

BEFORE THE
SURFACE TRANSPORTATION BOARD

246044

STB Ex Parte No. 749

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NATIONAL ASSOCIATION OF REVERSIONARY
PROPERTY OWNERS – PETITION FOR RULEMAKING

REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”) hereby replies in opposition to a petition for rulemaking filed by National Association of Reversionary Property Owners (“NARPO”) on June 14, 2018 in the above-captioned docket.

NARPO asks the Board to open a proceeding and issue three rules related to Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d) (“Trails Act”). Specifically, NARPO proposes rules that: (1) limit the number of 180-day extensions of a trail use negotiating period to six; (2) require a rail carrier or trail use proponent negotiating an interim trail agreement to send notice of the Notice of Interim Trail Use (“NITU”) to each landowner adjacent to the rail line covered by the NITU; and (3) require that all entities filing a request for a NITU or an extension pay a filing fee.

The Board’s current regulations implementing the Trails Act provisions are intended properly to facilitate the voluntary negotiation of interim trail agreements between a rail carrier abandoning a line and a trail sponsor. The rules do so by minimizing the procedural burdens on carriers and by recognizing the Board’s essentially ministerial role in facilitating the negotiation process. *See Rail Abandonments – Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 605 (1986).

Particularly given this ministerial role played by the Board, NARPO has not provided a justification for a rulemaking proceeding. As such, the Board should deny the petition.

Argument

Most notably, the Board should reject NARPO's request that carriers and/or potential trail sponsors be required to identify and provide notice of a NITU to each landowner along the right-of-way. The agency has already considered and rejected NARPO's more limited request for such a notice requirement to persons holding reversionary interests in the rights-of-way several times. *See Rail Abandonments – Use of Rights-of-Way as Trails – Supplemental Trails Act Procedures*, EP 274 (Sub-No. 13) (ICC served Feb. 21, 1990); *Rail Abandonments – Use of Rights-of-Way as Trails – Supplemental Trails Act Procedures*, EP 274 (Sub-No. 13) (ICC served July 27, 1994); *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, EP 537 (STB served June 18, 1997). The ICC and the Board have rightly concluded that a requirement to identify, locate and notify all reversionary interest holders would be a time-consuming, expensive and burdensome task, would be inconsistent with the Board's limited role in administering the Trails Act and would be contrary to the purposes of the Trails Act to encourage and facilitate the interim use as recreational trails of railroad rights-of-way that would otherwise be abandoned as recreational trails. *See Rail Abandonments – Use of Rights-of-Way as Trails – Supplemental Trails Act Procedures*, EP 274 (Sub-No. 13), slip op. at 2-3 (ICC served Feb. 21, 1990). Here, NARPO seeks notification to "each landowner who owns land adjacent to the rail line right-of-way covered by the NITU." Petition at 4.

Most recently, the Board declined to propose a rule requested by NARPO "to require the railroad to give direct notice to adjoining landowners following the issuance of a CITU or

NITU.” *National Trails System Act and Railroad Rights-of-Way*, EP 702, slip op. at 7 (STB served Feb 16, 2011). In rejecting NARPO’s request the Board stated:

We continue to believe that actual notice to individual landowners is not practical. Accordingly, we do not propose to adopt NARPO’s suggested approach here. Moreover, we also believe that our proposed rule requiring railroads to notify the Board when a trail use agreement has been reached will give landowners more information about the status of lines eligible for railbanking.

Id. NARPO’s only new justification for adopting the rule that has previously been rejected by the Board is that “[p]ractically every county in the United States now has their property records on computer.” Petition at 5. Even if all of the records were electronically available, which NARPO admits is not the case, and were accurate, there would still be a significant burden and cost to the railroad or the trail proponent, especially if a title company is retained.

Not only does NARPO propose an additional burden on the railroad and potential trail user, but there will be instances where an adjacent land owner has no property interest in the railroad right-of-way since it is owned in fee simple by the railroad. At best, NARPO’s proposal will result in confusion and added cost to the railroad, potential trail user, and adjacent property owner. NARPO’s petition does not explain why the combination of pre-filing local newspaper publication, post-filing notice in the *Federal Register* of the proposed abandonment, and the availability of a notice or certificate of interim trail use agreement on the Board’s website is not sufficient notice.

NARPO somewhat misleadingly refers to *CSX Transportation, Inc. — Abandonment — Between Delphi and Frankfort, IN*, AB-55 (Sub-No. 401) (ICC served Jan. 3, 1992) as taking 20 years to execute a trail use agreement. The facts contradict NARPO’s attempted slight-of-hand. Consummation of the abandonment or transfer of the line for trail use was not delayed by over 20 years because of negotiation over potential trail use. Instead, the ICC required that CSXT

retain its interest in and take no steps to alter the historic integrity of two bridges until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C.

§ 470. The agency retained jurisdiction over the rail line as a result of this condition and a trail sponsor made a trail use request in 2015. *CSX Transportation, Inc. — Abandonment — Between Delphi and Frankfort, IN*, AB-55 (Sub-No. 401) (STB served Sept. 24, 2015). The Board was notified of a trail use agreement two years later. *See CSXT Notice of Trail Use Agreement*, AB-55 (Sub-No. 401) (filed Dec. 18, 2017). NARPO does not provide any explanation as to how requiring notice to reversionary landowners would have mandated a different result in that case.

The other two issues raised by the NARPO petition do not need to be addressed in a rulemaking proceeding. Extensions to interim trail use negotiating periods can be evaluated on a case-by-case basis. Even if a negotiating period expires, the Board continues to have jurisdiction to grant an extension when warranted in instances where a carrier consents to continuing negotiations and has not consummated the abandonment of the line. *See Birt v. Surface Transportation Board*, 90 F.3d 580, 588-90 (D.C. Cir. 1996); *Grantwood Village v. Missouri Pacific Railroad Co.*, 95 F.3d 654, 659 (8th Cir. 1996).

Similarly, the Board can evaluate each request for a fee waiver on its own merit. The Board's rules at 49 C.F.R. § 1002.2(e)(1) are clear regarding the waiver of filing fees for federal, state and local entities and NARPO has not identified anything unique about interim trail use negotiations that would warrant different treatment for those entities. The Board has concluded that third parties have no standing to challenge the grant or denial of a party's fee waiver request because it has no bearing on the merits of that party's claims, and has noted that there is no private right of action to enforce the Independent Offices Appropriations Act, 31 U.S.C. § 9701, which regulates fees collected by government agencies. *Hartwell First United Methodist*

Church — Adverse Abandonment and Discontinuance — Hartwell Railroad Co. and the Great Walton R.R. Co., Inc. in Hart County, GA, AB 1242 (STB served June 2, 2017) (citing *Byers v. Intuit, Inc.*, 564 F. Supp. 2d 385, 414-19 (E.D. Pa. 2008)).

* * *

For the foregoing reasons, the Board should deny the petition for rulemaking filed by NARPO.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Kathryn D. Kirmayer', is written over the typed name.

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