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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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AB 1321X

OHI-RAIL CORPORATION — DISCONTINUANCE EXEMPTION — IN PERRY AND
MUSKINGUM COUNTIES, OHIO

AB 167 (SUB-NO 445N)

CONRAIL ABANDONMENT OF LINES IN ZANESVILLE, OHIO

**Newark, Heath & Buckeye Lake Scenic Railway
Motion for Preliminary Injunction**

EXPEDITED CONSIDERATION REQUESTED

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Dated: June 16, 2025

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INTRODUCTION

In a concurrent filing in docket AB 1321 (as captioned above) (the “Petition”), Newark, Heath and Buckeye Lake Scenic Railroad (d/b/a the “Zanesville & Western” (Z&W)) asks the Board to reopen the subject discontinuance to permit compliance with the National Environmental Policy Act and the National Historic Preservation Act. To support its relief and prevent further harm—track salvage—that would undermine the purposes of these acts, Z&W asks for a preliminary injunction against further removal. For that remedy to have efficacy, it must bind persons with interests in the subject line: the Ohio Rail Development Commission (“Commission”), its owner, and the Muskingum Valley Park District (“Park District”), the current trail sponsor.¹ Accordingly, Z&W seeks relief in both the underlying merits docket (AB 1321) and cross files this motion in the abandonment docket supporting so-called “trails use” under the National Trails System Act (AB 167 (Sub-No 445N)). Because Z&W has met the criteria for a preliminary injunction

¹ Pending resolution of matters in AB 1321, the Commission may be subject to the Board’s jurisdiction.

in the AB 1321 docket, the Board should enjoin any track removal for the pendency of that proceeding.

BACKGROUND

The subject rail line is known as the “Glass Rock Branch.” It lies between milepost 0.0 to milepost 3.1 (Glass Rock-East) and the former Z&W Industrial Track from milepost 45.8 to milepost 57.5 (Glass Rock-West), in Perry and Muskingum Counties, Ohio (the Line).

The Commission has owned the Line since it bought it from Conrail in 1982. *Ohio Rail Development Commission — Petition for Declaratory Order*, FD 36387 (STB served Dec. 22, 2020) 4. (“*ORDC*”). The purchase was under the aegis of the Northeast Rail Service Act. Pub. L. No. 97-35, Title XI. *Id.* at 2. The State’s purchase under to the Northeast Rail Service Act did not initially make it a common carrier on the Line. *Id.* at 6. Rather, the State admitted a succession of freight operators onto the Line, the most recent being the Ohi-Rail Corporation from 1987 to 2024. *Id.* at 2 (*citing Ohi-Rail Corp — Lease and Operation Exemption—Ohio Dep’t of Transp.*, FD 30986 (ICC served Feb. 27, 1987); and *Ohi-Rail Corporation — Discontinuance of Service Exemption—in Perry and Muskingum Counties, Ohio*, AB 1321X (STB served Feb. 1, 2023) (“*Ohi-Rail*”). That lease has been non-exclusive as Z&W has had a leasehold in the Line to support its excursion operation since 2008. Petition, Exhibit C, 2 “Current Lease Details.”

Z&W’s current lease iteration began in 2018. That same year, citing unsafe conditions, the State removed track from the grade-crossing at State Road 93—railroad milepost 0.83 on Glass Rock East—cutting Glass Rock East in two and stranding the Z&W’s heritage equipment east of the crossing the Line. Petition, Exhibit B, 1–2. The segment west of the crossing became stranded from the national rail network. Before discontinuance, the Commission has also taken out crossings

(including removing rail or permitting paving over) at milepost 55.89 (Old Town Road at East Fultonham, Ohio); milepost 50.00 (Coopermill Road at Mt. Perry, Ohio); and milepost 48.18 (State Route 668). *See* Petition, Exhibit C, at 1 “Current Condition of the Line.” The Commission has restricted Z&W’s operations to certain parts of the Line in the course of disputes over Z&W’s advocacy for freight traffic and the responsibility for the Line’s condition. Petition Exhibit B, 1, final paragraph.

