

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CSX TRANSPORTATION, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
	:	Docket No. 04-CV-5023
	:	
v.	:	
	:	
CITY OF PHILADELPHIA,	:	
Defendant.	:	

APPLICANTS’ AMICUS CURIAE BRIEF ON THE INJUNCTION

Applicants Free Schuylkill River Park, Bicycle Coalition of Greater Philadelphia, Logan Square Neighborhood Association, Philadelphia Parks Alliance, and several elected officials representing the district in which the Park and River is situate, in their individual capacities (Darrell L. Clarke, Jack Kelly, Anna C. Verna), and official capacities (State Rep. Babette Josephs, State Senator Vincent J. Fumo) (hereafter “River and Park Users” or “Applicants”) submit this memorandum of law in support of the City of Philadelphia and against CSX Transportation, Inc., on the issue of whether Race and Locust Streets should be permanently fenced off under the terms of the 1979 Construction Agreement calling for an effective barricade.

Applicants respectfully request that Applicants be permitted leave to file this memorandum of law to correct the misimpression created by CSXT at the hearing that 1) members of the public pose a substantial danger to public safety and its operations; 2) that only a permanent fence across the Race and Locust Street grade crossings will suffice to prevent the alleged danger; 3) that CSXT’s corporate policy to eliminate grade

crossings is absolute; and 4) that CSXT is permitted to park its trains across the subject grade crossings for any period of time.

Under traditional equitable principles for granting a preliminary injunction in this Circuit, a court must consider (1) whether the moving party has shown a reasonable probability of eventual success in the litigation; (2) that it will be irreparably injured if relief is not granted; and where relevant, (3) the possibility of harm to other interested persons; and (4) whether the public interest would be served by the injunction. In re Arthur Treacher's Franchisee, 689 F. 2d 1137, 1143 (3d Cir. 1982). Applicants address these questions seriatim.

A. CSXT's Likelihood of Success on the Merits is Weak

1. CSXT's Corporate Policy Regarding Grade Crossings Is Not Absolute

CSXT introduced no evidence to demonstrate that the drafters or signers of the 1979 Construction Agreement contemplated a continuous fence closing off Race and Locust Streets when it entered into the agreement. Rather, CSXT attempted to prove its interpretation of the agreement's term by introducing a chain of correspondence beginning 15 years after the agreement was struck, in 1994, in which it stated that it did not want to agree to any grade crossings. Each time, its correspondence was met by a response by the City stating the opposite. This shows nothing; it certainly does not show that the two parties had any meeting of the minds respecting the disputed term. The only other item CSXT referred to (but did not introduce, at least in writing) is its "corporate policy" to eliminate grade crossings. We do not know when this "policy" was formed or adopted, or how it is being implemented, especially since the elimination of grade crossings is quite expensive. This hardly constitutes a reasonable probability of success

on the merits, *i.e.*, proof that CSXT's post hoc interpretation of the 1979 Construction Agreement was the prevailing interpretation by the parties at the time. Evidence tending to show breach would, at a minimum, need to be much stronger than what CSXT has adduced thus far.

Moreover, CSXT's policy regarding grade crossings is not absolute. CSXT has apparently granted, licensed, suffered, or otherwise consented to several pedestrian hiking trail grade crossings over its tracks, or pedestrian-bicycle trail grade crossings over its tracks, in the last decade or two. Prime examples are the West Orange Trail, from Winter Garden Florida to Lake County Line, Florida, opened in 1994; the Jacksonville-Baldwin Rail-Trail near its headquarters in Jacksonville, Florida; University Parks Bike-Hike Trail in Toledo, Ohio, opened in 1995; the Kal-Haven Trail in Grand Junction, Michigan; and the Cambridge, Massachusetts grade crossing on the M.I.T. campus at Massachusetts Avenue (used by a CSXT-owned company). *See, e.g.*, Exhibit A-3, Agreement between CSXT and City of Jacksonville dated May 23, 1993.

