

Before the Surface Transportation Board

247437

Rails to Trails Conservancy --) Ex Parte 753 ENTERED
Petition for a Rulemaking) Office of Proceedings
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JOINT COMMENTS
On
RTC's PROPOSED RULE

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

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

Petition for Rulemaking filed by Rails to Trails Conservancy ("RTC") in Ex Parte 753. In a nutshell, RTC petitions the Board to establish a one year rather than 180-day negotiation period, and allow similar extensions for good cause.

RTC's petition is guided by its data base, showing that most railbanking transactions take at least a year to negotiate. This is hardly surprising since many public agencies that ultimately will become the interim trail manager must complete internal procedures and environmental check lists, and most railroads may need time to complete salvage activities, especially efficiently to accommodate necessary environmental conditions. Furthermore, the parties may require considerable time to work through title and appraisal issues. That has likewise been the experience of MCT and INHF.

RTC presented much of this data in the rulemaking this agency is conducting in NARPO - Limiting Extensions of Trail Use Negotiation Periods, Ex Parte 749 (sub no. 1). The Board's proposed accommodation of National Association of Reversionary Property Owners ("NARPO")³ in that rulemaking was overwhelmingly

for future use, and in the interim for trails and wildlife habitat.

³ The agency proposed to limit NITU extensions to six at the behest of NARPO. No data other than anecdotes was provided in support of such a limitation, nor was any showing of actual

opposed in comments filed by private and public commenters. Instead, the consensus change to railbanking practices advocated in the comments filed with the agency in Ex Part 749-1 was to provide a one-year negotiation period and related extensions based on the actual data and experience as compiled by RTC.⁴ Providing and extending the railbanking negotiation period in one-year increments will reduce administrative burden to the agency as well as to the regulated entities and the public.

MCT and INHF are both concerned that the agency, by seeking to accommodate NARPO's objective to restrict

benefit to any purpose within the purview of the agency's regulation.

⁴ The following organizations and governmental agencies indicated support for RTC's proposal for a one year negotiation period and one year extension periods in EP 729-1: West Virginia University's Northern West Virginia Brownfield Assistance Center (filed Nov. 1), Sierra Club (filed Nov. 1), New Jersey Department of Environmental Protection (filed Nov. 1), Greater Milwaukee Committee (filed Nov. 1), Parks & Trails New York (filed Nov. 1), Transportation for America (filed Nov. 1), Bicycle Colorado (filed Oct. 31), Wisconsin State Senator Lena Taylor (filed Oct. 31), Bicycle Federation of Wisconsin (filed Oct. 31), Bike Friendly West Bend (filed Oct. 31), Five Rivers Metroparks (filed Oct. 31), Friends of the Chester Valley Trail (filed Oct. 31), Kenosha Racine Bike Club (filed Oct. 31), Project for Public Spaces (filed Oct. 31), Rock Island Trail (filed Oct. 31), Ohio Valley Riverfront Dev. Comm. (filed Oct. 31), Urban Ecology Center (filed Oct. 31), Washington Area Bicyclist Association (filed Oct. 31), Northwest Side Community Dev. Corp. (filed Oct. 30), Summit Metro Parks (filed Oct. 30), Steel Valley Trail Council (filed Nov. 5), Friends of the Riverfront (filed Nov. 7), Greater Ohio Lake to River Greenway (filed Nov. 7). RTC's proposal was also supported by M. Vernon (filed Oct. 31). And finally, MCT and INHF support RTC's proposal.

railbanking, will not fully consider RTC's one-year negotiation period proposal in Ex Parte 749 (Sub-no.1). MCT and INHF accordingly welcome and support RTC's petition in Ex Parte 753, because it clearly encompasses the relief that is appropriate to relieve administrative burdens that arise under STB's current regulations in connection with railbanking. STB should either grant RTC's petition outright, or as the sole relief the agency issues in Ex Parte 749 (Sub-no.1). Of course, granting RTC's requested rule change in the context of Ex Part 749 (Sub-no. 1) would moot the need to address the petition in Ex Parte 753 separately. MCT and INHF favor efficiency in agency rulemaking proceedings. The agency should take note that NARPO, in its comments filed in Ex Parte 753, does not object to a one-year negotiation period.⁵

NARPO does, however, continue to seek hard limits on extensions for NITU negotiations (see note 5). This is baseless. NITU negotiation extensions have no more impact on adjoining property owners claiming reversionary interests if 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

⁵ See <https://www.stb.gov/FILINGS/all.nsf/c72552abc289f85285257515007219bd/670D1285C72DFD2D852583D000530FFB?OpenDocument>

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 have 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 noted by 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, 2017 (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.

NARPO, of course, is anti-trail. It does not seek relief against STB preemption of state law, no matter how indefinite, except if that preemption may result in productive use of the otherwise unused rail line as a public trail. Given the overall STB regulatory scheme, it makes no sense to penalize delays in de jure abandonment solely when they may result in so productive a use. Ironically, MCT and INHF in Ex Part 749 and 749 (Sub no. 1) have shown that STB's own rationale for limits on NITU extensions is based on this fallacy. The agency's sole basis for its proposed limits on railbanking 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 at p. 6, quoting STB slip op. at 3. But as we have indicated above, and in our comments in the other rulemaking, these dicta misconceive rail law. They instead better describe 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. Of course, we have no objection to a requirement that good cause be shown, 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 one 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.

Finally, NARPO in its comments in Ex parte 753 alludes to multiple extension requests filed by Illinois Department of Natural Resources in AB 33 (Sub no. 262X) in Fulton and Peoria Counties, Illinois. So far as the record shows, no one other than NARPO has objected to the extensions, and NARPO attached no evidence showing it actually represented individuals that were actually harmed by the extensions. Nonetheless, the agency in granting an extension by decision served April 3, 2019 requested detailed information to support further requests, demonstrating that the agency currently has the means to determine, on a case-by-case basis, whether repeated extension requests are legitimate. NARPO also alludes to AB 33 (Sub no. 255X) in St. Charles, Illinois. The STB website e-library has no decisions or filings in that docket so NARPO's assertions as to that docket must be disregarded as without basis.

In Ex parte 749 (Sub-no.1), NARPO criticized an INHF trail project (Union Pacific Railroad Co. - Abandonment Exemption - in Franklin County, AB 33 - 316X), for involving multiple extensions. These have flowed from problems encountered by Union Pacific in removing its property (salvage material) from the right of way. See decision in id. served Nov. 19, 2018. Problems (including delays) in completing salvage are hardly

grounds to burden the railbanking process by arbitrarily limiting NITU extensions as sought by NARPO. They are outside the control of the party seeking railbanking but a very real concern to railroads which seek to maximize their profits in salvage situations. Neither INHF nor MCT are abusing the railbanking process, and NARPO has not demonstrated such abuse by anyone else in the circumstances.

Conclusion

The Board should adopt RTC's proposal for one-year negotiation periods and extensions thereof, either as the sole relief afforded in Ex Parte 749 (Sub no. 1), or in Ex Parte 753.

Respectfully submitted,

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