

BEFORE THE SURFACE TRANSPORTATION BOARD ENTERED

CSX Transportation, Inc. –)
 Abandonment Exemption –)
 In Pinellas County, Florida)

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

Office of Proceedings
 April 6, 2023
 Part of
 Public Record

MOTION TO STRIKE

Rails to Trails Conservancy (“RTC”) hereby moves to strike (a) the Response filed by CSX Transportation, Inc. (“CSX”) and its subsidiary Georgetown and High Line Railway Company LLC (“GHL”) filed March 28, 2023, (b) the “Revised Public Version” of the foregoing filed April 3, 2023, and (c) the CSX/GHL Motion for a Protective Order filed March 28, 2023.

Background

By letter dated October 12, 2022 to the Board,¹ the U.S. Department of Justice (“DOJ”) raised questions concerning the “Notice of Interim Trail Use” this Board issued in this proceeding for CSX’s GHL subsidiary to engage in “interim trail use” over a rail line in Pinellas County, Florida. The rail line has been long unused for rail purposes. It apparently is mostly easement or in public highways. CSX was renting portions of it for non-rail uses, including as a beer garden. The City of St. Petersburg attempted to initiate an adverse abandonment proceeding to force CSX off the line and to secure public use of the rail line. To block St. Petersburg, CSX initiated a 49 CFR 1152.50 notice of exemption proceeding (as that proceeding confirms, CSX was not using the line for rail purposes), and then, to continue to block St. Petersburg from public use of the corridor, purported to enter into a railbanking agreement with its apparently for-profit subsidiary, GHL. Now, per DOJ, GHL is doing the same as CSX: blocking St. Petersburg and collecting rents for commercial and non-rail use of the corridor.

¹ The Board states it received the letter on December 14, 2022. See Decision in AB 55 (Sub-no. 794X), served Jan 27, 2023 at p. 2. The DOJ letter was filed in the 794X docket on December 14.

By decision served January 27, 2023, the Board issued an order calling for CSX and GHL to respond to the DOJ letter by February 27, 2023. The Board's order provided for any replies to be filed by March 8, 2023. The Board's order did not provide for replies to replies.

On February 27, 2023, CSX and GHL timely filed their response to the DOJ letter. On or by March 8, 2023, DOJ, St. Petersburg, and RTC filed replies.

On March 17, 2023, CSX filed a statement saying it would respond on March 28, 2023. The March 17 statement did not offer any rationale for why a response should be allowed or was appropriate. On March 28, 2023, CSX and GHL filed a "Response" to the reply comments. Part of the March 28 Response was non-public, for CSX and GHL also filed a motion for a protective order claiming they wished to file an allegedly confidential offer from the City. Leave to file was not sought.

Before any party had an opportunity to reply to the CSX/GHL protective order motion, STB on April 3 served an order issuing a protective order.

Shortly thereafter, CSX/GHL filed and served a corrected "Response" labeled "Revised Public Version." According to CSX/GHL, the City of St. Petersburg informed CSX/GHL on March 30, 2023 that the alleged confidential offer on which CSX predicated its proposed protective order was not confidential. CSX/GHL indicated it was therefore removing the redaction in footnote 8 on p. 11 of its March 28 filing and was filing a revised Public Version. So far as RTC can tell, the redaction is the only ostensible confidential information furnished by CSX.

Discussion

STB's rules are extremely clear that replies to replies are not permitted. 49 CFR 1104.13(c) states: "Replies to a reply are not permitted." Yet that is exactly what CSX and GHL have done, repeatedly, and without any motion for leave. CSX and GHL share experienced counsel. They

simply ignored the rule. To recapitulate, the Board's applicable Order did not provide for replies to replies by CSX, the regulation precludes replies to replies, and no leave for further reply was sought. That ends the matter. As a minimum,² the following CSX/GHL papers must accordingly be stricken.

The March 28, 2023 CSX/GHL "Response to Comments" (public version) must be stricken as violating 49 C.F.R. 1104.13(c).

The March 28, 2023 CSX/GHL "Response to Comments" (redacted version) must be stricken not only as violating 49 C.F.R. 1104.13(c), but also because it is moot: the allegedly confidential information is now admitted by CSX/GHL not to be confidential.

The March 28, 2023 CSC/GHL Motion for Protective Order must also be stricken as in service to a reply to a reply, and thus part of a reply to a reply, which is in turn barred by 49 C.F.R. 1104.13(c). The protective order motion must also be stricken as based on false pretenses: namely, that the City of St. Petersburg made a confidential proposal/offer to CSX. That, as CSX/GHL now admit, was not true.

