

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
January 29, 2025
Part of
Public Record

Ex Parte 777

**JOINT PETITION FOR RULEMAKING TO CONSIDER AMENDMENTS TO
REGULATIONS GOVERNING INTERIM USE OF RIGHTS-OF-WAY AS TRAILS
(49 C.F.R. PART 1152)**

**PETITION OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE U.S.
DEPARTMENT OF JUSTICE’S ENVIRONMENT AND NATURAL RESOURCES**

Comment of Rails to Trails Conservancy

The Rails to Trails Conservancy (“RTC”) submits this comment in the above-referenced petition for rulemaking initiated by the U.S. Department of the Interior and the U.S. Department of Justice Environment and Natural Resources Division (“DOI/ENRD”) to amend the Surface Transportation Board’s (“STB” or “Board”) rules regarding the process governing interim use of railroad rights of-way as trails under Section 8(d) of the National Trails Systems Act Amendments, 16 U.S.C. §1247(d) (“Railbanking Law”).

Interest of commenting party. RTC, which began operations in 1986, is a nation-wide non-profit organization with over 160,000 members and supporters dedicated to conserving otherwise-to-be abandoned railroad corridor for use of trails and for other compatible public purposes, most notably, through the use, defense, and protection of the federal railbanking statute, pursuant to Section 8(d) of the National Trails System Act Amendments, 16 U.S.C. § 1247(d) and the Board’s regulations implementing the statute, 49 C.F.R. § 1152.29. To carry out its mission, RTC identifies rail corridors that are not currently needed for rail transportation and

facilitates their preservation and continued public use through conversion to public trails, non-motorized transportation corridors, and other public uses, and provides technical assistance to communities across the country on rails to trails conversions.

For the past 39 years, RTC has been substantially involved in the interpretation, implementation, and legal defense of the federal railbanking law, which was enacted by Congress in 1983 to preserve our nation's irreplaceable national rail system, painstakingly built with substantial federal assistance over more than a century, for future rail service and for other compatible interim public uses, including use as trails. RTC has engaged in the railbanking process in a host of cases in order to preserve railroad corridors for interim trail use compatible with possible future rail reactivation. Since its inception, RTC has been actively involved in the efforts of this Board and its predecessor, the Interstate Commerce Commission, to develop regulatory procedures to implement Congress' mandate that this Board "to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale." 16 U.S.C. § 1247(d).

Position of RTC. RTC supports the intention of the DOI/ENRDR proposal to expedite and encourage railbanking by railroads through the establishment of alternative pathways for railbanking unused railroad corridors. Railbanking through the STB's discontinuance authority could reduce the costs and regulatory delays that can thwart even straightforward railbanking proposals and could thereby reduce the burdens to railroads and potential trail sponsors alike. Streamlining the railbanking process will certainly advance this Board's statutory mandate to encourage rail corridor preservation through interim trail use and railbanking.

RTC also supports the intent of the DOI/ENRD proposal to address what is, in our view, misguided jurisprudence from the U.S. Court of Appeals for the Federal Circuit, which has

determined that, under the current regulatory regime governing railbanking, the United States is liable for a temporary taking immediately upon issuance of an STB order permitting trail use/railbanking negotiation, regardless of whether the order expires without any transfer for trail use. This holding fundamentally misunderstands the nature of STB's regulatory scheme. Nonetheless, it remains the binding rule of law governing takings claims, so long as the STB's regulatory procedures remain unchanged.

Of course, the courts will be the final arbiter of whether the proposed rule change will affect the current temporary takings jurisprudence. However, if the rule change does accomplish its intended purpose of avoiding temporary takings claims for STB orders that simply authorize unconsummated trail use negotiations, this rule change will either benefit or have little to no effect on all legitimate stakeholders. Contrary to any suggestion that may be made by the ideological opponents of railbanking, adjacent landowners will suffer minimal financial impact as a result of the proposed regulatory change. This is because the primary beneficiary of the "temporary takings" line of cases are trial lawyers who troll communities across the country seeking landowners to join "taskings" cases every time a trail use order is issued by this Board. These trial lawyers typically secure large attorneys' fee payments, which may include a portion of the total compensation award to the landowners, often leaving individual landowners with only a token amount of compensation.¹

¹ For example, the website of the law firm of Stewart, Wald & Smith, LLC, states that "We have recovered more money in Rails-to-Trails litigation than any other law firm: \$390 Million and counting." <https://www.swslegal.com/>. However, in one of the firm's "temporary takings" cases, individual landowners received as little as \$190 in compensation. See, e.g. *Memmer v. United States*, No. 14-135 L (Fed. Cl., June 26, 2023). According to the database of payouts from the U.S. Judgment Fund, which pays all of the awards from takings claims, it is not unusual to see payouts made after the Federal Circuit made its "temporary takings" holding, in which the total amount of compensation awarded to the individual plaintiffs is a small fraction of the attorneys' fee payment.

While trial lawyers may desire to protect their extraordinarily profitable business model, that desire hardly outweighs the interests of the public in curtailing the unlimited stream of payments of taxpayer funds to wealthy trial lawyers under the current regulatory regime. Moreover, the proposed rule change will not affect the court's permanent "takings" jurisprudence, which will continue to allow trial lawyers to enrich themselves by bringing compensation claims on behalf of adjacent landowners where a railbanking order actually results in a transfer of a corridor to an interim trail manager.

As the petition represents, a disproportionate percentage of the DOJ/ENRD's resources are allocated to this litigation, diverting the agency from advocating to protect the interests of the public rather than private law firms. Further, the Judgment Fund is subject to unwarranted payouts at the taxpayer's expense, which this proposed regulatory change may correct. A regulatory change that corrects this unjust allocation of resources would be beneficial to all relevant stakeholders.

Respectfully submitted,



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