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SERVICE DATE – DECEMBER 1, 2020

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decided: November 30, 2020

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), 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. 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 have been extended a number of times, most recently to December 1, 2020. See N.Y. Cent. Lines, LLC—Aban. Exemption—in Middlesex Cnty., Mass., AB 565 (Sub-No. 1X) (STB served Dec. 26, 2019). By requests filed on November 2, 2020 and November 16, 2020, respectively, Sudbury and Framingham seek to extend their NITU negotiating periods for an additional year, until December 1, 2021. Sudbury and Framingham argue that their NITUs are 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), because the NITUs were issued before February 2, 2017, and they are making their first extension requests following the effective date of the final rule in that docket.

On November 3, 2020, the National Association of Reversionary Property Owners (NARPO) filed a letter objecting to Sudbury's extension request. NARPO argues that the one-year transitional extension adopted in EP 749 (Sub-No. 1) et al. does not apply to Sudbury's request

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

because it only applies to extensions that “fall between the fourth and fifth year” after the NITUs were issued.

On November 4, 2020, CSXT filed a reply agreeing to Sudbury’s extension request and opposing NARPO’s argument that Sudbury’s request should be denied. On November 20, 2020, CSXT filed another reply stating that it does not agree to Framingham’s extension request.

On November 20, 2020, the Georgetown and High Line Railway Company, LLC (GHL), filed a request for the issuance of a NITU to negotiate an interim trail use/rail banking agreement with CSXT for the Framingham Segment. Pursuant to 49 C.F.R. § 1152.29, GHL also submitted a statement of willingness to assume financial and managerial responsibility for the right-of-way, which included an acknowledgement that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on the same day, CSXT notified the Board that it is willing to negotiate an agreement for interim trail use with GHL.

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 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.

Here, Sudbury is eligible for the transitional measure because Sudbury and CSXT are engaged in negotiations under an existing NITU that was originally issued before February 2, 2017, and this is Sudbury’s first extension request since the final rule became effective on February 2, 2020. NARPO’s argument that the transitional measure applies only to requests that would extend the NITU negotiating period between the fourth- and fifth-year anniversaries of the issuance of the NITU is incorrect; the Board’s decision in Docket No. EP 749 (Sub-No. 1) et al., establishes no such limitation. Because Sudbury’s request is otherwise consistent with the new rule and CSXT consents to the extension, Sudbury’s NITU negotiating period will be extended for an additional year, to December 1, 2021. Any further extension requests will require a showing of extraordinary circumstances.

Framingham’s request to extend the NITU negotiating period, however, will be denied. 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 does not agree to continued negotiations with Framingham.

GHL’s NITU request complies with the requirements of 49 C.F.R. § 1152.29, and CSXT is willing to negotiate with GHL for interim trail use. Accordingly, a NITU will be issued, and GHL

and CSXT may negotiate an agreement for interim trail use/rail banking of the Framingham Segment during the one-year period prescribed below.

However, the Board previously has said it will consider the negotiating periods cumulatively for purposes of determining both whether the extraordinary circumstances standard applies and the availability of the one-year transitional measure. See CSX Transp., Inc.—Aban. Exemption—in Alachua Cnty., Fla., AB 55 (Sub-No. 718X), slip op. at 3 (STB served Apr. 16, 2020). Although GHIL itself has not previously been a prospective trail sponsor here, issuance of a NITU to GHIL will have the effect of extending NITU negotiations for the Framingham Segment, which have been ongoing for well over four years. Although a trail sponsor under a new NITU ordinarily may seek up to three one-year extensions of the initial period under § 1152.29(d)(1)(ii), under the circumstances here, as the Board found in Alachua County, “[a]llowing the clock to be ‘reset’ with each issuance of a new NITU would reintroduce considerable uncertainty and the potential for abuse, and therefore undermine the Board’s goals of promoting efficiency, clarity, and finality in the Trails Act process.” Alachua County, slip op. at 3. Therefore, although a NITU will be issued to GHIL for one year, any extension request will require a showing of extraordinary circumstances. See id. at 10-11.

If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) & (h). If no agreement is reached within one-year, CSXT may fully abandon the rail line, subject to any outstanding conditions. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

It is ordered:

1. This proceeding is reopened.
2. Sudbury’s request to extend its NITU negotiating period is granted; the NITU negotiating period is extended until December 1, 2021.
3. Framingham’s request to extend its NITU negotiating period is denied.
4. A NITU applicable to GHIL as interim trail sponsor is issued, effective on the service date of this decision, to permit GHIL to negotiate with CSXT for trail use for the 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, for a period of one year from the service date of this decision, until December 1, 2021.
5. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing 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.

6. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in ordering paragraph 5 above.

7. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

8. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking is reached by December 1, 2021, for the Framingham Segment, interim trail use may be implemented. If no agreement is reached, CSXT may fully abandon the Framingham Segment, subject to any outstanding conditions.

10. This decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.