

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

CSX TRANSPORTATION, INC.,

Plaintiff,

v.

CITY OF PHILADELPHIA,

Defendant.

CIVIL ACTION

NO. 04-CV-5023

ORDER

AND NOW, this ____ day of _____, 200__, upon consideration of the Motion for Issuance of a Preliminary Injunction of Plaintiff CSX Transportation, Inc. (“CSXT”), and any response of Defendant City of Philadelphia (“City”) thereto, it is hereby ORDERED that:

(1) Plaintiff CSXT’s Motion for Issuance of a Preliminary Injunction is GRANTED;

(2) The City shall effectively close off all gaps in the fencing adjacent to the Schuylkill River Park in the areas of Locust and Race Streets with temporary fencing within 72 hours of the effective date of this Order, so as to prevent trespassing and attendant safety hazards on CSXT’s tracks and right-of-way in those areas;

(3) The City shall report to this Court and to CSXT the date of the actual completion and construction of the temporary fencing adjacent to the Schuylkill River Park in the areas of Locust Street and Race Street;

(4) Such temporary fencing shall remain in place until the City constructs and thereafter maintains locked gates and fencing at the Locust Street and Race Street locations substantially consistent with the type of fencing currently used along the Schuylkill River Park between Locust and Race Streets. Such gates shall remain closed and continuously locked until such time as CSXT's Complaint in this matter is decided on the merits; however, keys to such gates shall be made available to City emergency personnel and such gates may be opened by City emergency personnel for use when responding to emergency situations. At such time that the emergency situation has abated, such gates shall be closed and relocked by City personnel;

(5) The City shall report to this Court and to CSXT the date of the actual completion and construction of the locked gates and fencing at the Locust Street and Race Street locations of the Schuylkill River Park; however, the gates and fencing shall be constructed by the City within thirty (30) days of the effective date of this Order; and

(6) This Order shall not take effect until such time as CSXT posts a bond issued by a surety suitable to the Clerk of Court in the amount of \$_____.

Upon the posting of the required bond, CSXT shall immediately inform the City with

regard to such posting, and the date and time that the City receives such notice from CSXT shall constitute the effective date and time of this Order.

BY THE COURT:

Bruce W. Kauffman, Judge

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

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

**MOTION OF CSX TRANSPORTATION, INC.,
FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION**

AND NOW comes CSX Transportation Inc. (“CSXT”), Plaintiff, by its attorneys, NAUMAN, SMITH, SHISSLER & HALL, LLP, and moves this Court for the entry of an order granting a preliminary injunction, pursuant to Fed. R.Civ. P. 65, representing in support thereof the following:

1. CSXT, through its predecessors (hereinafter collectively referred to as “Railroad”), and the City of Philadelphia (“City”) are parties to an Acquisition Agreement and a Construction Agreement both executed on October 9, 1979. True and correct copies of the Acquisition Agreement and Construction Agreement are appended to the Complaint in this matter as Exhibits “A” and “B” respectively.

2. The Acquisition Agreement allowed the City to obtain certain parcels of land owned by the Railroad for the purposes of constructing a public park to be

known as the Schuylkill River Park (“Park”). The Park was to be and is now located generally between the Schuylkill River and the right-of-way and tracks of Railroad.

3. The Construction Agreement permitted the City temporary rights of entry over the Railroad’s track in order to facilitate planning and construction of the Park in the areas near and between Race and Locust Streets.

4. Pursuant to the terms of the Construction Agreement, once the Park was substantially completed, these temporary rights of entry over the Railroad property were to be closed off and barricaded by the City, primarily for public safety reasons.

5. Schuylkill River Park has been substantially completed and CSXT has notified the City of its obligation to comply with the provisions of the agreement requiring it to close off, otherwise barricade or fence these temporary rights of entry, however, the City has failed and refused and continues to fail and to refuse to honor its obligations under the contract.

6. CSXT has filed a Complaint against the City seeking declaratory relief, preliminary injunctive relief and claims for breach of contract and promissory estoppel. The averments of the complaint are herein incorporated by reference.

