

BEFORE THE SURFACE TRANSPORTATION BOARD ENTERED
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Public Record

IN RE: JOINT PETITION FOR RULEMAKING TO CONSIDER
AMENDMENTS TO REGULATIONS GOVERNING INTERIM USE OF
RIGHTS-OF-WAY AS TRAILS (49 C.F.R. 1152)
AS FILED BY DEPARTMENT OF THE INTERIOR (“DOI”)
AND DEPARTMENT OF JUSTICE’S ENVIRONMENT AND NATURAL
RESOURCES DIVISION (“ENRD”)

COMMENTS ON BEHALF OF
LASSEN LAND AND TRAIL TRUST

These Comments are submitted on behalf of Lassen Land and Trail Trust (“LLTT”), which actively seeks to employ 16 U.S.C. 1247(d) (the federal railbanking/interim trail use statute) and associated procedures and regulations of the Surface Transportation Board (“STB” or “Board”) to create and to sustain a trail system and to preserve rights of way for future public use in northern California.¹ The Comments are directed at the petition filed on December 20, 2024, by DOI and ENRD (collectively “DOI/ENRD”) seeking amendments to the

¹ E.g., <https://dcms-external.s3.amazonaws.com/MPD/78432/85257CA7006C955B852574C800730004/223630.PDF>

STB's regulations governing applications under 16 U.S.C. 1247(d) for railbanking and trail use as currently codified at 49 C.F.R. 1152.29.

As indicated below, LLTT supports two key and interrelated objectives of the DOI/ENRD petition: (1) widening the availability of railbanking and (2) addressing a combination of fallacious decisions by the Federal Circuit to the effect that issuance of a Notice of Interim Trail Use ("NITU") triggers a "temporary taking" (entitling parties to file claims against the Judgment Fund and to obtain attorneys' fees) even if no railbanking agreement resulting in trail use is ever reached. After discussing (briefly) the background of railbanking, LLTT will argue in support of the two objectives identified above. LLTT reserves the right to comment further in reply, and to participate as a party in any further proceedings instituted by the Board in response to the DOI/ENRD petition.

Background

Under ICCTA (like its predecessors), no freight rail right-of-way may be lawfully abandoned in the United States without the prior authorization of the Board. Thus, state law (concerning easement extinguishments upon cessation of rail service, eminent domain, and local land use regulations) could not be given effect (i.e., they were preempted). Accord, 49 U.S.C. 10501(b). Under this regime, the only way a railroad could terminate current common carrier obligations but preserve a railroad right-of-way for possible future rail reactivation was to

obtain a “discontinuance” authorization from STB rather than an abandonment authorization. Under discontinuance authorization, a railroad could cease to provide rail service but keep its right-of-way intact. However, this would mean that current customers would have to defray the cost of maintaining a currently unused rail corridor for future customers, a kind of cross subsidization.²

Railbanking statute. Section 8(d) of the National Trails System Act, codified at 16 U.S.C. 1247(d), was enacted into law in 1983. It confirms a national policy “to preserve established railroad rights-of-way for future reactivation for rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use” by providing that, in the event of interim use of such rights-of-way as trails, such use “shall not be treated for purposes of any law or rule of law ... as an abandonment of the use of such rights-of-way for railroad purposes” so long as such trail use “is subject to restoration or reconstruction for railroad purposes.”

The Courts have properly construed this language to preempt state law claims that railroad easements that may encompass parts of a railroad right-of-way

² See Preseault v. ICC, 494 U.S. 1, 5-6 and note 3 (1990) (discussing the distinction between abandonment, where rail service is discontinued but the line is no longer under ICC/STB jurisdiction and discontinuance, where service is discontinued but the line remains under ICC/STB jurisdiction for possible future rail reactivation.

somehow extinguish or revert in the event that the right-of-way is converted to trail use, so long as it is subject to rail reactivation.

The last sentence of the statute further provides that if the party sponsoring the trail use agrees to assume the indicia of ownership (i.e., management, tort, and tax responsibility) for the right of way, then the Board shall impose those conditions as a requirement of transfer or conveyance for interim trail use, “and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.”

For railroads willing to preserve a right-of-way for future use, the statute thus provided an attractive alternative to simple “discontinuance”: the rail carrier could preserve the corridor, but its costs would be assumed by the party sponsoring the trail use. There would thus be preservation without requiring current rail customers to bear the costs for future rail customers, because a trail sponsor would bear the costs of facilitating the preservation.

