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September 30, 2019

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

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

Re: **Docket No. AB-55 (Sub-No. 794X), CSX Transportation, Inc.—Abandonment
Exemption—in Pinellas County, FL**

Dear Ms. Brown:

Attached for efilng is CSX Transportation, Inc.'s Reply to the City of St. Petersburg's Response to Petitioner CSX Transportation, Inc.'s Letter of intent to Negotiate with Georgetown and High Line Railway Company, LLC.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,

/s/ *Louis E. Gitomer*

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

CSXT REPLY TO THE CITY OF ST. PETERSBURG’S RESPONSE TO PETITIONER CSX
TRANSPORTATION, INC.’S LETTER OF INTENT TO NEGOTIATE WITH GEORGETOWN
AND HIGH LINE RAILWAY COMPANY, LLC

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Attorneys for: CSX TRANSPORTATION,
INC.

Dated: September 30, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–
PINELLAS COUNTY, FL

CSXT REPLY TO THE CITY OF ST. PETERSBURG’S RESPONSE TO PETITIONER CSX
TRANSPORTTION, INC.’S LETTER OF INTENT TO NEGOTIATE WITH GEORGETOWN
AND HIGH LINE RAILWAY COMPANY, LLC

CSX Transportation, Inc. (“CSXT”) replies to Response filed by the City of St. Petersburg (the “City”) on September 9, 2019 (the “Response”) to CSXT’s letter agreeing to negotiate interim trail use with the Georgetown and High Line Railway Company LLC (“GHL”) and refusing to negotiate interim trail use with the City. The City claims that CSXT is not engaged in a *bona fide* effort to convert the line of railroad into a trail. Nothing could be further from the truth. Therefore, CSXT respectfully requests that the Surface Transportation Board (the “Board”) deny the request of the City to reject the GHL request for a Notice of Interim Trail Use (“NITU”) where CSXT has agreed to negotiate interim trail use with GHL pursuant to 49 C.F.R. § 1152.29.

The Board’s responsibilities with regard to processing requests for trails in abandonment proceedings has always been ministerial. “The STB’s role under the Trails Act is limited and largely ministerial. *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001)” *National Trails System Act and Railroad Rights-of-Way*, EP 702 (served April 30, 2012).

Under the National Trails System Act and the Board’s implementing rules, if a prospective trail user (here, the City) requests a trail condition and the carrier indicates a willingness to negotiate a trail agreement, the Board has a limited

ministerial role and must issue the CITU. *See Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *see also Caddo Valley R.R.—Aban. Exemption—In Clark, Pike, & Montgomery Ctys., Ark.*, AB 1076X (STB served Feb. 27, 2013); *Rutherford R.R. Devel. Corp.—Aban. Exemption—In Rutherford Cty., N.C.*, AB 567 (Sub-No. 1X) (STB served Aug. 25, 2000); *Alloy Property Company, LLC-Adverse Abandonment-Chicago Terminal Railroad in Chicago, Ill.*, AB 1258 (STB served April 30, 2018).

This ruling applies to a NITU as evidenced by the conclusions in the exemption proceedings in *Caddo Valley* and *Rutherford*.

The City continues to flaunt the rules of the Board by failing to even seek leave to file a prohibited reply to a reply. 49 C.F.R. § 1104.13(c). For that reason alone, CSXT requests that the Board reject the City's improper filing.

Moreover, the City's baseless Response fails to account for the Board's limited ministerial role in converting railroad lines into trails and is rife with misstatements of fact and misrepresentations of the Board's rules.

BACKGROUND

CSXT filed a notice of exemption pursuant to the class exemption at 49 C.F.R. § 1152.50 for CSXT to abandon an approximately 0.86-mile rail line on the Clearwater Subdivision, between milepost ARE 897.57 and milepost ARE 898.43, in St. Petersburg, Pinellas County, FL (the "Line") on August 20, 2019 (the "Notice"). The Board served a Notice of Exemption. *CSX Transportation, Inc.—Abandonment Exemption—in Pinellas County, Fla.*, Docket No. AB-55 (Sub-No. 794X) (served September 9, 2019) (the "*Notice Decision*"). An Environmental Assessment was served on September 13, 2019.¹ Previously on August 29, 2019 the City and GHL filed trail use requests for a Notice of Interim Trail Use ("NITU"). On September 3, 2019,

¹ The EA misstates the party that CSXT has elected to negotiate trail use with, CSXT agreed to negotiate trail use with GHL and specifically refused to negotiate trail use with the City.