The April 3, 2023, CSX/GHL "Response to Comments" labeled "Revised Public Version" must also be stricken. Again, it is a reply to a reply barred by 49 C.F.R. 1104.13(c).

On April 3, 2023, this Board without taking comments issued the protective order sought by CSX/GHL. The protective order now appears inappropriately issued and should be stricken as well. In the cover letter to their April 3 filing, CSX/GHL admit that the alleged confidential information on which they based the protective order is not confidential. In other words, CSX sought the protective order for erroneous reasons (reasons that do not exist), and there is no

² An argument can be made that the March 17 CSX statement that it intended to file a reply to a reply should be stricken, but it was a mere notice of possible future intent.

rationale that STB can therefore rely upon for it. Leaving the protective order extant in the circumstances confuses parties concerning whether they must comply with the protective order and how.

There appears no ready manner to deal with CSX/GHL's abuse of Board procedures (by their action in filing a reply to a reply and a protective order ostensibly to "protect" part of that reply to a reply from public viewing) other than a motion to strike. RTC therefore moves to strike the identified CSX pleadings and for STB to withdraw or strike the protective order. RTC imagines that CSX/GHL may seek to exploit this opportunity by filing a reply to the motion to strike which reiterates all of its claims which should be stricken.

The CSX/GHL position is spurious. CSX/GHL is not "railbanking" this property to achieve any interim trail. CSX/GHL are for-profit entities. They do not construct or operate trails, which are not themselves for-profit in nature. Instead, 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.³

³ St. Petersburg and DOJ have evidently both found the CSX interest to be entirely or chiefly rail easement that extinguishes on abandonment authorization from STB.

The general rule is that so long as STB has not authorized an abandonment, then adjoining property owners claiming the underlying fee to a rail easement cannot obtain current use due to continuing federal common carrier regulation. Likewise, without an abandonment authorization (with or without a trail use condition), the adjoining landowners under existing law cannot claim a federal taking requiring the United States to compensate them for alleged reversionary interests because of continued federal common carrier regulation. The remedy for landowners and for public entities seeking to acquire the property (or enjoy their full fee interest) in such a circumstance is to file an adverse abandonment application. If they obtain an STB abandonment authorization, the rail line --if easement—extinguishes/reverts. The railroad in such a circumstance has no marketable title, and thus nothing to sell, but a landowner with the fee can use the fee without the burden of the easement, and a public entity can use eminent domain to secure the underlying fee interests for public purposes as necessary.

The abuse that DOJ noted is that CSX/GHL are misusing the railbanking process to avoid easement extinguishment in order to continue to occupy property for purely for-profit purposes really having nothing to do with rail or trail purposes. CSX, faced with easement extinction arising from a threatened adverse abandonment, started its own rail abandonment proceeding but then railbanked its easement interests with itself. It then claims immunity from eminent domain by public entities, and continues to assert federal preemption of easement interests when challenged by adjoining landowners claiming the underlying fee. The major change wrought by this maneuver is that, due to decisions by the federal courts, STB's railbanking jurisdiction -- unlike its other railroad abandonment jurisdiction--is considered a "taking" requiring the United

States to compensate the adjacent landowners.⁴ In the end, the actions of CSX/GHL block public entities from acquiring property for a trail because STB regulation continues to prevent eminent domain by local authorities of the CSX easement. This prevents public use of the property at fair market value. The maneuver also continues to prevent adjoining landowners reclaiming their land. However, they can obtain compensation by filing a takings claim in Claims Court. The United States is left paying off the landowners for CSX's abuse of the statute.

The DOJ's objection to the CSX practice is that compensation to underlying fee owners makes public policy sense if GHL is making a trail, but it is not. It is simply standing in CSX's shoes, asserting preemption, and demanding rent for non-rail purposes, at least until CSX is paid well over fair market value for the easement to go away. In short, CSX/GHL are trying to force the City of St. Petersburg to pay the railroad huge sums for non-marketable title by occupying the corridor until bought off. This is not a purpose of the Trails Act. And it is at the expense of the United States.

