation. (*Id.* at 9-12.)

On April 22, 2019, in Docket No. AB 290 (Sub-No. 117X), the Owners filed a consolidated reply to US Rail's March 29, 2019 motions. The Owners argue that US Rail's motion to vacate the NITUs and reactivate rail service is premature because no portion of the NITU Line is the subject of an executed trail use agreement. (Owners Reply 4-5, Apr. 22, 2019.) As a result, the Owners assert that no one has had occasion to notify the Board of a finalized interim trail use/railbanking agreement. (*Id.* at 5.) The Owners argue that, even if the Board were to address the merits of US Rail's motion to vacate, US Rail's case for vacating the NITUs and reactivating service is "grossly inadequate" because (1) US Rail has not proven that it possesses financial wherewithal, (2) US Rail's evidence of shipper and passenger demand is

⁶ Unless otherwise noted, the filings submitted beginning March 29, 2019 were filed in both Docket No. FD 36137 and Docket No. AB 290 (Sub-No. 117X).

⁷ According to US Rail, the HHPA was created in 1995 to own, protect, and preserve the Line. (US Rail Mot. to Vacate 3.) US Rail represents that each of the Owners owns a one-third interest in the Line through the HHPA. (*Id.*)

neither sufficient nor credible, and (3) the Owners are not interested in engaging in, or promoting, a financially reckless rail service operation. (Id. at 5-11.)

As to the motion for preliminary injunction, the Owners contend that the Board would not need to consider the merits of the motion if the Board were to deny the motion to vacate the NITUs as premature or without merit. (Id. at 12.) The Owners also argue that US Rail is reiterating the same arguments as it made in its previous motion for preliminary injunction, which the Board denied in its December 2018 Decision. (Id.)

On May 10, 2019, the Board received three additional filings from U.S. Rail: a rebuttal to the Owners' April 22, 2019 reply, a motion for leave to file that rebuttal, and a motion for protective order.⁸ In its rebuttal, US Rail argues that its motion to vacate the NITUs and reactivate rail service is not premature because the Board's role under the Trails Act is solely ministerial. (US Rail Rebuttal 3.) According to US Rail, the real trigger of the right to seek rail reactivation is when parties invoke the Trails Act by seeking a NITU, or at least when the Board issues a NITU. (Id. at 5.) Additionally, US Rail provides further evidence of its financial resources, in an effort to demonstrate that it has sufficient financing, and reiterates that there is sufficient shipper demand to warrant reactivation. (Id. at 6-9.)

On May 17, 2019, in Docket No. AB 290 (Sub-No. 117X), the Owners filed a motion to reject US Rail's May 10, 2019 filings and strike US Rail's rebuttal from the record on grounds that US Rail is not entitled to file a rebuttal and is attempting to present additional evidence that it had a full and fair opportunity to present when it filed its motion to vacate the NITUs and reactivate rail service in March 2019. (Owners Mot. to Reject & Strike 1-2.)

On May 22, 2019, in Docket No. AB 290 (Sub-No. 117X), US Rail filed a reply to the Owners' motion to strike and to reject. US Rail urges the Board to accept its rebuttal, including the confidential evidence it submitted, because the Owners' consolidated reply calls into question the adequacy of US Rail's evidence of financial ability. (US Rail Reply to Mot. to Reject & Strike 1-2.)

In addition, on April 15, 2019, and April 24, 2019, the Board received comments from Linda J. Kraatz and First Transit, Inc., respectively, in support of US Rail's motion to vacate the NITUs and reactivate rail service and motion for preliminary injunction. On May 30, 2019, in Docket No. AB 290 (Sub-No. 117X), Gary Davis filed a comment in support of US Rail's motion to vacate the NITUs and reactivate rail service.⁹

⁸ By decision served June 17, 2019, US Rail's motion for protective order was granted.