CSXT filed a response to both trail use requests, specifically stating “CSXT agrees to negotiate with GHIL toward a possible interim trail use/rail banking arrangement for the Line. However, **CSXT does not agree to negotiate with the City.**” (emphasis added). CSXT refused to negotiate with the City because CSXT and the City had been negotiating the sale and purchase of the Line for years and had not reached agreement. The main reason for the failure of negotiations was that the City did not have the funds available to acquire the Line. CSXT has no reason to believe that the City has funding to acquire the Line for interim trail use. Another potential trail user has negotiated with CSXT and does have the readily available means to acquire the Line. For those reasons CSXT refused to negotiate with the City and had GHIL file a request for a NITU as a placeholder for the ultimate trail user, as it has successfully done in the past. But, GHIL will negotiate in the event that the third party backs out.

The City claims to be “the responsible entity” for the trail that resulted from a CSXT abandonment of a 1.85-mile line in *CSX Transportation, Inc.—Abandonment Exemption—in Pinellas County, FL*, Docket No. AB-55 (Sub-No. 646X) (served June 18, 2004). Response at 2.² Contrary to the City’s claim, Pinellas County requested and was granted a NITU. *Id.* At 3. Indeed, nowhere in the record before the Board is there any indication that the City sought a NITU, was granted a NITU, or acquired the 1.85-mile line.

CSXT confirms that it has agreed to sell the Line as a trail to a third party through the NITU process. Response at 2-3. The third party is not prepared to close on the purchase. However, the City forced CSXT’s hand when it began an adverse abandonment proceeding by filing a Petition for Waiver and Exemption in *City of St. Petersburg, Fla.—Adverse*

² The City also claims to be “a successful CITU applicant.” Response at 6. However, there is no evidence in the Board’s records that the City was ever granted a CITU or became the owner of a trail that was created pursuant to 16 U.S.C. §1247(d).

Abandonment--CSX Transportation, Inc. in Pinellas County, Fla., on July 23, 2019. CSXT opposed the Petition. The matter is pending at the Board.

In response to the proposed adverse abandonment, CSXT filed the Notice on August 20, 2019 and the Board served the *Notice Decision* on September 13, 2019. GHL and the City each requested a NITU on August 29, 2013 and CSXT agreed to negotiate with GHL, but not the City on September 3.

The City then filed the Response.

ARGUMENT

The City contends that GHL is not qualified to request a NITU because it is a subsidiary of CSXT and is not a “qualified private organization” as that term is used in 49 C.F.R. § 1152.29(a).

GHL has requested that a NITU be granted previously in CSXT abandonment proceedings and the Board has granted the NITU.³ Being a subsidiary of CSXT did not prevent the conversion of a railroad line into a trail.

The City claims that GHL and CSXT are the same entity. They are not and the City has not even attempted to pierce the corporate veil of GHL. The City relies on a tortured reading of 49 C.F.R. § 1152.29(a) to conclude that GHL is not “qualified” because a railroad, carrier, and applicant are terms defined by the Board and since GHL and CSXT are the same entity it cannot seek a NITU. The City is wrong.

³ See, e.g., *CSX Transportation, Inc.-Abandonment Exemption-in Worcester County, MA*, Docket No. AB-55 (Sub-No. 691X) (served December 23, 2010), where GHL was granted a NITU, which was eventually transferred to the Cities of Leominster and Fitchburg (decision served August 3, 2017), who acquired the railroad line for a trail. As is the case here, GHL was a successful placeholder for converting a railroad line into a trail that could be reactivated at a later date as a railroad line.