According to the Federal Railroad Administration, "In 1996, there were more than 37 active Rail with Trails (RWT) and at least 60 more proposed. By August 2002, there were about 65 active RWT in 30 States and at least 82 proposed RWT in 40 States in various stages of planning, development, or implementation. If all plans are successful, there will be 105 RWT." *See* Rails With Trails Issue Brief, at <http://fra.dot.gov/us/content/1466>. Indeed, the prominence and popularity of rail-trails has grown alongside the diminishing trend of injuries or fatalities to pedestrians at railroad grade crossings. Clearly, pedestrians and railroads can co-exist.

If CSXT's grade crossing policy were absolute, it might help the railroad tend to show that, from its own perspective, its predecessors understood the meaning of an effective barricade when the predecessors negotiated for same in 1979. Yet CSXT produced no witness to the negotiations or drafter of the contract to say that. Its actions elsewhere, as discussed above, in permitting grade crossings for similar biking-hiking trails contrasts with its purported policy here in Philadelphia. Its chain of correspondence with the City, submitted as Exhibit P-7 (begun some 15 years after the agreement was struck) showed nothing other than the City's continuing requests for protective devices at the grade crossings and CSXT's refusal of same. The correspondence did not evidence any meeting of the minds as to the erection of a continuous fence across the grade crossings in 1979 or thereafter. CSXT's position may be nothing more than a *post hoc* rationalization for its decision, accompanying its acquisition of part of the Conrail business, not to invest in tracks elsewhere and instead to maximize use of these particular tracks which cross Race and Locust Streets.

2. CSXT Did Not Prove That A Permanent Fence Was the Only Effective Barrier to Trespassing

CSXT did not carry its burden to show that it was likely to succeed in its request for a preliminary or permanent injunction or its contract interpretation.

CSXT did not put on any evidence to show that a continuous fence was actually contemplated by the parties or agreed to in 1979. CSXT also did not prove that a continuous immovable fence, as opposed to an automatic rolling gate/fence of equal height and same materials as the remainder of the barricade fence, or some other type of automatic gate or protective device used for grade crossings, would be a more effective deterrent to trespassers.

CSXT offered no methodology, no examples from other places, and no examination or analysis of accident statistics and the types of devices that successfully prevented trespassing, or failed to prevent accidents, in Pennsylvania or elsewhere, to justify its position. CSXT offered nothing at all except a handful of incident reports, most of which detailed trespassers whose acts would be frustrated by the deterrent effect of a fence.

CSXT has a high burden of both production and persuasion, in a request for such a broad, mandatory injunction. Rather than offer specifics, it merely stated that its “corporate policy” was otherwise, *i.e.*, to eliminate grade crossings, invoking public safety as the rationale. This is insufficient.

The “policy,” or the intent to actually to eliminate these grade crossings— if the policy or intent existed in the 1979— was not referenced specifically in the 1979 Construction Agreement. Nor could the City have necessarily known of it. CSXT’s many other unprotected grade crossings in the City (See Exhibit A- 2) would not have evidenced this intent, and they continue to be inconsistent with the absolute policy CSXT now attempts to invoke to aid in its one-sided contract interpretation.

B. No Irreparable Injury Will Occur to CSXT If the Injunction Is Not Issued

1. Crossing the Tracks Absent an Approaching Train is Not Unlawful and Poses Little Danger to the Public and None to CSXT

Even assuming *arguendo* that an injury or fatality at the grade crossings in question constitutes irreparable injury to the railroad, no accidents have occurred at the grade crossings in question. The past is a good predictor of the future. This is especially so with respect to long-term trends. In fact, grade crossing incidents are trending downward, impressively, nationwide.

Public records of freight railroad accidents at highways are required to be filed by the railroads with the Federal Railroad Administration, which publishes them on its website, <http://safetydata.fra.dot.gov.OfficeofSafety>. These records may be queried by state, by county, by railroad, by trespasser and by non-trespasser pedestrians in the category of highway-freight railroad incidents.