CSX/GHL seem to suggest that this misuse of railbanking is a natural outcome of the Board's rulings to the effect that the Board does not require any particular kind of trail or development of a trail by a particular date. But CSX/GHL push that principle too far. Fundamental to the railbanking law is the purpose that STB should "encourage State and local agencies and private interests to establish appropriate trails." 16 U.S.C. 1247(d). The statute then provides that if a trail is established in a fashion that is "consistent with restoration or reconstruction for railroad purposes," then the trail use may not be deemed an abandonment of rail use. *Id.* The final

⁴ RTC has always disagreed with the plurality ruling by the U.S. Court of Federal Appeals that the issuance of a railbanking order is a per se taking of any easement-held interests, but for now, this is the operative rule of law. But that does not mean it should be abused by CSX as is happening in this case.

sentence provides that STB may not permit abandonment or discontinuance inconsistent or disruptive of trail use if the “State, political subdivision, or qualified private organization” is prepared to assume financial, tax, and tort liability. *Id.*

There are situations where a state-owned or locally-owned rail entity decides to convert from rail use to trail use but generally due to the demise of rail need. But CSX is not a government-owned enterprise; it is a for-profit entity. It is not in the trail business and indeed, has rebuffed the *bona fide* and reasonable trail use request of the City of St. Petersburg. Its use of a for-profit subsidiary to purport to hold defunct lines indefinitely under the railbanking statute under the facts of this case appears to be a subterfuge, serving only the purpose of extracting rent from the underlying land owner, which rent will ultimately be paid by the U.S. taxpayers through the underlying owner’s “takings” claim. These circumstances warrant referral to the full Commission to determine whether the offer is in fact a “subterfuge” because “the right-of-way would not in fact be used for a trail.” *Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, 4 I.C.C.2d, 152, 156 (1987) .

The problem appears to be more than a quirk manifest in this proceeding. Per the STB website (RTC searched “filings” for all AB dockets mentioning GHIL), CSX has evidently used GHIL in the following proceedings in addition to the case at bar (AB 55 (Sub-no. 794X)):

AB 565 (Sub-no. 7X), filings June 5, 2008 and passim
AB 55 (Sub-no. 691X), filings Nov. 19, 2010 and passim
AB 55 (Sub-no. 763X), filings April 20, 2017 and passim
AB 55 (Sub-no. 718X), filings July 19, 2019 and passim
AB 55 (Sub-no. 763X), filings Oct. 17, 2016 and passim
AB 347 (Sub-no. 3X), filings Feb. 28, 2008 and passim
AB 565 (Sub-no. 1X), filings date from 2002, but GHIL’s first appearance is apparently Nov. 20, 2020.
AB 565 (Sub-no. 17X), filings date from 2004 but GHIL’s first appearance is apparently January 5 2012.
AB 1073 (Sub-no. 1X), filing January 19, 2022
AB 55 (Sub-no. 793X), filings January 31, 2022 and passim

In three cases, presumably where CSX hit the maximum number of negotiation period extensions, the railroad caused its subsidiary to file notices that a Trails Use Agreement was reached [AB 565 (Sub-no. 1X) 2/22/2021, AB 55 (Sub-no. 794X) 6/23/2021, and AB 55 (Sub-no. 718X) 2/22/2021]. In several cases, it interposed its subsidiary despite pending requests by public entities to negotiate trail use. In a few instances, the records show a transfer of at least part of the line to a public entity or bona fide trail group for interim trail use. Thus, some instances may be justified by a public interest motive, and not simply to make money by abusing federal preemption to force landowners or state and local governments to pay CSX's demands for what otherwise are non-marketable property interests.

For this case, however, there is no indication GHL intends to construct or to manage a trail in the case at bar. To develop the record, the agency should establish a schedule for discovery against CSX and GHL to fully determine CSX/GHL's true intentions in this case. . Even assuming that the abuse of the railbanking law is unique to this particular case, it is imperative that this Board not sanction this subterfuge, thereby encouraging other similar ploys to misuse the railbanking law to extract payments from adjacent landowners, leaving the U.S. treasury with the burden of making them whole through compensation awards.

Conclusion

For the reasons stated, the various CSX/GHL filings of March 28 and April 3, 2023 should be stricken, and the protective order issued April 3, 2023 should be withdrawn or stricken as based on erroneous representations by CSX/GHL.

Respectfully submitted,

/s/ Andrea Ferster
Andrea Ferster
General Counsel
Rails to Trails Conservancy
2121 Ward Court, N.W. 5th Floor
Washington, D.C. 20037
(202) 974-5142 (phone)
(202) 669-6311 (cell)
(202) 223-9257 (fax)
e-mail: afferster@railstotrails.org

Of counsel:

Charles H. Montange
Law Offices of Charles H. Montange
426 NW 162nd St.
Seattle, WA 98177
c.montange@frontier.com
206-546-1936

Certificate of Service

I hereby certify that on this 6th day of April, 2023, a copy of the foregoing Motion to Strike was served by email upon all parties of record in this proceeding.

/s/ Andrea Ferster
Andrea C. Ferster