In 2020, the Commission asked the Board what it had to do to put the Line in “Trails Use” under the National Trails System Act (Pub. L. No. 90-543). *ORDC* at 1. For the Commission to invoke Trails Use, the Board determined Ohi-Rail must *first* obtain discontinuance authority for the Line. *Id.* at 6. For that discontinuance, the Board concluded that it did not need to do an environmental review because the Line had already been approved for abandonment. *Ohi-Rail*, 3 at n.3 (“In addition, because the Line has already been authorized for abandonment, this discontinuance does not require an environmental review.”)

Ohi-Rail has since dissolved,² but the Commission has told Z&W it has residual “common carrier responsibilities” on the Line. The Commission has also claimed that it acquired an unspecified freight interest on the Glass Rock Line from the Ohio Southern Railroad.³ Finally, the Commission has said it will undertake track removal east of milepost 0.83, extending the salvage project it began in 2018—6 years before discontinuance was authorized. *See* Petition, Exhibit E.

² Petition, Exhibit D.

³ Petition, Exhibit C, 1 “Rail Line History” at 3d, 4th and 5th bullet points. This conflicts with *ORDC* and *Ohi-Rail* which did not consider that another carrier—Ohio Southern or now the Commission—might need discontinuance authorization.

ARGUMENT

The Board has the power to enter preliminary injunctions to prevent irreparable harm. 49 U.S.C. § 721(b)(4). Further track removal would prejudice the environmental review the Petition demonstrates the law requires. Accordingly, with the *prima facie* showing Z&W has made here, a preliminary injunction is merited.

That necessity is borne out in a four-part showing that: (1) an irreparable harm would occur without the injunction, (2) Z&W is likely to prevail on the merits; (3) the injunction is consistent with the public interest; and (4) that other parties will not be substantially harmed by an injunction. *Colorado Wheat Admin. Comm. et al. v. V&W Railway, LLC*, NOR 42140 (STB served May 7, 2015), 4. First, Z&W and other persons interested in the human environment will be irreparably harmed by the removal of the track. There is nothing Z&W itself can do to prevent or undo its salvage and restoration would be prohibitively expensive. Second, Z&W has shown a likelihood of success on the merits; the Board has not explained why it did not undertake an environmental inquiry and will need to reopen the discontinuance to make an explanation. Third, Congress made compliance with NEPA/NHPA to be a fundamental public interest. Fourth, given that the sole party to this discontinuance has dissolved a trails use agreement has only recently been reached, no other person will be harmed.

1. Track Salvage will Irreparably Harm Z&W.

Track salvage under a discontinuance that has not been subject to environmental inquiry prejudices that review in both process and conclusion. It is also fiscally impossible to reverse.

On the process, one cannot gauge the environmental affect of any action if that action has long since been completed, track removal has an “adverse affect” in its ability to meet its environmental obligations under NEPA and NHPA. Ex Parte

678, *Consummation of Rail Line Abandonments that are Subject to Historical Preservation and Other Environmental Conditions*, Apr. 23, 2008, at 3. That is evident here; with at least 3 pre-discontinuance track removals occurring, the Board has been deprived of the ability to assess the role of this track in its *status quo ante* rail service operating environment.

Likewise, track salvage prejudices the conclusion of any inquiry. It presumes the outcome—that no environmental or historic preservation conditions for preserving the track will be warranted in the Board’s judgment after undertaking the inquiries NEPA and NHPA require.

Even beyond that, Z&W will have irreparable economic harm. Replacement of track that should never have been removed will artificially drive up the subsidy amount under an offer of financial assistance by inflating the cost of meeting Federal Railroad Administration standards. 49 C.F.R. § 1152.27(a)(3). The Board recognized a similar problem in *Colorado Wheat*, another salvage- discontinuance case, when it found the offeror would “have to expend substantial funds on design, engineering, and labor to install replacement tracks.” *Colorado Wheat*, at 5. In finding irreparable economic loss, the Board reasoned that the offeror “if saddled with these substantial and unrecoverable costs . . . it is highly unlikely—if not impossible—[the offeror] would be able to ever overcome the high barriers associated with replacing the track.” *Id.* at 5.

