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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re National Association of Rail Passengers, Petition for Rulemaking –
Docket ~~EP-729~~. EP - 749

Dear Ms. Brown:

The Rails-to-Trails Conservancy (“RTC”) hereby provides preliminary comments in response to the petition for rulemaking filed by the National Association of Rail Passengers (“NARPO”), which has recently come to RTC’s attention. Pursuant to 49 C.F.R. § 1117.1, RTC requests that an extension of the comment deadline be granted in order to allow for more detailed comments on this petition within the next 30 days.

Interest of Rails to Trails Conservancy

Rails-to-Trails Conservancy (“RTC”) is a national nonprofit conservation organization founded in 1985. Headquartered in Washington, D.C., with four regional field offices located in California, Florida, Pennsylvania, and Ohio, RTC’s mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. RTC services as the national voice for its more than 250,570 members and supporters nationwide, who support the goal of creating more walkable, bikeable communities in America. RTC has worked from coast to coast, supporting the development of thousands of miles of rail-trails – in every state – for millions to explore and enjoy, creating connections between towns and suburbs, linking communities along vibrant corridors in much the same way as the railroads did in their heyday.

RTC has a significant interest in the interpretation and implementation of the federal railbanking law, 16 U.S.C. § 1247(d), 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. The railbanking statute has preserved thousands of miles of rail corridors that would otherwise have been lost to the public for future transportation use, and has facilitated the creation of extraordinary trails, including Missouri's 200-mile Katy Trail, Seattle's Burke-Gilman Trail, and New York City's Highline, which have been an economic boon to their communities.

To that end, for over 30 years, RTC has been deeply involved in the implementation, interpretation, and legal defense of this federal statute and policy across the country, including testifying before Congress and participating in proceedings before this Board that could affect this important federal policy. RTC's has also been extensively involved in litigation to defend against changes to the implementation or interpretation of the federal Railbanking program that would undermine the statute's goals and policies.

RTC also serves an important educational role in the larger trails community, providing information and technical assistance to state and local jurisdictions across the country on railbanking.¹ Through its "early warning system," RTC alerts communities and officials about railbanking opportunities from railroad abandonment applications filed with the STB.² RTC has itself acted as an interim trail manager to secure the legal protections of railbanking to facilitate rails to trails conversions. RTC also maintains a database of rail-trails that includes specific information on railbanked trails gathered through records maintained by this Board and through direct communications with trail managers, which is widely acknowledged to be the most comprehensive source of information on rail-trails in existence.

Reason an Extension is Needed

RTC has a particular interest in the present petition because the changes requested by NARPO. As will be discussed preliminarily below, these proposed changes would undermine the purposes and policy of the federal railbanking law "to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way." 16 U.S.C. § 1247(d).

An extension of 30 days is requested to allow RTC to evaluate the specific case examples cited in NARPO's petition, and the additional examples cited in its motion filed this week, seeking to file a reply to the reply filed by the Association of American Railroads. This additional time will also allow RTC to alert key members of its trail constituency who have an interest in it the subject matter of this petition, and who can provide relevant information bearing

1 <https://www.railstotrails.org/build-trails/trail-building-toolbox/acquisition/railbanking-basics/> and <https://www.railstotrails.org/build-trails/trail-building-toolbox/acquisition/how-to-railbank/>

2 <https://www.railstotrails.org/build-trails/early-warning-system/>

on the examples cited by NARPO. Many interested commenters have scheduled vacations that warrant an extension. No prejudice would result to NARPO, given its own request for relief from this Board's rules to file a reply to a reply.

Preliminary Response to NARPO's Requested Rule Changes

RTC provides the following preliminary comments to the three changes to this Board's railbanking procedures requested by NARPO. More detailed comments will be provided later.

1. The Request to Limit the Number of Extensions of NITUs to Six.

NARPO's proposed limit of six extensions for NTIUs is unreasonable and would significantly undermine the implementation and effectiveness of the federal railbanking law in accomplishing its congressionally mandated goals. The vast majority of abandonment applications proceed under this Board's exempt abandonment procedures, in which requests for trail use conditions must be filed within ten days of publication of notice of the abandonment in the *Federal Register*. This notice may be the first notice received by the public of this opportunity to negotiate a interim trail use agreement.

The ability to extend NITUs where more time is needed is critical to carrying out the purposes and policies of the federal railbanking law. Negotiating a railbanking/interim trail use agreement is a complex undertaking, requiring the potential trail manager to assume extensive liabilities and long-term financial responsibilities for the management of the corridor. Public agencies are constrained by existing, legislatively-approved budgets, and so must go through often extensive public procedures to secure expenditure authorizations or make budgetary changes. Available public funding mechanisms necessary to acquire a corridor, such as bond referenda or federal grants, likewise take time to secure.

