

SERVICE DATE – DECEMBER 4, 2023

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 565 (Sub-No. 1X)

NEW YORK CENTRAL LINES, LLC—ABANDONMENT EXEMPTION—IN MIDDLESEX
COUNTY, MASS.

Decided: December 4, 2023

By decision and notice of interim trail use or abandonment (NITU) served on October 12, 2001, the Board, under 49 U.S.C. § 10502, exempted from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by New York Central Lines, LLC (NYC), of 4.80 miles of rail line known as the Albany Division, Fitchburg Subdivision, between milepost QBS 0.00 at Framingham and milepost QBS 4.80 at South Sudbury, in Middlesex County, Mass. (the Line), subject to public use and standard employee protective conditions.

That decision also issued a NITU under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, authorizing a 180-day period for the Town of Sudbury (Sudbury) to negotiate an interim trail use/rail banking agreement with CSX Transportation, Inc. (CSXT)¹ for a 1.4-mile portion of the Line extending north from the Framingham town line to the intersection of the former Penn Central Transportation Company line at milepost QBS 4.80. Thereafter, by decision served on December 12, 2006, a second NITU was issued authorizing a 180-day period for the Town of Framingham (Framingham) to negotiate an interim trail use/rail banking agreement with CSXT for a 3.4-mile portion of the right-of-way between milepost QBS 0.00 at Framingham and milepost QBS 3.40 at the Framingham town line (the Framingham Segment). The negotiating periods under the NITUs were extended a number of times.

By decision served on December 1, 2020, the Board granted a request filed by Sudbury to extend its NITU negotiating period for an additional year, until December 1, 2021. See N.Y. Cent. Lines, LLC—Aban. Exemption—in Middlesex Cnty., Mass. (Dec. 2020 Decision), AB 565 (Sub-No. 1X) (STB served Dec. 1, 2020). There, the Board found that Sudbury's NITU was eligible for the transitional one-year extension adopted in Limiting Extensions of Trail Use Negotiating Periods, EP 749 (Sub-No. 1) et al., slip op. at 11 (STB served Dec. 4, 2019).² Dec. 2020 Decision,

¹ CSXT is the successor to NYC. See CSX Corp.—Control—Conrail Inc., FD 33388 (Sub-No. 94) (STB served Nov. 7, 2003).

² The final rule in Docket No. EP 749 (Sub-No. 1) et al., modified the Board's regulations regarding the number and duration of, and standard for granting, extensions of the NITU negotiating period (as well as the duration of the initial NITU negotiating period). In the final rule, the Board included a transitional measure that allows parties engaged in negotiations under an existing NITU that was originally issued before February 2, 2017, to request one additional

slip op. at 2. The Board's December 2020 Decision, however, denied an extension request for the Framingham Segment filed by Framingham, noting that the interim trail use program is voluntary and consensual between the railroad and the trail sponsor, see Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986), and CSXT had not agreed to continued negotiations with Framingham. Dec. 2020 Decision, slip op. at 2. Finally, the December 2020 Decision issued a NITU for the Framingham Segment to the Georgetown and High Line Railway Company, LLC (GHL). The Board concluded that GHL's NITU request complied with the requirements of 49 C.F.R. § 1152.29 and noted CSXT's willingness to negotiate with GHL for interim trail use. Dec. 2020 Decision, slip op. at 2. Accordingly, the NITU permitted GHL and CSXT to negotiate an agreement for interim trail use/rail banking for a one-year period, until December 1, 2021.³

Subsequently, by letter filed on December 4, 2020, CSXT and Sudbury notified the Board that they had entered into a Purchase Sale Agreement for the 1.4-mile segment of the Line. (CSXT/ Sudbury Letter 1, Dec. 4, 2020.) Thereafter, on February 22, 2021, CSXT and GHL notified the Board that the parties had entered into a Purchase Sale Agreement for the Framingham Segment. (CSXT/ GHL Letter 1, Feb. 22, 2021.)

Request for Substitution of Trail Sponsor

On September 6, 2023, GHL and Framingham filed a request that the Board reopen this proceeding, remove GHL from the NITU, and issue a replacement NITU to Framingham for the Framingham Segment. Pursuant to 49 C.F.R. § 1152.29(f), Framingham has submitted a statement indicating its willingness to assume full responsibility for: (i) management of 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 railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way. Framingham has also acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation of the right-of-way for rail service.

extension of one year, beyond the four-year anniversary of the issuance of the NITU, without making the showing of extraordinary circumstances that otherwise would be required under the new regulations. Limiting Extensions of Trail Use Negotiating Periods, EP 749 (Sub-No. 1) et al., slip op. at 11.