7. Members of the public have been and currently are trespassing on Railroad's right of way, misusing these temporary construction crossings as a means of access from Race and Locust Streets to the Schuylkill River Park.

8. Members of the public have been observed illegally crossing the Railroad tracks and also climbing between stopped railway cars to reach the Park using these access points.

9. The City's failure to erect an effective barricade immediately upon substantial completion of the Park has caused the Railroad to suffer immediate and irreparable harm for which there is no adequate remedy at law until the litigation relative to the contracts appended as Exhibits "A" and "B" to CSXT's Complaint is complete.

10. Despite numerous requests by CSXT, the City has refused to comply with its contractual obligations to erect an effective barricade in the areas of Locust and Race Streets so as to prevent public passage over the Railroad's right-of-way into the Park.

11. The City's refusal to comply with its contractual obligations to barricade the temporary construction crossings such that they continue to be illegally utilized by pedestrians constitutes a danger to the operation of a public utility organized to serve the public interest, and poses a threat to public safety.

12. CSXT is unable to reconfigure its rail operations to avoid temporary blockages of its right-of-way in the area of Locust and Race streets without incurring expenses amounting to millions of dollars and disruptions of service.

13. CSXT cannot safely operate its railway along the Park until the City bars public passage in the area of Locust and Race streets by erecting an effective barricade as it agreed to do by contract.

14. The fact that the public continues to illegally utilize these temporary construction crossings, thus increasing the liability exposure of the Railroad for accidents involving third parties and which would substantially interfere with CSXT's operations, constitutes a harm that cannot be adequately compensated by damages.

15. The public's passage over the temporary construction crossings poses an imminent threat to CSXT's operations over its tracks.

16. CSXT requires the Court's intervention to order the City to close off the fencing gaps at Locust and Race Streets, as the fencing is on City property and the City has threatened to prosecute CSXT for trespass if CSXT should close off the gaps.

17. The City has failed to perform its contractual obligations that were established to benefit public safety and safe railroad operations, and thus breaches the Construction Agreement.

18. CSXT can show a likelihood of success on the merits of its breach of contract claim.

19. CSXT and the public it seeks to protect in its role as a public utility would suffer more harm by the refusal to grant the preliminary injunction than the City would suffer by granting it.

20. The public safety concerns compel that the City's failure to protect CSXT's right-of-way be enjoined.

21. Pedestrians have access to the Park via overhead crossings which have stairs at Walnut Street and which have stairs and ramps at Chestnut and Market Streets.

22. There are no public safety concerns that can justify a refusal to grant an injunction. The only interest the City can assert in favor of refusing the barricade while the breach of contract claim is determined on the merits is that of convenience.

WHEREFORE, CSX Transportation, Inc., Plaintiff, moves this Court for the entry of an order granting CSXT's motion for issuance of a preliminary injunction and requiring the City of Philadelphia to erect appropriate fencing or other barricades to prevent access over CSXT's right-of-way in the vicinity of Race and Locust Streets within the City of Philadelphia until a determination upon the merits of the accompanying claims of CSX Transportation, Inc., are made and then to issue a permanent injunction in this respect.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

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Counsel for Plaintiff, CSX Transportation, Inc.

Date: November 19, 2004

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

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

CERTIFICATE OF SERVICE

AND NOW, on the date stated below, I, **Benjamin C. Dunlap, Jr., Esquire**, of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day served the foregoing **Motion of CSX Transportation Inc., Plaintiff, Pursuant to Fed. R. Civ. P. 65 for the Issuance of a Preliminary Injunction** by electronic filing and by United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

Christopher I. McCabe, Esquire
Senior Attorney
City of Philadelphia Law Department
Commercial Litigation Unit
One Parkway Building, 17th Floor
1515 Arch Street
Philadelphia, PA 19102-1595

NAUMAN, SMITH, SHISLER & HALL, LLP

By: s/Benjamin C. Dunlap, Jr., Esquire
Benjamin C. Dunlap, Jr., Esquire
Supreme Court ID#66283

Date: November 19, 2004