

Before the Surface Transportation Board

Rails to Trails Conservancy --	)	Ex Parte 753	
Petition for a Rulemaking	)		248105
			248106
Limiting Extensions of Trail Use	)	Ex Parte 749 (sub-no.1)	
Negotiation Periods	)		ENTERED
			Office of Proceedings
			July 5, 2019
			Part of
			Public Record

JOINT COMMENTS
On
SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

These Comments are filed on behalf of Madison County Mass Transit District ("MCT")¹ and Iowa Natural Heritage Foundation ("INHF")² (jointly "Commenters") in response to the agency's

¹ MCT is a municipal corporation organized pursuant to the Local Mass Transit District Act (70 ILCS 3610) of the Illinois State statutes. MCT is dedicated to providing public mass transportation within Madison County, Illinois. To this end, MCT among other things has developed a series of interconnected rail trails, sometimes through use of the federal railbanking statute (16 USC 1247(d)), to provide bicycle connector routes to its bus lines, and also to preserve otherwise-to-be abandoned rail lines for possible future mass transit (including passenger rail) uses. MCT wishes to be able to employ section 1247(d) in a similar fashion in the future. As explained herein, the proposed rule changes recommended by RTC will better accomplish MCT's purposes while decreasing administrative burdens to the agency, regulated entities, and the public.

² Iowa Natural Heritage Foundation is a statewide nonprofit conservation organization that works with private landowners and public agencies to protect and restore Iowa's land, water, and wildlife. INHF has been involved with preserving railroad corridors as multi-use trails since our founding in 1979. Since that time INHF has assisted in the planning and development of nearly 700 miles of rails-to-trails projects. Overall, INHF has provided Iowa communities support for the planning and construction of nearly 1,400 miles of trails across the state.

“supplemental notice of proposed rulemaking” served June 6, 2019. In the supplemental notice, the agency proposed to adopt a modified version of the rule change sought by Rails to Trails Conservancy (RTC) in Rails to Trails Conservancy – Pet. for Rulemaking, Ex Parte 753; namely, to extend the negotiation period under the Trails Act (16 U.S.C. 1247(d)) to one year, and to grant one-year extensions for the negotiation period. Commenters support this proposed change. The change reduces administrative costs to the agency and the parties; better conforms to industry practice in negotiations; and is more consistent with the one-year extensions the Board grants railroads upon their request for purposes of filing notices of consummation.

However, Commenters oppose any statement by the agency that extensions in the negotiation period are “disfavored,” even if limited to extensions after the first three.

The kerfuffle over the interim/trail use railbanking negotiation period commenced on the basis of a petition by National Association of Reversionary Property Owners (NARPO), an anti-trail group, which sought a hard limit on the negotiation

Like MCT, INHF has employed and wishes to employ section 1247(d) in the future in an efficient fashion to preserve rail corridor for future use, and in the interim for trails and wildlife habitat.

period beyond which it could not be extended. See NARPO Petition, Ex Parte 749, at p. 2, filed June 14, 2018. NARPO produced no evidence a hard limit was needed, but the agency instituted a rulemaking (Limiting Extensions of Trail Use Negotiation Periods, Ex Parte 749 (Sub-no.1)) in response. Commenters consistently opposed the NARPO proposal, specifically calling on the agency to reject it, and instead to adopt RTC's proposal for one-year negotiation periods and extensions. The overwhelming majority of comments received by the agency supported RTC's proposal and objected to that of NARPO. But more important, to date neither NARPO nor the agency has supplied any data or evidence suggesting that a hard limit or any other burden or limitation on extension of negotiation periods is necessary or prudent in response to Ex Part 749 (Sub-no. 1). Nonetheless, the agency in its decision served June 6, 2019, evidently to placate NARPO, now proposes to "disfavor" extensions for railbanking negotiations beyond the first three, but to allow the extension upon a showing of "good cause" if both the railbanker and the railroad agree.

Commenters do not oppose a showing of "good cause" for extensions after the first three. However, Commenters object to the use of the expression "disfavor." The agency fails to explain the purpose of the use of that term on top of a "good cause" requirement. Either the expression "disfavor" is

redundant of the requirement to show "good cause," or it means that something more than normal "good cause" must be shown. If the expression "disfavor" is redundant, then it should be omitted. If the expression is intended to mean that something more than "good cause" must be shown, then the agency should explain what that may be so Commenters understand what the agency intends and can meaningfully comment.

NARPO's original and continued requests for hard limits on extensions for NITU negotiations are and remain baseless. As Commenters have said before, NITU negotiation extensions have no more impact on adjoining property owners claiming reversionary interests in property (i.e., interests that could be fully enjoyed only on abandonment) than many (indeed most) other forms of STB regulation. For example, STB issues many licenses or similar forms of relief which are permissive rather than mandatory. Examples include notices of exemption to lease and to operate, to acquire and to operate, to change operators, to operate pursuant to modified certificate, and so on. Many of these licensing mechanisms are set forth in 49 CFR Part 1150. None has time limits, yet all forestall the application of state property law due to federal preemption (see 49 U.S.C. 10501(b)) while rail property (or interests therein) is passed from one owner to another in a fashion similar to the situation in railbanking.

In addition, the statute governing abandonments also provides for “discontinuances”. See 49 U.S.C. 10903. Under a discontinuance authorization, a railroad may indefinitely suspend its common carrier obligation, but keep the line under STB jurisdiction thus preventing easement extinguishments or base fee reversions (that is, the application of state property law). Neither NARPO nor the agency is proposing to limit any of these.