⁹ On June 7, 2019, the Owners filed a letter in response to Mr. Davis's comment, arguing that the Board should disregard the comment since Mr. Davis did not seek leave to intervene and noting that they would not respond substantively to the comment unless the Board requested that
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On June 24, 2019, in Docket No. AB 290 (Sub-No. 117X), a group of residents of Fishers, Noblesville, and Hamilton County filed a request for the Board to expedite its consideration of US Rail's motion for preliminary injunction, presenting evidence that the HHPA has issued a request for proposals seeking bids for the purchase and removal of 22 miles of rail assets on the NITU Line, with work to begin on or before July 29, 2019. (Residents Letter 1-2; see also id., Attachment 1.) On July 1, 2019, in Docket No. AB 290 (Sub-No. 117X), Tina Siefert, a resident of Fishers, filed a letter raising concerns that the Indiana Department of Transportation's planned construction of a highway overpass over the NITU Line would impede any future plans to reactivate service and urging the Board to grant US Rail's motion for preliminary injunction.¹⁰

PRELIMINARY MATTERS

US Rail's Rebuttal

Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will accept US Rail's May 10, 2019 rebuttal. See Soo Line R.R.—Pet. for Declaratory Order & Prelim. Inj.—Interchange with Canadian Nat'l, FD 36299, slip op. at 2 n.2 (STB served May 9, 2019). Accordingly, the Board will grant US Rail's motion for leave to file rebuttal and deny the Owners' motion to reject and to strike.

Docket No. FD 36137

In their April 22, 2019 reply, the Owners note that US Rail's motion to vacate the NITUs and reactivate rail service and its motion for preliminary injunction were filed in both Docket No. FD 36137 and Docket No. AB 290 (Sub-No. 117X). (Owners Reply 2, Apr. 22, 2019.) The Owners object to US Rail's filing in both dockets. (Id.) For their part, the Owners indicate that they have filed their reply only in Docket No. AB 290 (Sub-No. 117X) because that docket involves the Owners' efforts to implement interim trail use/railbanking. (Id. at 2-3.) According to the Owners, many of the parties in Docket No. FD 36137 have expressed confusion and anger at receiving the recent filings, and the Owners claim some have demanded that the Owners cease and desist from sending them copies of any material related to that docket. (Id. at 3.)

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they do so. Given the outcome of this decision, the Owners need not file a substantive response to Mr. Davis's comment.

¹⁰ On July 15, 2019, the Owners filed a response to the residents' June 24, 2019 letter and Ms. Siefert's July 1, 2019 letter, arguing that there is no basis for the Board to enjoin its future removal of track.

The Board will close Docket No. FD 36137 and will direct the parties to make any future filings in only Docket No. AB 290 (Sub-No. 117X). Docket No. FD 36137 was opened when the Owners filed a petition on August 1, 2017 to partially revoke their exempt status under Common Carrier Status of States for the purpose of invoking the Trails Act. By decision served May 31, 2018, the Board denied that petition as unnecessary and permitted the Owners to pursue interim trail use/railbanking under 49 C.F.R. § 1152.29. Because the Line was authorized for abandonment and the NITUs were filed in Docket No. AB 290 (Sub-No. 117X), it is the appropriate docket in which the Board can consider the Owners' efforts to pursue interim trail use/railbanking for the NITU Line and US Rail's efforts to reactivate service on the NITU Line. Therefore, it is no longer necessary for the parties to file in both dockets.

DISCUSSION AND CONCLUSIONS

Motion to Vacate the NITUs and Reactivate Rail Service

As the Board has previously stated, under appropriate circumstances, a bona fide third-party petitioner can request that a NITU be vacated to permit the reactivation of rail service. Ballard Terminal R.R., FD 35731 et al., slip op. at 4-5; see also GNP Rly, Inc.—Aquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision, FD 35407 et al., slip op. at 5 (STB served June 15, 2011). A bona fide petitioner is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation. Ballard Terminal R.R., FD 35731 et al., slip op. at 5. Whether a petitioner is bona fide is a fact-bound determination. Id.

The Board need not address the merits of US Rail's motion because it is premature. As the Board indicated in the December 2018 Decision, if US Rail wishes to restore service on the NITU Line, "the appropriate path is by seeking to vacate the 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." December 2018 Decision, FD 36137 et al., slip op. at 9 (emphasis added). At this juncture, the Board has issued three NITUs, but the Board has not been notified that any interim trail use/railbanking agreement has been reached. In the case of the segment of the NITU Line between milepost I-14 and milepost I-19, although Fishers has been authorized to enter an interim trail use/railbanking agreement with the HHPA, and both Fishers and the HHPA were presented with the Fishers Trail Use Agreement on January 14, 2019, no agreement has been reached since both parties have not executed the Fishers Trail Use Agreement. (See Owners Reply 2, Apr. 22, 2019; US Rail Mot. to Vacate, Ex. B, License Agreement by & Among HHPA & Fishers, at 12-13 (showing that the HHPA has not executed the Fishers Trail Use Agreement).) As to the segments of the NITU Line between milepost I-19 and milepost I-23 and between milepost I-2.13 and milepost I-14, there is no evidence in the record that agreements for interim trail use/railbanking have been reached. Accordingly, because no agreement has been reached between the Owners and the proposed interim trail sponsors, no part of the NITU Line has yet been railbanked and made available for interim trail use, and US Rail may not presently seek to reactivate service.

