

**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. TO STRIKE OR
IN THE ALTERNATIVE TO DISMISS
APPLICANTS’ MOTION TO RENEW INTERVENTION OR
TO FILE APPENDED BRIEF AS AN *AMICUS CURIAE***

CSX Transportation Inc. (“CSXT”), Plaintiff and Petitioner for Preliminary Injunction, by its attorneys, NAUMAN, SMITH, SHISSLER & HALL, LLP, hereby moves this Court to strike Applicants’ Renewal of Motion for Intervention or for Leave to File an *Amicus Curiae* Brief on the Injunction, (“Motion”) and the proposed *Amicus Curiae* Brief, including attachments, or in the alternative to dismiss the Motion, and in support states as follows:

1. On or about January 21, 2005, proposed Intervenors, including non-profit associations, elected officials of the City of Philadelphia, as well as other groups of park and river users (hereinafter referred to as “Applicants”), filed a document entitled “Renewal of Motion for Intervention Pursuant to Fed. R. Civ. P. 24(a) and (b) or, in the Alternative, for Leave to File an *Amicus Curiae* Brief in the

Injunction Request” currently pending before this Honorable Court (hereinafter referred to as “Motion”).

2. Applicants had previously moved for intervention in the preliminary injunction proceeding on or about December 20, 2004 (hereinafter “Original Motion to Intervene”).

3. As required by Federal Rule of Civil Procedure 24, Applicants’ Original Motion to Intervene stated the grounds therefor, and attached a copy of the pleading they sought to assert if granted intervenor status.

4. CSXT responded in opposition to Applicants’ Original Motion to Intervene on or about December 30, 2004, and filed a Memorandum of Law in Support of its Opposition to Applicants’ proposed intervention.

5. CSXT argued within its Memorandum of Law that Applicants failed to show Article III standing, failed to show a legally protectable interest threatened by the litigation, and emphasized that Applicants could not support their assertions that the City failed to adequately represent their interests.

6. The City and Applicants share the identical interest of having public at-grade access to the Park permitted at Race and Locust streets, contrary to the contract CSXT seeks construction of through this litigation.

7. Applicants have acknowledged that they share this interest with the City and have not come forth with any evidence, or even facts, to support their assertion that the City has failed to support that interest and defend it in litigation.

8. Apart from its response to CSXT's Motion for Preliminary Injunction, the City has not yet filed a responsive substantive pleading in the case.

9. Oral argument on Applicants' Motion to Intervene was held on the same day scheduled for the hearing on the preliminary injunction, January 5, 2005, before the Honorable Bruce W. Kauffman.

10. Applicants requested to become a party to the above captioned suit, which request was held in abeyance by the Court because the grounds for intervention had not been established.

11. During oral argument, the Court stated that it did not believe that the Applicants had established grounds for intervention because they could not show that the City did not adequately represent their interests in obtaining at-grade public pedestrian access at the two locations CSXT seeks to have barricaded in accordance with the City's contractual and promissory obligations.

12. Although the Court declined to issue a formal order denying the intervention, it stated that the City appeared to be adequately representing the Applicants' interests such that their intervention was not warranted at this time.

13. The subject matter of the litigation before the Court is the construction of the meaning of the phrase “effective permanent barricade or wall” that the City agreed to erect in its 1979 Construction Agreement with the Railroad. See Complaint, Exhibit “B” at § 5(a)(7).

14. By the end of the hearing, the City acknowledged that it had an obligation to erect a barricade at the two locations, but disputed what the term “effective permanent barricade” meant in the context of the Construction Agreement.

15. Accordingly, for preliminary injunction purposes, at this point, the Court requested that the City propose its understanding of what an “effective barricade” was, given that the City acknowledged that it was contractually obligated to do something, and had, as of yet, done nothing while the pedestrian trespass continued unabated.

16. The City submitted its Proposal for an Effective Barricade to the Court on January 14, 2005; other than this filing, the City has not apprised the Court of its position regarding the ultimate issues in the case.

17. Applicants concur with the City’s proposal. Applicants’ Motion ¶32.

18. The circumstances and the City’s position have not changed since the date of the hearing at which the Court stated the intervention was premature, and

could be renewed at such time that the Applicants could make a showing that their interests were not being represented by the City.

19. The City has not yet filed an Answer or New Matter with respect to the Complaint, and the matter has not proceeded beyond the preliminary injunction stage.