An examination of the public records of freight railroad-highway grade crossing accidents available on the Federal Railroad Administration website shows that no pedestrians were struck by CSXT trains in 2001 or 2002 in Pennsylvania, and that two were struck in 2003 (not at the subject grade crossings). None was struck in 2004. Including all railroads, just six pedestrians were struck from 2001 to 2004 (through October) in Pennsylvania. There were 288 total accidents, most of which were motor vehicle collisions with trains during the same time period, 2001-2004. Moreover, CSXT's trespasser incidents are down 61% between 2001 and 2004, according to the Federal Railroad Administration.

It is obvious from perusal of this Federal Rail Administration website on safety data that motor vehicles continue to present the largest danger, especially to the public, and to freight railroads' operations. The risk of harm to pedestrians from trains, and to the railroad from pedestrians crossing the tracks, is extremely small. Indeed, there would be more risk to a pedestrian or bicyclist wishing to go to the Art Museum from the Race Street neighborhood if he had to walk along and cross, or ride a bicycle on, the Ben Franklin Parkway from Race Street, than across the CSXT tracks and along the off-road trail that the Schuylkill River Park now provides. That is, City traffic poses a greater hazard to pedestrians and bicyclists than does the occasional freight train at the subject

crossings. Comparative statistics to determine the public interest would seem to be in order before the Court grants an injunction.

The Court may take judicial notice of the federal agency's safety data reports. Such reports are excepted from the hearsay rule as a public record under F. R. Evid. 803(8). They are not evaluative reports; they simply consist of the reports submitted by the railroads and collected and reported by the public federal agency. Extrinsic evidence of authenticity is not required for public records of this type under F. R. Evid. 902(5).

C. The Railroad's Requested Relief Will Have a Harmful Effect on Third Parties

CSXT tends to conflate the issue of lawful use of the Park and River (which requires crossing the tracks) with trespassers climbing through parked trains. Equity demands that they be treated separately and that the remedy be appropriate to the situation presented. "An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct." United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 584, 91 S. Ct. 1076, 1081, 28 L. Ed 2d 339 (1971).

Applicants agree that people should not climb through parked trains. Such conduct is inadvisable and unlawful. However, almost 5,000 Park and Rivers users per week do not climb through parked trains, and it is their lawful conduct (crossing the tracks absent an approaching train) that CSXT also seeks to enjoin for no safety reason whatsoever. The injunction CSX seeks would be an overbroad injunction. That is particularly so where the terms of the 1979 agreement do not spell out such a "remedy" or obligation in any detail whatsoever.

An underlying dispute would also have to be resolved in CSXT's favor in order for a permanent fence to be erected over the grade crossings— and that is that the streets are not grade crossings. It was evident throughout the hearing that CSXT believes— erroneously— that either in 1885, or in 1979, its predecessors acquired the right to the use of the property in the roadbeds at any time and for any period of time, effectively vacating the streets beyond (west of) the railroad right-of-way. CSXT buttresses this assertion by stating that it owned the parcels that abutted the streets west of the railroad prior to its sale of them to the City. That is precisely the point— those parcels which it sold to the City for good value *abutted the City Streets*. CSXT did not ever own, have or hold the streets, nor does it now. CSXT glosses over this fact of property ownership in the roadbeds, which rests with the City, hence providing its residents with a right of travel over them. If the City streets have not been vacated, or sold or otherwise compromised, then the River and Park users' crossing activity is lawful, and cannot be enjoined, unless a train is on the right-of-way.

An overbroad injunction will have a harmful effect on third parties, to wit, Applicants. Since their lawful crossing activity has not been shown to be unlawful, it cannot be enjoined, by interpreting a private agreement the City made with the railroad. The agreement is simply ambiguous as to how the term effective barricade would be defined in further and future negotiations.

Moreover, it is Applicants position that CSXT has a federal obligation to provide safe grade crossings, and that it cannot avoid that obligation merely by entering into an agreement with the City in 1979. Adequate warning and protective devices are required at Multi-track mainline operations such as this one, at grade crossings. The obligation

cannot be avoided by pretending the streets are not grade crossings merely because they are no longer used by vehicles, as there are thousands of other River and Park users, who travel across the railroad on bicycle and on foot.