Though the result of an operating subsidy and not a line sale, the financial harm is similarly irreparable here. Should someone ask the Board to re-do the discontinuance to trigger the NEPA/NHPA-required, predicate, inquiries—but allow track removal to go forward unimpeded in the interim—it is highly unlikely Z&W (a modest excursion operation with equipment trapped on part of the Line) could afford the one-year subsidy that replacement to FRA-specifications would require. 49 C.F.R. § 1152.27(a)(3).

2. Z&W will Likely Succeed on Reopening

The gravamen of Z&W's Petition is that the Board should have conducted an environmental inquiry under NEPA and the NHPA before licensing the discontinuance. That is because NEPA and NHPA require the inquiry *before* any "major Federal action" (NEPA) or "licensing" (NHPA). *Padgett v. Surface Transp. Board*, 804 F.3d 103, 109 (1st Cir. 2015); *Goos v. ICC*, 911 F.2d 1283, 1294 (8th Cir. 1990). *See also*, Petition to Reopen in AB 1321 Part I. The record presents no evidence of either inquiry, and so Z&W is likely to succeed on the merits.

But even absent that, reopening is inevitable. Should the Board determine that it did not need to make an environmental inquiry, it owes the public an explanation about why. *See Baltimore Gas & Electric v. Natural Res. Def. Council*, 462 U.S. 87, 97–98 (1983). To forgo such an explanation would be arbitrary and capricious. *See Citizen's Comm. to Save our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023 (10th Cir. 2002). And so whether to undertake the environmental inquiry or to explain why it will not, the Board will need to reopen this proceeding to add to the record. That apparent inevitability shows Z&W is likely to succeed on the Petition's merits.

3. The Public Interest is Consistent with NEPA and NHPA Inquiries.

Beyond the public interest inherent in the enactments, Congress said that the questions NEPA and NHPA raise are important ones for the public. In NEPA, Congress made it "the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations." 42 U.S.C. § 4331(a). Likewise, Congress enacted NHPA so that the federal and state governments would examine if historic properties could coexist

with these same requirements. 54 U.S.C. § 300101 (1). Until that balancing is undertaken, a preliminary injunction preserving the *status quo* is consistent with the public interest and NEPA/NHPA mandates.

Were this not enough, the “integrity of the Board’s processes is a public-interest consideration.” *Colorado Wheat* at 8. Here Z&W is asking the Board to observe its environmental regulations under 49 C.F.R. § 1105 before permitting discontinuance and salvage. To that end, the Board has concluded its processes require an environmental and historic report as a predicate for a discontinuance that would permit salvage. *BNSF Railway — Discontinuance — in Iron and Crawford Counties, Mo.*, AB 6 (Sub-No. 476) (STB served Aug. 17, 2011), 6. Thus a preliminary injunction prohibiting salvage will serve the Board’s and the public’s interest in the Board’s processes.

4. Other Parties will not be Substantially Harmed.

No party could be harmed by a preliminary injunction in AB 1321. Ohi-Rail has dissolved and thus does not appear capable of having an interest in a vacating the discontinuance.

Nor is any harm apparent in AB 167 (Sub- No. 445N). The Commission has not consummated its abandonment after the threshold discontinuance. Instead, it has recently determined to negotiate with a new potential trail user, the Muskingum Valley Park District as of March 18, 2025. As of May, the Commission had no firm plans to remove track. Petition, Exhibit E. There is therefore no harm apparent to either the Commission or the Park District. Even if there were, they will need to show their interest and apparent harm in an intervention petition in AB 1321. Presumably the Commission will intervene to attempt a so-called “adverse discontinuance” against the empty Ohi-Rail chair in AB 1321. But until the

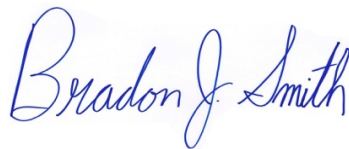
Commission tries to prove otherwise, no harm from a preliminary injunction is apparent.

PRAYER

Wherefore, Z&W asks the Board to enter a preliminary injunction in these matters against further removal of track for the pendency of Z&W's petition to reopen.

Dated: June 16, 2025

Submitted,



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