Moreover, as previously noted by Commenters and RTC, STB’s own abandonment regulations provide one year for railroads to consummate abandonment authorizations (49 C.F.R. 1152.29(e)(2)). STB appears freely to grant extensions of the one-year consummation period upon request by the railroad. A typical example is BNSF – Ab. Ex. – in Snohomish County, WA, AB 6-422X. The NITU originally issued in that case expired on May 1, 2005. The agency, at BNSF’s request, subsequently granted extensions in the one-year period for consummation of abandonment by decisions served July 7, 2005; December 28, 2005; June 21, 2006; December 14, 2006; and December 18, 2007 (the latter two extensions were for one year). (The railroad ultimately retained a portion of the line for rail purposes.) The agency extension decisions stated that the railroad had shown good cause due to salvage difficulties. Neither the agency nor NARPO is suggesting that the agency curtail a railroad’s ability to

extend the one-year consummation period, and if anything, extensions for NITU's should be granted more freely since they are for retention of hard-to-assemble rail corridors that may be needed in the future for rail reactivation.

In the end, whether to seek an abandonment, and whether to consummate an abandonment, is up to the railroad owning a line, not a group or government seeking trail use. The agency's case law makes clear that rail lines remain under the jurisdiction of the agency until and unless a rail abandonment license is sought and granted, even if all track and ties have been removed, and even if the line is (unlawfully) sold off. Until the railroad obtains and consummates STB abandonment authority, federal preemption of state property law rules applies. See, e.g., Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008.

So far as Commenters can tell from the agency's explanations in this rulemaking, STB's sole basis for any limitation on negotiation periods is dicta by the D.C. Circuit in Birt v. STB, 90 F.3d 580, 583 (1996) that NITU "extensions 'ad infinitum' could have the undesirable effect of 'allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use.'" MCT/INHF Comments in Ex Parte 749 (Sub-no.1) at p. 6. As

we have repeatedly indicated to the agency, this dictum is not based on any "facts" and on top of this misconceives rail law. The dictum instead describes the typical result that flows from STB rail discontinuance proceedings, in which the railroad obtains authority indefinitely to stop rail service without relinquishing its rights to rail easements or base fees, and without putting the right-of-way to any use. Or they better describe the result when a railroad simply stops using a line and does not seek any abandonment or discontinuance authority at all.

NITU negotiations are designed to promote conservation of otherwise to be lost rail corridors. Congress in adopting the federal railbanking program determined that every corridor merited preservation if that could be accomplished without cost to current interstate commerce. In the words of the Supreme Court,

"Congress did not distinguish between short-term and long-term rail banking, nor did it require that the Commission develop a specific contingency plan for reactivation of a line before permitting conversion. To the contrary, Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional

regulation of railroad abandonments, see, e.g., *Colorado v. United States*, 271 U.S. 153 (1926), that is a judgment that Congress is entitled to make."

Preseault v. ICC, 494 U.S. 1, 19 (1990).

The D.C. Circuit dicta in Birt upon which the agency relied for purposes of accommodating NARPO in Ex parte 749 (Sub-no.1) fails to recognize that "every line is a potentially valuable national asset" so long as parties are seeking to preserve it for interim trail and future rail uses. In light of the Supreme Court's confirmation that conservation of lines itself is a productive use, prolonged negotiations to that end cannot be termed unproductive. Whether it takes 6 months or 60 months, a "valuable national asset" (the rail corridor) is conserved. In light of the Supreme Court's statement, the Board should facilitate railbanking by freely granting extensions rather than foreshortening opportunities with arbitrary cut-offs. As noted, we have no objection to a requirement that good cause be shown after the first three extensions, which good cause could include completion of appraisals, title review, salvage, environmental studies, and negotiations. If the "abuse" that one aims to resolve is "procrastination" in negotiating an agreement, or sheer incompetence in putting a deal together, then requiring the parties to make a showing of good cause that they are serious should be enough to correct the "abuse." In all events,

NARPO has not demonstrated a need for an arbitrary limit on extensions for railbanking negotiations. The railroad that filed comments in Ex parte 749 (Sub-no.1) (Missouri Central RR Company, Nov. 1) noted that the Board had ample means at hand to prevent mis-use of the negotiation process and stated that arbitrary limits are unnecessary. The American Association of Railroads (AAR), in opposing NARPO's petition underlying this rulemaking, made the same point in its Reply filed July 5, 2018 in EP 749.

Commenters otherwise readopt their prior comments in Ex Parte 753 and 749 distinguishing cases cited by NARPO.

Conclusion

The Board should adopt RTC's proposal for one-year negotiation periods and extensions thereof as the sole relief afforded in Ex Parte 749 (Sub no. 1) and in Ex Parte 753. Commenters object strongly to any statement that STB "disfavors" extensions in railbanking cases, for any such statement has no justification based on practice to date. Commenters do not object to a requirement that "good cause" be shown for extensions after the first three.

Respectfully submitted,

s/CHARLES H. MONTANGE

Charles H. Montange
426 NW 162nd Street
Seattle, WA 98177
(206)546-1936
-3739 (fax)
c.montange@frontier.com
For Madison County Transit
and Iowa Natural Heritage Foundation

Dated: 5 July 2019