In fashioning a remedy, and in determining the public interest, the Court should differentiate the harm allegedly posed by both groups (trespassers and lawful users) and prevent CSXT's overbroad perception of the problem to negate at-grade access and avoid adequate protective devices for lawful Park and River users.

D. CSXT's Corporate Policy Does Not Serve The Public Interest At These Grade Crossings

CSXT's witness, Sgt. Steven Burns, testified that he knew of no other unprotected grade crossings in his area of jurisdiction, from Manville to Elkton, Maryland. In fact, CSXT has many unprotected grade crossings in this area, including in Philadelphia. Applicants' Exhibit A-4 (attached hereto) depict twelve (12) such unprotected grade crossings, including an entrance to Fairmount Park and 30th street that is on the same main line tracks at issue here, and which grade crossing is well-worn by pedestrians. CSXT adduced no evidence of other places in the City of Philadelphia where it seeks to enforce its "policy" to eliminate grade crossings.

The CSXT police incident reports introduced through this witness reveal just three dates when trespassers were warned not to climb through trains— on June 17, 2004, and on July 24 and 27, 2004. On one occasion (July 23, 2004), a fisherman who was intoxicated wanted to retrieve his poles. On the remaining occasions when incidents were reported as "trespassing," there was no train present. CSXT merely objected to trespassers on the tracks. Two were art students from the University of Pennsylvania

taking photographs (November 11, 2004), and four were adult men who were sitting in their cars at the waterfront (Oct. 28, 2004).

Although Applicants do not discount the importance of the incidents on June 17, and July 24 and 27, 2004, the paucity of dates when people were reported to be climbing through parked trains and the lack of continuing recent evidence of same (none since July), demonstrates that the vast majority of River and Park Users are law-abiding citizens who do not engage in dangerous or unlawful behavior. Their access rights would be cut off if the entrance points at Race and Locust Streets were continuously fenced, as CSXT requests.

Most importantly, each of the incidents in the CSXT police reports that allegedly constitutes the danger requiring the injunction— people climbing through *parked* trains— would be eliminated if CSXT agreed to the automatic gate (rolling fence) and flashing signal lights, that the City has proposed. This solution is equally as effective at preventing trespassing as the immovable fence demanded by CSXT.

Balancing the public interests at stake here is not difficult. Great harm will be visited on Applicants who represent River and Park Users, if their at-grade access to the river and park is cut off. They will be endangered by having to use city streets to access destinations they now use the off-road Park trail to access. There is minimal danger to public safety from lawful track-crossing activity. There was no evidence that people are trying to cross in front of moving trains. As for *parked* trains, trespassers who climb through trains will be prevented from doing so if the City's proposal for an automatic gate and flashing signal lights, triggered by an approaching or parked train, were

installed. Moreover, CSXT could do much more to warn, ticket or arrest such trespassers.

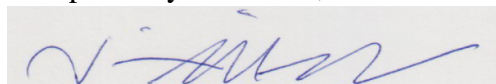
CONCLUSION

For the reasons stated in the Motion, Applicants renew their request for rightful or permissive intervention to represent their legal property interests in access over uplands to the public trust asset for navigation and other river uses, and the right of transit over public streets so that they may be able to continue to access the park and river at Race and Locust Streets.

Respecting the injunction request, Applicants urge the Court to deny it. The precedent that could be set in this case is large, although CSXT has styled it as a narrow contract matter. CSXT wants to monopolize the waterfront. It uses the danger of trespassers climbing through its parked trains as the excuse; the City seeks an appropriate solution that maintains its property rights in the City streets while fencing off the tracks from any would-be trespassers, thereby preserving to law-abiding River and Park Users the right to cross the tracks when a train is not upon them. That is an appropriate, and balanced, solution.

CSXT has not carried its burden in showing that its extreme remedy is the only one, or the appropriate one, where the only real danger stems from trespassers and parked trains. Both of those problems require other solutions. There are many lawful users at the intersection of this railroad and these two city streets, and their rights of at-grade access should be preserved.

Respectfully submitted,



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Dated: January 20, 2005