As the courts have recognized, 16 U.S.C. 1247(d) “serves two purposes: (1) preserving rail corridors for future railroad use and (2) permitting public recreational use as trails.” Preseault v. ICC, 853 F.2d 145, 150 (1988), aff’d Preseault v. ICC, 494 U.S. 1 (1990). “Section 1247(d) enables railroads that wish to discontinue service to help preserve rights-of-way for future rail use, when they might otherwise seek to abandon a line; it protects the railroad from liability in the interim; and it provides for maintenance of the right-of-way by the trail user during

the interim. This seems a remarkably efficient and sensible way to achieve both objectives.” 853 F.2d at 150.

Railbanking regulations. Notwithstanding the clear language barring abandonment or discontinuance where an interim trail user is willing to assume the indicia of ownership (i.e., management, tort and tax responsibility) subject to possible future rail reactivation, STB has treated railbanking and interim trail use as totally voluntary on the part of railroads. Thus, under the agency’s regulations, a railroad must voluntarily consent to negotiate a trail use agreement before the Board issues an authorization for interim trail use. This authority can take one of two forms: either a Notice of Interim Trail Use or Abandonment (“NITU”) in an exemption proceeding or a Certificate of Interim Trail Use or Abandonment (“CITU”) in a statutory proceeding under 49 U.S.C. 10903. See, e.g., 49 C.F.R. 1152.29(b)(1)(ii)& id. (d)(1).

There are two noteworthy features of the Board’s regulatory formulation for purposes of the DOI/ENRD proposed rule revision. First, the Board only issues a permit (authorization) for interim trail use/railbanking. It does not require railbanking. As explained below, this is consistent with the Board’s abandonment and discontinuance permits or authorizations: they are all permissive, not mandatory.

The current formulation of the regulation provides that if a NITU or CITU is issued, the parties have one year to reach an agreement for trail use. They may ask for an extension of that period. They must notify the Board if a Trails Use agreement is reached within the negotiation period (or its extension). If the Board receives no notification, the permission for trails use/railbanking lapses by converting into an abandonment license.

The second noteworthy feature of the Board's railbanking regulation is that it only provides for railbanking in abandonment proceedings. It does not have a mechanism for application of 16 U.S.C. 1247(d) in discontinuance proceedings. This is unusual in that railbanking (preservation of a rail corridor for future rail reactivation) most resembles exactly the result of a discontinuance proceeding: current common carrier obligations are terminated but the rail right-of-way remains under STB jurisdiction for future rail reactivation.

Abandonment/discontinuance regulations. As already noted, abandonment authorizations (licenses) are also permissive, not mandatory. That is, a railroad may obtain an abandonment authorization (or a NITU or CITU authorizing abandonment) and choose not to exercise the abandonment authority. In particular, unless the railroad files a notice of consummation of abandonment authority within one year of obtaining authority, then in general "the authority to abandon will automatically expire" and a new proceeding must be "instituted if the

railroad wants to abandon the line.” 49 C.F.R. 1152.29(e)(2). Railroads can seek an extension of time to file a notice of consummation of the authority to abandon (just as parties may seek an extension of the NITU or CITU negotiation period) so long as they file their request “sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.”

Id.

The issuance of an abandonment or railbanking authorization in no way means that abandonment or railbanking must or will ensue. An example is the BNSF – Ab. Ex. – in Snohomish County proceeding, docketed as AB 6 (Sub-No. 422X). STB initially authorized abandonment by decision served July 2, at 2004, at 69 Fed. Reg. 40479-71, later converted (at the request of City of Snohomish) to a NITU authorizing either railbanking or abandonment by decision served August 3 of that year. The railroad subsequently sought numerous extensions of the initial deadline for consummating the abandonment -- not for negotiations for trail use which had evidently ceased -- but instead solely because of problems in arranging salvage of the line (which contained a major bridge over the Snohomish River). E.g., BNSF letters dated July 1, 2005; December 2, 2005; June 15, 2005 (misdated, should read 2006); Nov. 29, 2006; and Dec. 3, 2007 (all in docket AB 6 (Sub-no. 422X)). STB granted extensions for the consummation date on this basis. E.g., decision in referenced docket served Dec. 18, 2007. Within the final extension

period per STB's decision served Dec. 18, 2007, the railroad (by letter dated July 18, 2008) consummated the original abandonment authorization between MP 38.35 and 39.00 and stated that it was retaining the remainder of the line (which incidentally contained the bridge) for "railroad purposes." (BNSF Letter dated July 18, 2008; STB document 222997³). In short, although a NITU was issued in 2004, the railroad four years later ultimately decided to abandon the bulk of the line and keep the remainder.

