

BEFORE THE SURFACE TRANSPORTATION BOARD

246135

NATIONAL ASSOCIATION OF REVERSIONARY)
PROPERTY OWNERS - PETITION FOR A) EP 749
RULEMAKING)

ENTERED
Office of Proceedings
July 27, 2018
Part of
Public Record

REPLY ON BEHALF OF THE CITY OF SEATTLE

These reply comments are on behalf of the City of Seattle (City). The City opposes the petition, and the relief sought in the petition, filed in this proceeding.

The National Association of Reversionary Property Owners (NARPO) petition calls for this Board to adopt rules that would serve to burden or inhibit the use of the federal railbanking statute (16 U.S.C. 1247(d)) in preserving otherwise-to-be abandoned railroad rights-of-way for possible future rail purposes and for other allied public purposes, including trails. More specifically, NARPO asks (1) for a limitation on "extensions" of Notices of Interim Trail Use (NITU's) to six periods of 180 days, (2) for railroads or "trail use proponent" to jointly or perhaps severally notify all adjacent property owners of issuance of a NITU, and (3) evidently for a repeal of the fee exemption customarily available to federal, state and local agencies under 49 C.F.R. 1002.2(e)(1), at least for NITU extensions. NARPO's proposals are unjustified.

The City of Seattle (City) has frequently employed the federal railbanking statute in the past to preserve rail corridor within the City, in some cases over the opposition of NARPO. The City is currently engaged in such an effort in BNSF - Ab. Ex. - in King County, AB 6-490X. The City, using the fee waiver or exemption, has previously sought five NITU extensions in that proceeding to date. The City expects that BNSF will shortly request it to seek at least one further, and possibly more in the future, before BNSF is prepared to complete what the City regards as BNSF's contractual obligation to railbank the rail line in question upon STB-authorized abandonment.¹ NARPO's proposals will burden or inhibit railbanking, and may result in what would amount to a serious breach of a contract (the Burke Gilman Agreements, see note one) with potentially costly and disruptive consequences.

NARPO's first proposal. NARPO fails to justify its proposed rule limiting NITU extensions to six 180-day periods. Its petition does not show any prejudice to any member of NARPO

¹ Per a set of agreements known as the Burke-Gilman Agreements, BNSF agreed to convey certain lines to the City of Seattle upon receipt of an abandonment authorization, and to railbank same at the request of Seattle. The line involved in AB6-490X is covered by the Burke-Gilman Agreements. The Burke-Gilman Trail now operates atop another of the lines covered by the Burke-Gilman Agreements.

(assuming arguendo NARPO has members whom it is representing).²

In particular, NARPO shows no conspiracy anywhere between a railroad and a trail proponent to "shake-down" some adjoining property owner presumably for money by repeated use of extensions. In the circumstances, all extension requests should be assumed to be for valid reasons presented to STB along with the requests.

In any event, NARPO seems to misunderstand the railbanking process. STB has implemented 16 U.S.C. 1247(d) by creating a regulatory construct with names and deadlines and procedures not specified in the statute. 16 U.S.C. 1247(d) does not specify that the parties have only 180 days to negotiate, subject to 180-day extensions. STB in order to maintain orderly processes provides for the 180-day negotiation period. If the parties reach an agreement, the NITU extends indefinitely. Otherwise, STB practice allows the parties to seek an extension. The parties in theory could seek, and the Board has sometimes granted, extensions longer than 180 days for negotiations. The point is that NARPO has no statutory basis for a time limit.

²NARPO was established by a King County resident who previously resided next to an otherwise-to-be-abandoned rail line parallel to the east side of Lake Sammamish. King County long ago acquired the rail line in question for trail use and railbanking. In any event, NARPO does not show that it or its organizing party owns any property adjoining a rail corridor, active or inactive.