This Board's policy to liberally extend NITUs is in response to its recognition of the "strong Congressional policy favoring trails use/rail banking." *St. Louis S.W. R.R. Co.—Abandonment—in Smith and Cherokee Counties, Texas*, No. AB-39 (Sub-No. 12), 1992 ICC WL 457275 at *3 (Mar. 23, 1992). Delays in negotiations can also arise from innumerable factors not attributable to any delay by a potential interim trail manager, including proceedings to consider an Offer of Financial Assistance, delays resulting from compliance with environmental and historic preservation conditions, or from negotiations with salvage operators. Indeed, the D.C. Circuit relied on this Board's stated policy of accepting (and by implication extending) trail use requests "so long as it still retains jurisdiction to do so" in rejecting a challenge brought by RTC claiming that the time frames afforded in exempt abandonment proceedings were inadequate to carry out the purposes and policies of federal railbanking law. *Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988)

Moreover, protracted railbanking negotiations are the exception rather than the rule. According to RTC's records, of the 388 railbanking orders issued by the STB since 1986, only nine have been extended for more than six years. Moreover, this Board has the discretion to ask for additional information, on a case by case basis, to determine whether good cause exists for extending a NITU in the cause of unusually lengthy extension requests, and even has the authority to impose, with due notice, a reasonable time limit in particular cases, albeit only where doing so is necessary to prevent any abuses that would undermine federal policies. To impose an arbitrary limit on the number of extensions in all cases would undoubtedly undermine this federal policy.

2. The Require To Require Trail Managers Or Rail Operators To Provide Actual Notice to Adjacent Landowners of Interim Trail Use Requests.

This is the fourth attempt by NARPO to change the procedures for railbanking to require that actual notice be given to the owners of reversionary interests in rights-of-way before approving conversion of rights-of-way to trail use. On each occasion, this Board, has given consideration to this proposal and rejected. See *Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13) (May 18, 1989); (*Petition for Rulemaking Concerning the Rails-to Trails Program*, March 25, 1994.) The ICC denied the petition on July 27, 1994. *Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, Ex Parte No. 274, (Sub-No. 13). Each time, the U.S. Court of Appeals for the D.C. Circuit has found that the agency's existing notice procedures are adequate to inform provide notice to adjacent landowners, and has rejected the due process arguments raised by NARPO, or otherwise rejected NARPO's contentions. See *National Association of Reversionary Property Owners v. STB*, 70 F.3d 638, 1995 WL 687741315 U.S.App.D.C. 77 (D.C. Cir. 1995) (Table); *NARPO v. STB*, 158 F.3d 135 (D.C. Cir. 1998).

In effect, NARPO's petition is a petition to reopen rather than to initiate rulemaking, and must allege "material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination." 49 C.F.R. § 1115.4. NARPO's petition fails to invoke this rule and fails to identify any material error, new evidence, or substantially changed circumstances that warrant revisiting this issue. While NARPO asserts generally that this notice could be "easily" accomplished because many jurisdictions maintained computerized land records, NARPO provides no actual data to support this claim. As the U.S. Supreme Court has held, petitions to reopen must be supported "new data" in order to be reviewable. *ICC v Locomotive Engineers*, 482 U.S. 270 (1987). NARPO's petition fails to meet this standard and must be denied.

3. Imposition of Filing Fees on Public Agencies

NARPO's request that the rules be changed to impose fees on public agencies for the filing of trail use requests would undermine the federal railbanking law while serving no countervailing legitimate purpose. As noted above, public agencies operate under constrained budgets and must operate within existing budgets with little room for discretionary expenditures. As noted above, the expedited time frames afforded by the abandonment process are insufficient to allow public agencies to secure the authorizations needed to make these expenditures. NARPO fails to articulate a single rationale for why requiring public agencies to pay fees would in any way protect legitimate interests of adjacent landowners or reversionary interest holders. Rather, this proposed rule change is a transparent attempt to discourage and undermine the federal railbanking program, and is blatantly contrary to those federal policies.

Please feel free to contact me if you would like any additional information.

Respectfully submitted,



Andrea C. Ferster, General Counsel
Rails-to-Trails Conservancy

Certificate of Service

I hereby certify that the foregoing preliminary comments and request for extension have been served electronically on Thomas McFarland, counsel for NARPO, at McFarland@aol.com on July 27, 2018.



Andrea Ferster