

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

CSX TRANSPORTATION, INC.,	:	
Plaintiff,	:	Docket No. 04-CV-5023
	:	
	:	Filed Electronically
CITY OF PHILADELPHIA,	:	
Defendant.		

**RENEWAL OF MOTION FOR INTERVENTION PURSUANT TO
FED. R. CIV. PRO. 24 (a) and (b), OR, IN THE ALTERNATIVE, FOR LEAVE TO
FILE AN *AMICUS CURIAE* BRIEF ON THE INJUNCTION REQUEST**

**BY FREE SCHUYLKILL RIVER PARK, LOGAN SQUARE NEIGHBORHOOD
ASSOCIATION, BICYCLE COALUTION OF GREATER PHILADELPHIA,
PHILADELPHIA PARKS ALLIANCE, DARRELL L. CLARKE, JACK KELLY,
ANNA C. VERNA, STATE REP. BABETTE JOSEPHS,
AND STATE SENATOR VINCENT J. FUMO**

AND NOW COMES Proposed Interveners Free Schuylkill River Park, an unincorporated association of more than one hundred residents of the City of Philadelphia and users of the Schuylkill River Park and the Schuylkill River, with an office at 113 North Van Pelt Street, City of Philadelphia, County of Philadelphia, Pennsylvania 19103; Logan Square Neighborhood Association, a Pennsylvania non-profit corporation since 1967 with 300 members, including Park and River users, with a goal, among others, of practicable and safe access to the Schuylkill River Park adjacent to its neighborhood; the Bicycle Coalition of Greater Philadelphia, a Pennsylvania non-profit corporation formed in 1972, with 1500 dues-paying members, who on behalf of 4,000 bicyclists in the City of

Philadelphia, wish to see safe and secure access to the Schuylkill River Trail and River, Philadelphia Parks Alliance, a Pennsylvania non-profit corporation with an office at 5070 Parkside Avenue, Philadelphia, Pennsylvania with over 700 members, many of whom make significant use of the Schuylkill River Park and access the Park through Race and Locust Streets; and several individuals (who are also elected officials whose districts touch the Park and River, and who use or have worked to implement the Park in their capacity as elected officials, and whose constituents use the Park), Darrell L. Clarke, Jack Kelly, Anna C. Verna, and elected officials, State Rep. Babette Josephs, State Representative to the House of Representatives for the 182nd district, and State Senator Vincent J. Fumo, State Senator, representing the 1st senatorial district, in their official capacities, by their attorney, Janine G. Bauer, whose local address is 100 North 17th Street, 11th Floor, Philadelphia, Pa. 19103, who respectfully renew their Motion before this Court, first made on December 17, 2004, for the entry of an Order granting said corporations, association, individuals and elected officials (hereinafter “Applicants”) leave to intervene as parties in the above-referenced matter, pursuant to Fed. R. Civ. Pro. 24 (a), and in the alternative, Fed. R. Civ. Pro. 24(b), or, in the alternative, for leave to file and Amicus Curiae Brief, representing in support of said Motion the following:

Renewal of Motion to Intervene

1. Applicants hereby renew their motion to intervene in the instant matter under Fed. R. Civ. Pro. 24(a) or (b).
2. Testimony at the injunction hearing on January 5, 2005 by Russell Meddin demonstrated that there are almost 5,000 users of the Park and River during the week in

good weather and that they primarily access the Park and River over the Locust Street and Race Street grade crossings.

3. There was no testimony by any party at the injunction hearing that any citizens attempting to access the Park or River were crossing the tracks at Race or Locust Streets in front of moving trains approaching those grade crossings.

4. The only testimony elicited by CSXT at the injunction hearing respecting safety was testimony by its witnesses that on occasion they had observed people climbing through trains that were parked across either the Race or Locust Street grade crossings or both.

5. Train parking is an important issue in this case; CSXT was prepared to put on testimony about its “need” to park trains and block the Race and Locust Streets grade crossings. This testimony would have been subject to cross-examination and impeachment.

6. No injunction should issue without the Court hearing testimony on the need for, and frequency of, parked trains blocking these crossings, and having that testimony tested in the usual manner.

7. Applicants do not agree to the City of Philadelphia’s stipulation that, even for this hearing only, CSXT needs to park to trains across these tracks and block the crossings.

Parked trains are the primary cause of the safety danger of which CSXT complains.

8. To clarify the safety issue, Applicants refer to CSXT’s testimony and exhibits.

CSXT’s introduced seven police incident reports for the period June through December 2004.

9. CSXT’s police report exhibit shows that on three hot summer days, people climbed through parked trains (6/17/04; 7/24/04 and 7/27/04) to access the Park. On one occasion

(7/23/04), a fisherman who was intoxicated wanted to retrieve his poles. On the remaining occasions, there was apparently no train present. CSXT merely objected to “trespassers” on the tracks. Two were art students from the University of Pennsylvania taking photographs (11/10/04), and four were adult men in their cars probably engaged in something else at the waterfront (10/28/04). Exhibit P-14.