Because STB authorizations, whether for abandonment, discontinuance, or railbanking are permissive, not mandatory, a line MUST be treated as active (not abandoned, discontinued, or railbanked) until the railroad which receives the permissive authority files a consummation notice with STB letting the agency and the world know that the permissive authority has been exercised. Everything up to that point in essence is simply an application process required of all rail lines before federal preemptive jurisdiction is relinquished or retained. In essence, the last federal action is the receipt and publication by the STB of the railroad's letter of consummation. If no letter of consummation is timely filed, the entire abandonment, discontinuance, or railbanking proceeding is in essence meaningless

³ See also GNP Rly – Modified Rail Certificate – in Snohomish County, WA, F.D. 35151, served Aug. 13, 2008, slip op. at p.2 n.4 (BNSF exercise of abandonment authority).

and void. With this background in mind, LLTT is ready to address the two key and interrelated objectives which we have identified in the DOI/ENRD petition.

I.

It is easy to support DOI/ENRD's objective of widening the availability of interim trail use and railbanking. That objective is arguably a statutory requirement and a longstanding federal policy. After all, 16 U.S.C. 1247(d) explicitly calls for the STB Chairman and the Secretaries of Transportation and Interior to "encourage State and local agencies and private interests to establish appropriate trails...." LLTT will therefore focus on DOI/ENRD concerns arising from the Federal Circuit's temporary takings jurisprudence.

II.

Although the Second Circuit held that 16 U.S.C. 1247(d) would not result in a taking because any STB order that retained jurisdiction over a right of way for railbanking purposes served a legitimate railroad purpose. Preseault v. ICC, *supra*, 853 F.2d at 850-51. The Federal Circuit ultimately disagreed, contending a taking occurs when state law reversionary interests are "effectively eliminated" by application of 16 U.S.C. 1247(d). Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004), citing Preseault v. U.S., 100 F.3d 1525, 1543 (Fed. Cir. 1996) (discussing laws of some states). As the DOI/ENRD petition contends at 11 (citing Caldwell at 1233-34), the Federal Circuit concluded the taking may occur on

issuance of a NITU authorizing trail use because it is the only governmental action involved. There are two problems with this view of a NITU. First, it is essentially irrelevant, in that it does not terminate or indefinitely postpone any reversionary interests any more than an abandonment authorization does. Any additional “postponement” over and above what would happen in the event of an abandonment authorization will only occur when and if the railroad files a letter consummating the railbanking authorization component of the “Notice of Interim Trail Use or Abandonment.” This leads to the second flaw in the Federal Circuit’s jurisprudence as described by DOI/ENRD: the actual final act by STB in railbanking at present is publication on its website (under “filings”) of the railroad’s letter of consummation.⁴ This act may be ministerial, but it is the actual last act that must happen for interim trail use railbanking to postpone any reversionary interests or easement extinctions.

Although LLTT can show that the Federal Circuit jurisprudence makes no sense, the court nonetheless has held that a compensable “temporary physical taking” can take place from the date of issuance of a NITU even if there is never a trail and the railroad abandons the line, or decides to continue using it. DOI/ENRD petition at

⁴ If no letter of consummation either of abandonment or railbanking is timely filed, then the authorizations automatically expire, and the railroad must start the process all over if it wishes to abandon or railbank. This further refutes the notion that the issuance of a NITU is some kind of automatic temporary taking.

12. ENRD is stuck with capricious and unfathomable Federal Circuit rulings that appear not to comprehend the permissive nature of STB authorizations.

As LLTT reads the DOI/ENRD petition, the gravamen of the petitioners' proposed solution is to continue to encourage interim trail use railbanking by employing discontinuance procedures and by de-emphasizing abandonment proceedings as the vehicle to achieve railbanking. In essence, we read DOI/ENRD as basically seeking to forestall any claim of taking by not authorizing railbanking until there is actually a railbanking agreement. This is a laudable objective which hopefully would prevent the spurious temporary takings claims arising from the current regulations which provide for STB to authorize either abandonment or -- if the railroad consents to issuance of a NITU (to attempt to negotiate possible trail use) -- abandonment or railbanking.

II.