US Rail’s argument in its rebuttal that the Board’s issuance of the NITUs in the December 2018 Decision triggered its right to seek reactivation of service on the NITU Line is misplaced. Under the Trails Act and the Board’s implementing regulations, interim trail use/railbanking must be established, meaning an interim trail use/railbanking agreement has been reached, before an entity may seek to reactivate service on a railbanked right-of-way. See 16 U.S.C. § 1247(d) (stipulating that a railbanked right-of-way shall not be considered abandoned “if such interim [trail] use is subject to restoration or reconstruction for railroad purposes”); 49 C.F.R. § 1152.29(d)(2) (instructing that a NITU in an exemption proceeding shall require the parties to notify the Board “if an interim trail use agreement is reached (and thus interim trail use established)”) (emphasis added). By issuing a NITU, the Board provides time for voluntary negotiations for interim trail use/railbanking. See 49 C.F.R. § 1152.29(d)(1). Because the negotiations are voluntary, the abandoning railroad (or the railroad’s successor, such as the Owners) may end the negotiations at any time and request that the Board vacate the NITU, thereby reinstating the abandoning railroad’s authority to abandon the line. See CSX Transp., Inc.—Aban. & Discontinuance of Serv. Exemption—in City of Richmond & Henrico Cty., Va., AB 55 (Sub-No. 726X) et al., slip op. at 2 (STB served Apr. 15, 2015) (vacating a NITU during negotiating period upon carriers’ request and reinstating carriers’ authority to abandon and discontinue service). However, a third-party petitioner like US Rail seeking to vacate a NITU to permit the reactivation of rail service can only do so after an interim trail use/railbanking agreement has been reached, thereby allowing interim trail use/railbanking to be established.

Therefore, the Board will deny as premature US Rail’s motion to vacate the NITUs and reactivate rail service, without prejudice to refile with respect to any portion(s) of the NITU Line over which the Board may be notified in the future that an interim trail use/railbanking agreement has been reached.

Motion 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., 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 & Prelim. Inj., 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).

US Rail's motion for preliminary injunction will be denied. In its December 2018 Decision, the Board denied US Rail's previous motion for preliminary injunction, in which US Rail made essentially the same arguments that it makes here. Because it is still true that no interim trail use/railbanking agreements have been reached, US Rail's position with respect to the Line is no different than it was when the Board issued the December 2018 Decision. As the Board previously explained, US Rail's interest in the Line remains speculative. Only if the Owners reach agreements for interim trail use/railbanking can US Rail possibly seek to reactivate service on what would then be a railbanked right-of-way. December 2018 Decision, FD 36137 et al., slip op. at 7. Moreover, as the Board further noted, economic loss alone does not typically qualify as irreparable harm. Id. In addition, because the Board is denying as premature US Rail's motion to vacate the NITUs and reactivate rail service, US Rail cannot presently show a likelihood that it will prevail on the merits of that motion.

Because U.S. Rail has failed to demonstrate that it will suffer irreparable harm in the absence of a preliminary injunction or that it has a likelihood of success on the merits of its motion to vacate the NITUs and reactivate rail service, 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 R.R. Auth. v. Sonoma-Marin Area Rail Transit Dist., NOR 42148, slip op. at 4 (STB served Oct. 21, 2016); Am. Chemistry Council, NOR 42129, slip op. at 5.

It is ordered:

1. US Rail's motion for leave to file rebuttal is granted.
2. The Owners' motion to reject and to strike is denied.
3. US Rail's motion to vacate the NITUs and reactivate rail service is denied without prejudice.
4. US Rail's verified motion for preliminary injunction is denied.
5. Docket No. FD 36137 is closed. Any future filings related to rail banking of, and possible reactivation of rail service on, the NITU Line shall be filed in Docket No. AB 290 (Sub-No. 117X).
6. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.