10. Although Applicants do not discount the importance of the incidents on 6/17, 7/24, and 7/27/04, the paucity of dates where people were reported climbing through parked trains, particularly none after July, demonstrates that the vast majority of River and Park users are law-abiding citizens who do not engage in dangerous behavior. These Park and River users would have their access rights cut off if the entrance points at Race and Locust Streets were continuously fenced, as CSXT requests.

11. Applicants are fearful that their right to access the Park and River will be decided based on two issues not fully explored at the hearing. The first is train parking. The second, related, is the ability of an “effective” (but not continuous) barrier, consisting of the warning devices and automatic gates (see City’s submission) would control trespassing (people climbing through parked trains), and therefore obviate the only real safety issue.

Train Parking

12. CSXT has the right under the 1885 ordinance to move its trains across the Race and Locust street grade crossings. The ordinance specifies that the grant of the right-of-way was for “crossing purposes only.”

8. Whether CSXT has a right to park a train across either or both grade crossings for extended periods of time is another matter.

9. “Blocked crossings” are a matter of national importance. The Federal Railroad Administration has an explanation of jurisdictional issues associated with blocked crossings on its website. See “Blocked Crossings” at the Federal Railroad Administration website, <http://www.fra.dot.gov/us/content/907> (Issue Briefs).
10. CSXT has track capacity constraints on its network which result in its having to use its existing tracks, including across Race and Locust Streets, to lay up trains. Train parking at Race and Locust, then, occurs in the event of natural disasters, such as the flooding that accompanied the two hurricanes in September 2004, which backed freight traffic up from Richmond, VA, testified to by CSXT’s witness Larry Kostar, but also for ordinary operational reasons, such as having to “re-crew” a train when its crew has reached the federal working limit of 12 hours.
11. Applicants contend that CSXT is using the area, from time to time, at Race and Locust Streets, as a yard, laying up trains, and as a switching area.
12. CSXT’s capacity constraints, especially with the growth in rail freight traffic, is judicially noticeable. See, e.g., “CSX Moves to Cut Delays,” *Wall Street Journal*, Jan. 5, 2005 (attached hereto as Exhibit A-1).
13. CSXT has apparently not yet determined to make the necessary capital investment in new right-of-way and new tracks, at its yard south of Locust Street, or on its tracks on the west side of the Schuylkill River, or elsewhere in the Philadelphia area, which investment may avoid the extended parking of trains across Race and Locust Streets.
14. CSXT is instead pursuing a “corporate policy” to eliminate the grade crossings, in order to maximize its investment in existing tracks, allowing it to park trains at Race and

Locust Streets for extended periods of time. Applicants believe this parking will only increase from the present time.

15. Counsel for CSXT at the hearing did not answer negatively the Court's question as to whether it had the right to park a train at these grade crossings permanently, or indefinitely. Such an action would monopolize the waterfront and cut off access for Park and River users, and work a *de facto* closure and vacation of the City streets at issue.

16. While local ordinances or state statutes limiting trains from obstructing grade crossings have been found pre-empted if they interfere with federally controlled issues including train speed and length, the parking or idling of trains of any length for extended periods across grade crossings is not subject to federal control. It is subject to local control as a matter of land use (location of a yard), highway traffic regulation, and safety and police powers.

17. Whether CSXT may park trains for extended periods of time across Race and/or Locust Street is a subject of vital interest to the outcome of this injunction hearing and the case generally, and Applicants' rights of access to the Park and River and over the public streets in particular.

CSXT's Burden

18. Because parked trains (not moving trains) cause the danger that CSXT complained of, adduced evidence about, and seeks to prevent, and because CSXT seeks an extreme equitable remedy which would materially inconvenience thousands of other Park and River users, CSXT must show that it has done everything in its power to park trains across these crossings only when truly necessary and to otherwise reduce the danger of trespassing through parked trains. It has not done so.

19. CSXT maintained at the hearing that it has a corporate policy to eliminate grade crossings.

20. CSXT has other unprotected grade crossings, including in the jurisdiction of the CSXT police officer who testified that he knew of none in his jurisdiction. There are many such crossings in the City of Philadelphia alone, at Lanier Avenue, Snyder and Swanson, Columbus and Wolf, Columbus and Snyder, Columbus and Dickinson, Columbus and Pattison, Columbus and Packer, Columbus and Fitzwater, and 30th Street and Pennsylvania at Fairmount Park. See Photographs of these grade crossings are attached hereto as Exhibit A-2. These photographs were taken by Russel Meddin, who is from three of the Applicant groups and testified on behalf of the City at the injunction hearing. An affidavit by Mr. Meddin will be submitted dating and authenticating these photographs.

