

**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	:	

**RESPONSE OF CSX TRANSPORTATION, INC.
TO DEFENDANT’S SUBMISSION REGARDING
“EFFECTIVE” BARRICADE AT RACE STREET AND LOCUST STREET
LOCATIONS IN THE SCHUYLKILL RIVER PARK**

CSX Transportation, Inc., (“CSXT”), by its undersigned counsel, hereby submits this response to the submission of the City of Philadelphia (“City”), Defendant, to the Court’s inquiry as to what the City intended by its promise to construct “an effective permanent barricade or wall, between the railroad’s tracks and the park project” in the 1979 Construction Agreement attached to CSXT’s Complaint as Exhibit “B”. CSXT thinks that the City’s proposals provide a basis for further negotiations and therefore requests a 45-day stay of the proceedings to attempt to resolve the safety issues before the Court acts on CSXT’s Motion for Issuance of a Preliminary Injunction, as explained in more detail below.

However, a response to the City’s submission first requires an analysis of the meaning of the contractual phrase “effective permanent barricade or wall.” As the Pennsylvania Supreme Court has repeatedly recognized, “courts of this Commonwealth generally use dictionaries as a source

material to determine the common and approved usage of terms.”¹ See *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 573 Pa. 189, 220, 823 A.2d 108, 127 (2003), citing, *Fogle v. Malvern Courts, Inc.*, 554 Pa. 633, 722 A.2d 680 (1999); *Love v. Philadelphia*, 518 Pa. 370, 543 A.2d 531 (1988). A barricade is defined as “[s]omething that serves as an obstacle; a barrier” by the American Heritage Dictionary of the English Language (4th ed. 2000). Barrier is defined by the same dictionary as “[a] structure, such as a fence, built to bar passage.” As a verb, to barricade is defined is “[t]o close off or block by barricade.” *Id.*

The Pennsylvania Supreme Court has stated that “[a] barricade to be effective must be constructed of such material that it will by size, weight and conspicuousness offer visual and reasonable resistance to the elements and to fortuitous invasion.” *Walsh v. City of Pittsburgh*, 379 Pa. 229, 231-232, 108 A.2d 769, 771 (1954). Other courts have likewise interpreted “barricade,” when the meaning of the word was called into question, to mean “an obstruction or block for the purpose of rendering passage impossible.” *Schawe v. Leyendecker*, 269 S.W. 864, 866 (Tex. App. 1925). *Accord, Amer. Waterwords Co. v. Dougherty*, 55 N.W. 1051, 1052 (Neb. 1893) (with respect to ordinance requiring fences or other sufficient barricades to prevent accidents on travel areas, “the term ‘barricade’ imports an obstruction; not merely a warning, but an actual impediment to travel”); *Flynn v. Egan*, 124 So. 598 (La. App. 1929) (“A barricade should be an obstruction and an actual impediment to travel, not merely a warning.”)

¹Although the Pennsylvania Supreme Court was here discussing the determination of terms in a municipal ordinance, the same rule would apply to the Construction Agreement, which was approved by the City *in toto* by City ordinance.

Thus, for any barricade to be “effective” and “permanent,” it must be immovable and obstruct, or render passage impossible, from the Park to the Railroad right-of-way. This is further shown by the Construction Agreement’s alternative provision permitting the City to construct a “wall” to address the recognized “increase in hazards to public safety by the creation of the Park, adjacent to and in immediate proximity of Railroad’s existing mainline tracks.” Furthermore, even the purpose of permitting temporary rights of entry at grade level was meant to “prevent pedestrian access from one property to another.” Construction Agreement, Sec. 4.

Under that analysis, CSXT takes the position that the intent of the parties in 1979, as shown by the plain meaning of the words in the documents, required the City to construct a permanent obstruction to prevent any grade level access from the Railroad right-of-way into the Park or vice versa at all points along the Schuylkill River Park, including in the areas of Race and Locust Streets. The City had the power to agree to barricade its streets and did so agree in the 1979 Construction Agreement, as discussed in detail in CSXT’s Brief in Support of Its Motion for Issuance of a Preliminary Injunction.

With that being said, the City’s submission proposing rolling gates that would close and thus obstruct pedestrians from traveling across the right-of-way when a train is approaching or at the crossing goes closer to fulfilling the City’s contractual obligations than its previous proposals. Prior to this point, the City had posited that regular gate arms and flashing lights found at most railroad crossings would be sufficient to protect the public safety and the Railroad’s operations. While such gates may be an effective barrier for automobile traffic, such gates are easily circumvented by pedestrians, who can proceed over, under or around the gate arms. If pedestrians are presently

proceeding between railroad cars when trains are parked at the crossings, gate arms certainly would not provide an “effective” barricade.

CSXT still contends that overhead bridge crossings would be a safer means to provide access into the Park, especially at the Locust Street location where CSXT’s operations would necessarily require trains to be parked at the crossing on occasion. Because the Race Street crossing is located near the northern end of the double track area, CSXT would be more likely to have sufficient room to park trains south of this crossing and thus keep it open at most times.

CSXT recognizes that the City’s response was stated not to be a settlement proposal, nor in so responding is CSXT treating it as such. However, CSXT thinks that the City’s submission has the potential for a possible resolution of this matter, at least at the Race Street crossing. A potential alternative to be considered by the City could be a spring loaded swing gate that has both a magnetic or electromechanical holder or latch in the open and closed position. The magnetic holder for the gate in the open position, like a fire door holder, would release when a train is approaching and let the spring mechanism close the swing gate. A second magnetic latch could then hold the gate closed until the train movement is clear of the crossing area and then release the latch. The first user after the train passes would then open the gate and it would again be held open by the magnetic holder for the open position.

The City would need to construct at its cost any “barricade” agreed upon by the parties in order to fulfill its contractual obligations. In order to be both “effective” and “permanent,” the City would also need to test and maintain any barricade agreed upon at its cost. If or when any gates constructed became inoperable, they must automatically revert to the safest position, *i.e.*, the closed

position. CSXT would require indemnification from the City for any damages CSXT may incur due to the City's failure to properly maintain any alternative barricade to fencing agreed upon.

The City currently proposes two crossings at each location, one for pedestrian access, and the other for emergency vehicular access. For safety reasons, there should be only one grade level crossing at any location where such a crossing may be agreed upon, which would serve as both the emergency grade crossing and the pedestrian crossing. While CSXT would agree to use its best efforts to keep any grade level access open, at the same time the City would need to agree that there are times when CSXT's operations would require trains to park at and block the crossings for periods of time and that pedestrians would need to use alternative access points during those periods. Finally, any resolution reached with the City would need to resolve all other related matters raised in CSXT's Complaint as well as those which may be raised in any counterclaims which may be asserted by the City.

Because the City's submission holds some promise, CSXT requests that the Court place a 45 day stay on any further actions in response to CSXT's Motion for Issuance of a Preliminary Injunction in order to provide the parties the opportunity to discuss the City's submission and this response in more detail. A settlement conference to be overseen by the Court may be useful in helping to move the parties toward a resolution and may be requested. During this stay period, CSXT will agree to reduce and restrict the speed of its trains in the crossing areas (*i.e.*, between

Mileposts BAK 0.0 and BAK 0.5) to 15 miles per hour and to sound the locomotive bell when approaching the crossings in order to provide audible warning to pedestrians.

Respectfully submitted,
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Date: January 26, 2005

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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 **Response of CSX Transportation Inc. to Defendant’s Submission Regarding “Effective” Barricade at Race and Locust Street Locations in the Schuylkill River Park** by electronic filing and by United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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Date: January 26, 2005