Seattle's experience with BNSF in AB 6-390X suggests that there should be no specific limit on 180-day extensions. After obtaining an abandonment authorization for the line in AB6-390X, BNSF began discussions with a shipper about returning a portion of the NITU-covered line to service. Since railbanking is, perhaps to the surprise of NARPO, not just about trails but also about rail reactivation, BNSF has pursued these discussions with the shipper as opposed to issuing the otherwise-required deed to Seattle. BNSF has informed the City that the discussions are still on-going; City surmises that both BNSF and the shipper are trying to strike an advantageous deal. The City does not know when the discussions will end; the City has no control over that. At BNSF's request, the City has sought five NITU extensions so far, and expects to seek a sixth shortly. The City has no basis to conclude that a sixth extension will be enough for BNSF and its shipper to conclude their negotiation, and then for BNSF to draw up papers with the City. In the circumstances, the City - which is otherwise entitled to the property under the Burke-Gilman agreements (note 1) - would be victimized by a rule limiting the number of extensions. This would be counterproductive because the reason for the extensions (possible future rail reactivation) is a purpose that the underlying statute seeks to facilitate. NARPO simply fails to demonstrate why any further limitation on the agency's

flexibility in granting extensions is necessary or prudent, especially in light of federal policy of encouraging conservation of otherwise-to-be abandoned rail lines.

NARPO's second proposal. NARPO's proposal to require the railroad or trail proponent to notify adjoining property owners upon issuance of a NITU is re-packaging of past NARPO notice proposals which have previously been rejected by this Board or Board's predecessor as unduly burdensome. E.g., Rail Abandonments - Use of Rights-of-Way as Trails, ICC EP 274 (Sub-no. 13), served Feb. 21, 1990; id. served July 27, 1994; Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. 10903, EP 537, served June 18, 1997. NARPO suggests that the burden of notice is no longer so great because of computerization of some land title repositories. But it provides no evidence to back its assertions in this regard. Title searches relating to railroad corridors are inevitably burdensome, costly, and fraught with possibility of error. The job remains onerous even with computers. In effect, NARPO appears to be seeking not a new rulemaking but to reopen past proceedings without making the onerous showings required for reopening (material error, changed circumstance, or new evidence). The Board should simply adhere to its precedent, deny reopening if that is what NARPO is

seeking on grounds of lack of the necessary showings, and in all events reject NARPO's proposed rule again.

Finally, the City notes that all adjoining property owners receive in advance of Board action newspaper notice of relevant STB proceedings relating to abandonments/railbanking. They can ask to participate in the proceeding, receiving all notices and so forth from the Board. If they wish to become parties, they can also receive copies of all pleadings. And in all events, the Board posts pleadings and decisions promptly on its website. Finally, the Board publishes, in the case of exempt abandonments, abandonment decisions (which as a minimum reference the possibility of railbanking) in the Federal Register [49 C.F.R. 1152.50(c)(2)(3)] and in the case of applications for abandonment, notice of the proceeding (id. 1152.2(e)(2)). "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance. See 44 U.S.C. § 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85, 68 S. Ct. 1, 3-4, 92 L. Ed. 10 (1947); Government of Guam v. United States, 744 F.2d 699, 701 (9th Cir. 1984); Bennett v. Director, Office of Workers' Compensation Programs, 717 F.2d 1167, 1169 (7th Cir. 1983); North Alabama Express, Inc. v. United States, 585 F.2d 783, 787 n. 2 (5th Cir. 1978)" Friends of Sierra Railroad v. ICC, 881

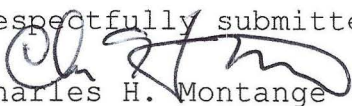
F.2d 663, 667-68 (9th Cir. 1989). This settled law independently renders NARPO's request for actual notice superfluous and an unwarranted burden.

NARPO's third proposal. NARPO appears to suggest that the Board not waive fees for NITU extension requests filed by government entities because such waivers burden the Board and increase costs to parties who seek NITU extensions without a fee waiver. NARPO makes a solid case for making fee waivers to government entities automatic (and thus non-burdensome) as 49 C.F.R. 1002.2(e)(1) appears to provide already. There is no evidence that the Board raises the price to fee payers due to fee exemptions granted government entities. Seattle accordingly opposes repeal of 49 C.F.R. 1002.2(e)(1) generally or by singling out NITU's or NITU extensions for discriminatory adverse treatment (i.e., making 1002.2(e)(1) inapplicable to them).

If leave is required to file these reply comments, leave is so sought. Seattle only recently became aware of the NARPO petition and requests that these comments be considered for purposes of compiling a more complete record before this agency embarks on a rulemaking.

For the reasons stated, the petition should be denied.

Respectfully submitted,


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