21. CSXT's police officer's testimony was that trespassers are simply ejected and warned. They are not given summonses or arrested. Stiffer penalties would deter people from climbing through parked trains, as would an effective barrier consisting of flashing signal lights and an automatic gate across the opening in the fence when a train is approaching or is parked there.

22. Moreover, CSXT's policy is inconsistent. CSXT has consented to grade crossings on bicycle and pedestrians trails in other places. This was not developed on cross-examination and could be upon further hearings.

23. CSXT has a grade crossing in Cambridge, Massachusetts between Memorial Drive and Massachusetts Avenue, which grade crossing separates two areas of the M.I.T. campus, including its residential dormitories. Moreover, this crossing was constructed in

the early 1990s in connection with the construction of a park, Fort Washington Park. It is protected by signals and gates.

24. CSXT also has two grade crossings across the Jacksonville-Baldwin Rail-Trail near Jacksonville, Florida; West Orange Trail that leads from Winter Garden FL, to Lake County Line, FL, opened in 1994; CSXT has a grade crossing across the University Parks Bike-Hike Trail in Toledo, OH. That grade crossing is located on a university campus. CSXT has a grade crossing at the Kal-Haven Trail in Grand Junction, Michigan. See, e.g., Exhibit A-3 (Jacksonville-Baldwin rail-Trail crossing Agreement between CSXT and City of Jacksonville).

Public Safety and the Public Interest

25. There is an extremely low incidence of pedestrian/rail crossing accidents resulting in injuries or deaths in Pennsylvania, and in the quad-state area of NJ, PA, MD and DE generally.

26. Incidents reports authored by railroads covering highway-grade crossing accidents are publicly available. These incident reports must be filed whenever there is an incident. They are written and filed by the railroads themselves with the Federal Railroad Administration, a part of the United States Department of Transportation.

27. Incidents reports available on the Federal Railroad Administration Office of Safety website, <http://safetydata.fra.dot.gov/OfficeofSafety>, show that for the past four years, 2001-2004, including all railroads operating in those four states, there were a total of 459 accidents, but only 13 of these involved pedestrians. With respect to CSXT, for this four year period, in these four states, there were 99 total incidents, but just 8 involving pedestrians. In Pennsylvania, there were 35 incidents total on CSXT tracks, and two

involved pedestrians for this four year period. (See attached spreadsheet, Exhibit A-4, of data taken from the FRA website, and put into Excel spreadsheet format, but not interpreted.)

28. This incident report information on the FRA Office of Safety website is judicially noticeable, and meets the requirements of F. R. Evid. 803(8) (public records). No analysis was undertaken; Exhibit A-4 is merely a compilation of incident reports found on the federal website.

Effective Barricade

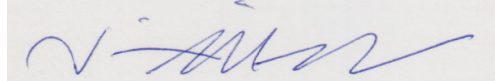
29. Regarding the issue of an effective barricade, the foregoing incidents reports for all four years and all four states, shows that of the total 99 pedestrian incidents, just 12 occurred with automatic gates in place (presumably swing-arm type gates which may be traversed, not a rolling fence as the City has proposed), and just one occurred with flashing light signals.

30. An automatic fence-type gate covering the gap in the fence at the Race and Locust grade crossings, and a flashing light signal system, would deter all but the most determined trespassers, and would be at least as effective, if not more effective, as an immovable fence.

31. For the forgoing reasons, and to protect their interests, it is respectfully requested that Applicants be permitted to intervene, to ensure that future evidence, impeachment and stipulations protect their interest, and in the alternative, that Applicants be permitted to file a brief *amicus curiae* to introduce the aforementioned judicially noticeable materials that tend to contravene CSXT's posture in the case with respect to the nature of the safety problem, its frequency, its cause and an appropriate equitable remedy.

32. Applicants agree with the City of Philadelphia's submission dated January 14, 2005 that the automatic gate (rolling fence) and flashing light signal system would be a very effective barricade that would still preserve lawful at-grade crossing activity by Applicants and other Park and River users.

Respectfully submitted,



JANINE G. BAUER,
ESQUIRE
Supreme Court ID # 41872

100 North 17th Street
Robert Morris Building, 11th Floor
(c/o Sugarman and Associates)
Philadelphia, PA 19103
Telephone: 215-864-2500
Facsimile: 215-864-2501
Mobile: 917-916-8972

**Counsel for Free Schuylkill River Park,
Logan Square Neighborhood Association,
the Bicycle Coalition of Greater
Philadelphia, Philadelphia Parks
Alliance, Darrell L. Clarke, Jack Kelly,
Anna C. Verna, Rep. Babette Josephs,
and Senator Vincent J. Fumo**

Dated: January 20, 2005