First, 49 C.F.R. § 1152.2, the definition section of the abandonment rules, only defines the term “carrier” as “a railroad company...subject to regulation under 49 U.S.C. Subtitle IV, chapter 105.” GHL does not hold itself out to provide railroad transportation and is not licensed by the Board to provide transportation for compensation. GHL is not a railroad. GHL is not a railroad or applicant, and those terms are not defined in 49 C.F.R. § 1152.2.

Second, the City misinterprets the term “qualified.” The term “qualified” does not appear in 16 U.S.C. § 1247(d). Instead, the language says “shall encourage State and local agencies and private interests to establish appropriate trails....” In proposing the rules governing trail use it was stated that “The only requirements to be met by the user are that it takes full responsibility for the management of the right-of-way, for any legal liability, and for the payment of taxes on the land. If the user agrees, then the Commission cannot permit abandonment inconsistent with the use as a trail.” *Rail Abandonments – Use of Rights-of-Way as Trails*, ICC Docket No. Ex Parte No. 274 (Sub-No. 13) (ICC served February 20, 1985), slip op. at 1. In adopting the final rules, it was explained that a prospective trail user should demonstrate “its ability to assume full legal and financial responsibility for managing the right-of-way.” *Rail Abandonment-Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 592 (1986). These requirements are embodied in the Statement of Willingness to Assume Financial Responsibility (the “SWAFR”) at 49 C.F.R. § 1152.29(a)(3). Meeting these criteria qualifies a private organization, and not the higher standard proposed by the City. There is no other requirement for a private organization to be qualified than the SWAFR.

The City questions whether there will be arms-length negotiations between CSXT and GHL. As mentioned above, GHL has filed the NITU as a placeholder for a third party that has

agreed to purchase the Line as a trail after arms-length negotiations. CSXT and GHL are in compliance with the law and will negotiate as needed.

The City claims that granting a NITU to GHL would create “a new category of rail line – one in a state of quasi-abandonment.” Response at 6. However, any NITU granted to any party prevents the trigger of reversionary interests, permits cessation of rail service, and permits salvage of the line, thereby reducing maintenance costs. See 49 C.F.R. § 1152.29(d)(1).

The City also improperly claims that granting a NITU to GHL will create additional work for the Board and circumvent timetables in the Board’s governing legislation. First, CSXT has agreed to enter an agreement with a third party. Therefore, the unknown additional burdens on the Board suggested by the City will not occur. And even if the Board must issue a NITU to a substitute trail user that CSXT has agreed to negotiate with, the burden on the Board is ministerial. At present, there is no time limit on the negotiating period for trail use.⁴ Therefore, even in the hypothetical case put forth by the City, there is no timetable to circumvent.

The City also erroneously relies on 49 C.F.R. § 1152.29(b)(1), which governs the issuance of a Certificate of Interim Trail Use when an abandonment application has been filed. Here CSXT filed the Notice. Where trail use is sought in an exemption proceeding, which is the case here, the requirements are set forth in 49 C.F.R. § 1152.29(b)(2), which are different than when an application is filed. Even if the requirements of (b)(1) apply, CSXT and GHL have complied. GHL has complied by filing the SWAFR. In the response to GHL filed on September 3, 2019, CSXT stated “CSXT agrees to negotiate with GHL toward a possible interim trail

⁴ There is a proposal pending before the Board to impose a limit on the number of extensions of the period to negotiate trail use. *Limiting Extensions of Trail Use Negotiating Periods*, EP 749 (Sub-No. 1) (served June 6, 2019).

use/rail banking arrangement.” GHL and CSXT have met the requirements of 49 C.F.R. § 1152.29 for the Board to issue a NITU.

CSXT respectfully requests that the Board issue the NITU as requested by GHL, as it will prove the most efficient and expeditious means of implementing trail use and preserving the Line for future service.

Respectfully submitted,

/s/ *Louis E. Gitomer*

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Attorneys for: CSX TRANSPORTATION,
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Dated: September 30, 2019

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document on all parties of record in this proceeding, by email.

// *Louis E. Gitomer*
September 30, 2019