³ In establishing the NITU negotiating period, the Board noted that it considers the negotiating periods cumulatively for purposes of determining both whether the extraordinary circumstances standard applies and the availability of the one-year transitional measure. Dec. 2020 Decision, slip op. at 3; see also CSX Transp., Inc.—Aban. Exemption—in Alachua Cnty., Fla., AB 55 (Sub-No. 718X), slip op. at 3 (STB served Apr. 16, 2020). Although GHL had not been a previous prospective trail sponsor of the Framingham Segment, the Board articulated that issuance of a NITU to GHL would have the effect of extending NITU negotiations for the Framingham Segment, which had been ongoing for well over four years. Dec. 2020 Decision, slip op. at 3. Thus, the Board determined that GHL would be eligible for the transitional one-year extension, but that any additional extension requests would require a showing of extraordinary circumstances. Id.

On September 7, 2023, the National Association of Reversionary Property Owners (NARPO) filed a letter urging the Board to deny the request for transfer of the NITU from GHIL to Framingham. (NARPO Reply 2, Sept. 7, 2023.) According to NARPO, GHIL is an alter ego of CSXT, created solely for the purpose of circumventing Board rules and regulations with respect to rails-to-trails proceedings. (*Id.* at 1.) NARPO argues that other NITUs authorizing GHIL to negotiate interim trail use/rail banking have given rise to concerns by the United States Department of Justice (DOJ). (*Id.*) Thus, NARPO contends that, “due to the obvious subversion of STB rules, the STB should declare that the [Framingham Segment] . . . is abandoned and consummated due to over 23 years of non-use . . .” (*Id.*) Finally, NARPO argues that the 1.4-mile segment of the Line is still in “limbo” as no NITU extension has been requested in more than five years. (*Id.*)

CSXT and GHIL filed a joint letter on September 21, 2023, responding to NARPO’s allegations. CSXT and GHIL contend, among other things, that there has been no subversion of the Board’s rules or regulations. (CSXT/GHIL Joint Letter 2, Sept. 21, 2023.) The parties state that GHIL properly acquired a NITU for the Framingham Segment, and that the parties timely notified the Board that a trail use agreement had been reached. (*Id.*) Further, the parties state that CSXT, GHIL, and Framingham have agreed to establish a trail pursuant to the requirements of 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. (CSXT/GHIL Joint Letter 2, Sept. 21, 2023.) To that end, the parties assert that GHIL and Framingham, in compliance with the Board’s rules at 49 C.F.R. § 1152.29(f), jointly requested a substitution of Framingham for GHIL as the trail user, and that Framingham submitted a Statement of Willingness to Assume Financial Responsibility for the right-of-way. (CSXT/ GHIL Joint Letter 2, Sept. 21, 2023.) Thus, CSXT and GHIL argue that, at all times in this proceeding, CSXT, GHIL, and Framingham have complied with the Board’s trail use rules at 49 C.F.R. § 1152.29 and that NARPO has not demonstrated a failure by the parties to abide by such rules.⁴ (CSXT/ GHIL Joint Letter 2, Sept. 21, 2023.)

DISCUSSION AND CONCLUSIONS

The Trails Act permits a railroad to “preserve established railroad rights-of-way for future reactivation of rail service” while allowing the right-of-way to be transferred to a third-party sponsor for interim use as a trail. 16 U.S.C. § 1247(d); *see Birt v. STB*, 90 F.3d 580, 583 (D.C. Cir. 1996). The statute expressly provides that “such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” 16 U.S.C. § 1247(d); *see Preseault v. ICC*, 494 U.S. 1, 6 (1990). The Board’s role under the Trails Act is limited and “essentially ministerial.” *See Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990).

⁴ Although 49 C.F.R. § 1104.13(c) does not permit a “reply to a reply,” such replies were submitted by various parties in this proceeding. In the interest of a complete record, the Board will accept all filings submitted to date.

When a request for a NITU is filed, the Board is responsible for confirming that the trail sponsor agrees to assume full legal and financial responsibility for management of the right-of-way during the interim trail use and to keep the right-of-way available for reactivation of rail service. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a)(2)-(3). These are the “only requirements” for qualifying as a trail sponsor and “invoking section 1247(d).” T & P Railway—Aban. Exemption—in Shawnee, Jefferson, & Atchison Counties., Kan. (T & P), 2 S.T.B. 36, 45 (1997), pet. for review granted sub nom., Becker v. STB, 132 F.3d 60 (D.C. Cir. 1997). Thus, a trail sponsor may be qualified regardless of its affiliation with the railroad and, indeed, the railroad itself may serve as the trail sponsor. See, e.g., Great Redwood Trail Agency—Aban. Exemption—in Mendocino, Trinity, & Humboldt Cntys., Cal., AB 1305X, slip op. at 6 (STB served Oct. 25, 2023). Further, the Board’s primary concern once parties reach an agreement for interim trail use/rail banking is that the statutory conditions under the Trails Act are not 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 reactivate rail service. Sunflower Rails-Trails Conservancy, Inc.—Pet. for Declaratory Ord.—Sale of Railbanked Right-of-Way, FD 36034, slip op. at 4 (STB served Feb. 23, 2017) (citing Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Washington & Adams Cntys., Idaho, 3 S.T.B. 50 (1998)).