When a railroad seeks and receives a discontinuance authorization, its federal common carrier obligation is terminated (that is, it can lawfully decline to quote tariffs or to provide rail service), but the railroad right-of-way itself remains under STB preemptive jurisdiction. It is the historical way a railroad preserves a line (keeps it intact) for future use.⁵

⁵ Discontinuance procedures are also used to terminate trackage rights and similar sorts of use rights by third parties over a particular railroad's right-of-way. "Remedies" that require or permit title transfer (like purchase OFA's or trail

A simple way to address the Federal Circuit issues would be to amend the notice of exemption process to allow railroads to apply for “discontinuance or abandonment” authority, rather than the current format of seeking “abandonment” authority followed (possibly) by “interim trail use or abandonment.” If the railroad sought discontinuance or abandonment authority (LLTT will term this a “Notice of Discontinuance or Abandonment” or “NDA”), the amended regulations would permit the railroad to exercise the authority within one year, subject to extensions as at present for NITU’s or Notices of Abandonment. Parties interested in trail use would notify the railroad by serving and filing with STB a “statement of willingness” indicating their interest (essentially as currently done). If during the one year period (or timely extension thereof) for consummation of discontinuance or abandonment authority, the railroad and interim trail railbanker notified the agency that a railbanking agreement had been reached, STB as a ministerial act would issue a Notice of Railbanking.

This approach has a number of benefits. First, the Notice of Railbanking would not issue until the commencement of actual railbanking. This would presumably eliminate any temporary taking attributable to 16 U.S.C. 1247(d) by reason of trail

agreements) are generally not available in such circumstances. LLTT understands DOI/ENRD to be focused on use of discontinuance procedures by the railroad which owns the rail line, and that is LLTT’s focus in these comments.

use negotiations because there is no authority for trail use railbanking until the Notice of Railbanking issues. Second, the Notice of Railbanking under this scenario supplants the need for any kind of consummation letter for it amounts to a determination of interim trail use railbanking. Third, because abandonment is authorized by the posited NDA, the NDA can serve as a predicate for local governments to purchase the line for modified certificate operations under 49 C.F.R. 1150.20, et seq.⁶ Fourth, if STB feels that there should be a purchase OFA opportunity in any railbanking context, it could occur on application by the OFA proponent when the NDA is issued (as now occurs with Notices of Exempt Abandonment).

Railbanking is essentially a discontinuance, not an abandonment. In both cases the line remains under STB jurisdiction for future reactivation. It makes sense to make it available by authorizing discontinuance or abandonment, and then only

⁶ The modified certificate program requires that a line be abandoned or authorized for abandonment. Then if acquired by a local government, which contracts with an operator, only the operator has common carrier obligations, which can be limited by conditions adopted by STB from the operating agreement (like payment of subsidies by third parties, or guaranteed carloadings), and the modified certificate otherwise can be terminated on notice. This is another major way to preserve otherwise-to-be abandoned rail corridor for future rail purposes, and it can be combined with a NITU (i.e., trail use authorization). See, e.g., Sea Lion Railroad – Ab Ex.—in King County, WA, AB 544X, served Sept. 18, 1988 (issuing NITU); Ballard Terminal Railroad Company – Modified Rail Certificate, F.D. 33594, served Feb. 26, 1999 (modified certificate operations authorized over line involved in AB 544X. For further background, see decision in AB 544X served August 11, 1988.

converting that authorization to a railbanking (trail) authorization (as a ministerial act) when the railroad and trail sponsor advise the Board that they have reached an agreement. And if a railroad has worked out a railbanking deal in advance (as DOI/ENRD posit), the railroad could simply apply for a Notice of Railbanking, triggering an NDA proceeding. In such circumstances, most environmental documentation relating to the environmental conditioning process may be rendered unnecessary.⁷ STB currently provides that railbanked lines do not have to comply with environmental conditions so long as the line is railbanked.⁸ This may allow some streamlining of the environmental and historic preservation processes. Certainly this approach should not add to environmental and historic preservation requirements. In addition, the Board generally provides in its environmental conditioning process that environmental conditions are not applicable if the property remains under STB jurisdiction pursuant to a railbanking agreement.

⁷ In addition, the DOI/ENRD proposal is primarily directed at notices of exemption and NITU's, and these are only available where there has been no rail traffic for at least two years. In such cases, key environmental issues (like diversion of traffic) are simply not applicable (because there is no traffic to divert).

⁸ E.g., Final Environmental Assessment in Snohomish County – Ad. Ab. – GNP RLY, Inc., in Snohomish County, WA, AB 1331, served Jan. 19, 2024, at p. 2 n.2.

LLTT supports efforts to make railbanking more efficient for trail users and the rail industry, and in doing so, to consider modifications to the regulations to forestall temporary takings claims by emphasizing the permissive nature of authorizations and enhancement of use of discontinuance procedures.

By my signature below, the undersigned certifies service by email attachment on all parties of record in EP 777 on or before the due date (Jan. 29).

Respectfully submitted,

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