20. As no additional facts have been developed, and no additional filings indicating the City's arguments with respect to the issues underlying the Complaint have been made, there is no basis for Applicants to show inadequacy of representation, which the Court stated was essential to their proposed intervention.

21. There has therefore been no showing that the City's representation of the Applicants' interests has been inadequate.

22. Without such showing, the Court stated that it would not grant intervenor status. *See* Hearing Transcript, p. 21, lines 7-8.

23. Because Applicants' Renewal of Motion for Intervention fails to assert sufficient grounds for intervention on its face, and the Original Motion is pending, Applicants' renewed Motion must be dismissed.

24. Applicants' Motion to Intervene does not contain grounds for intervention and, instead, asserts opinions and arguments that are not properly

before the Court because Applicants enjoy no legally recognized status to make such arguments to the Court.

25. The contents of Applicants' Motion should be struck as immaterial and impertinent matter that is either redundant of the City's arguments, or asserts new arguments not presently before the Court that serve to complicate the disposition of this case rather than assist the Court.

26. As there are no grounds on its face for the renewed Motion for Intervention, and the Court has expressly stated that inadequacy must be shown prior to its consideration of a renewed motion for intervention, Plaintiff CXST hereby moves to strike the Applicants' Motion.

27. Moreover, were this Court to deem Applicant's Motion to constitute a Motion for Leave to file an *Amicus Curiae* Brief on the Injunction Request, CSXT also moves to strike said Motion for failure to state the requisite grounds therefor, and for containing immaterial and impertinent matter consisting of argument extraneous to the subject of the litigation, not properly within a motion for leave.

28. Under federal common law, and this District's interpretation of that law through case decisions, an *amicus curiae* brief may not be filed as of right, and the Motion for Leave must show that the petitioner (a) possesses a "special interest" in a particular case; (b) that the petitioner's interest is not represented

competently or at all in the case; (c) that the proffered information with the *amicus* brief is timely and useful; and (d) that the petitioner is not partial to a particular outcome in the case.

29. None of the above enumerated elements have been shown, or even alluded to, within the Applicants' Motion.

30. Lacking these requisite elements, and the Court having already determined that the Applicants' interests are currently being adequately represented within the case by the City, there are no grounds to support the Applicants' Motion for Leave to file its brief as an *amicus curiae* in the action.

31. The contents of Applicants' multi-purpose Motion are immaterial and impertinent material that should be struck.

32. CSXT would suffer prejudice were it compelled to respond to extra-filings of a non-party that do not involve matters relevant to the action before the Court, and that, if raised by a party like the City, would be properly struck in accordance with Rule 12(f).

33. CSXT would suffer prejudice in responding to the Motion that asserts claims and defenses properly characterized as a pleading, that are improperly labeled as a "motion," particularly when the pleadings in the case are not closed,

and responding to the motion which asserts impertinent matter undermines CSXT's Complaint.

34. As no grounds for the *amicus* status have been shown, the proposed *Amicus Curiae Brief* and documents appended thereto are not properly before the Court and should be struck.

35. In addition, as evidence may not be asserted by anyone other than a party to the case, the documents appended to Applicants' Brief are improperly submitted, and should be stricken from this Court's consideration.

WHEREFORE, CSX Transportation, Inc., Plaintiff and Petitioner for the Issuance of a Preliminary Injunction now pending before the Court, hereby moves to Dismiss Applicants' Renewal of Motion for Intervention/Motion for Leave to File *Amicus Curiae* Brief for failing on its face to state the requisite grounds

underlying it, instead consisting of immaterial and impertinent material that in the alternative should be struck, and shall not be considered in the case at bar.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

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Date: February 14, 2005

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CITY OF PHILADELPHIA,	:	Filed Electronically
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CERTIFICATE OF NON-CONCURRENCE

I, BENJAMIN C. DUNLAP, JR., ESQUIRE, attorney for CSX Transportation Inc., hereby certify that I have contacted the City of Philadelphia in regard to the Motion of CSX Transportation Inc., to Strike Applicants' Renewed Motion to Intervene and/or for Leave to file amicus curiae brief on the Injunction Request, Pursuant to Fed. R. Civ. P. 12(f) and the City of Philadelphia does not concur with the Motion.

NAUMAN, SMITH, SHISSLER & HALL, LLP

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Counsel for CSX Transportation Inc.

Date: February 14, 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 **Motion of CSX Transportation Inc. To Strike or in the Alternative to Dismiss Applicants' Motion to Renew Intervention or to File Appended Brief as an *Amicus Curiae*** by electronic filing and by United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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Date: February 14, 2005