Here, NARPO has provided no basis for denying the request to substitute Framingham for GHL as the interim trail sponsor for the Framingham Segment.⁵ Pursuant to the Board’s regulations, a prospective trail sponsor must file a request with the Board accompanied by a statement of willingness to assume responsibility for management, legal liability, and payment of taxes, and an acknowledgement that interim trail use is subject to reconstruction and reactivation of rail service at any time. 49 C.F.R. §§ 1152.29(a), (d). Parties can subsequently request the substitution of one trail sponsor for another pursuant to 49 C.F.R. § 1152.29(f). In either case, if the railroad indicates its willingness to negotiate a rail banking/interim trail use agreement, the Board will issue a NITU. See Nat’l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 3-5 (STB served Apr. 30, 2012); see also 16 U.S.C. § 1247(d) (requiring the Board to “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor offers to assume responsibility for a right-of-way for use in the interim as a trail.); Citizens Against Rails-to-Trails, 267 F.3d at 1151-52; Goos, 911 F.2d at 1295.

Because GHL’s NITU request complied with the requirements of 49 C.F.R. § 1152.29 and CSXT was willing to negotiate with GHL for trail use, a NITU was properly issued in the Board’s

⁵ Regarding NARPO’s reference to DOJ concerns, on January 27, 2023, the Board directed CSX and GHL to respond to a letter filed by DOJ regarding the railbanked status of the line at issue in CSX Transportation, Inc.—Abandonment Exemption—in Pinellas County, Fla., AB 55 (Sub-No. 794X) (STB served Jan. 27, 2023). Based on the information provided and the totality of the circumstances particular to that proceeding—including, among other things, GHL’s unexplained statement that the railbanked line was not being used as a trail, CSXT’s prior unwillingness to negotiate with another potential trail sponsor, and GHL’s stated view that it was acting as a “placeholder”—the Board revoked the NITU by decision served November 14, 2023. CSX Transp., Inc.—Aban. Exemption—in Pinellas Cnty., Fla., AB 55 (Sub-No. 794X) (STB served Nov. 14, 2023).

December 2020 Decision for the Framingham Segment. Further, as noted above, pursuant to 49 C.F.R. § 1152.29(h), CSXT and GHL timely notified the Board by letter dated February 22, 2021—prior to expiration of the NITU negotiating period—that the parties had entered into a Purchase Sale Agreement for the Framingham Segment. NARPO has not otherwise shown that the Trails Act was improperly invoked or that the statutory or regulatory requirements have not been met by the applicable parties here. Moreover, notwithstanding NARPO’s assertion that the 1.4-mile segment of the Line remains in “limbo” as no NITU extension has been requested in more than five years, the Board’s public record indicates that shortly after the December 2020 Decision, on December 4, 2020, CSXT and Sudbury notified the Board that the parties had entered into a Purchase Sale Agreement for the 1.4-mile segment. Therefore, that segment is not in “limbo” as NARPO would suggest, but rather is subject to an interim trail use/railbanking agreement.

Therefore, because Framingham’s request complies with the requirements of 49 C.F.R. § 1152.29(f), and the record indicates CSXT’s consent to the substitution of trail sponsor, this proceeding will be reopened, the NITU issued to GHL will be vacated, and a replacement NITU will be issued to Framingham for the Framingham Segment.

It is ordered:

1. This proceeding is reopened.
2. All filings submitted to date are accepted into the record.
3. The NITU issued on December 1, 2020, for the Framingham Segment is vacated.
4. A replacement NITU applicable to Framingham as interim trail sponsor is issued, effective on the service date of this decision and notice.
5. The new trail sponsor is required to assume, for the term of the agreement, full responsibility for (i) management of the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
6. Interim trail use/rail banking is subject to the future restoration of rail service and to the new sponsor's continuing to meet the financial obligations for the right-of-way.
7. If the trail sponsor intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
8. NARPO’s request to deny the substitution of interim trail sponsor is denied.
9. This decision is effective on its service date.

By the Board, Mai Dinh, Director, Office of Proceedings.