

Before the Surface Transportation Board

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Office of Proceedings
October 25, 2018
Part of
Public Record

National Association of Reversionary)
Property Owners - Petition for a) Ex Parte 749
Rulemaking)

Limiting Extensions of Trail Use) Ex Parte 749
Negotiation Periods) (Sub-no. 1)

JOINT COMMENTS

These Comments, filed on behalf of Madison County Mass
Transit District ("MCT")¹ and Iowa Natural Heritage Foundation
("INHF")² (jointly "Commenters"), are in opposition to a proposed

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 encumbers use of section 1247(d) inconsistent with any rail purpose and inconsistent with other STB regulations. It is thus contrary to MCT's interests.

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 unfettered with arbitrary limits imposed on behalf

rule by the Surface Transportation ("STB") arising out of a petition by the National Association of Reversionary Property Owners ("NARPO").³ STB's proposed rule would require that the number of extensions of the trail use negotiation period to six, absent extraordinary circumstances.⁴

of anti-trail entities, especially limits inconsistent with federal policies to encourage rail corridor preservation.

³ NARPO is not a railroad, a railroad holding company, a shipper, or a representative of shippers. NARPO per its webpage (screenshot 10/18/2018) represents itself to be a property rights organization, dedicated to private as opposed to government ownership, but it is devoted to opposing "trails," and apparently especially "rail trails," only opening emails with a subject line containing those terms or the words property rights." NARPO also appears generally to oppose bicycling. NARPO's webpage highlights the following: **"**October 27, 2007-A NARPO member sent me an article from the Omaha World Herald dated 10/11/2007 which describes how Crawford County, Iowa had to pay a stupid biker \$350,000 because the biker couldn't avoid a bump in one of the county's roads and injured himself. Now the County has banned all bike traffic on its roads, especially an annual bike ride put on by some newspaper. And people wonder why most folks despise bikers!"** [Bold face in original.] While there is no evidence to support its claim, NARPO tries to associate crime and trails, part of its effort to portray them as some kind of social if not socialist menace. NARPO advises its readers to google "bike trail crime" and "[a]bout two million articles will come up." The first 22 pages of google articles include many studies reporting no link between trails and increased crime, a few that involve reports of a crime, and a subjective plurality that appear to deal with how to report a crime, should one be witnessed. Mr. Welsh, who runs NARPO, formerly lived along what is now the East Lake Sammamish Trail in King County. His current standing is unclear for he does not claim to own any property adjacent to an existing or former rail line. He filed no evidence indicating any standing as recognized in the courts of the United States.

⁴ In general, no freight rail line in the United States may be abandoned without obtaining what amounts for a license for

I. The Rationale for the Rule on Examination Is
Inconsistent with Federal Rail Abandonment Regulation

NARPO is basically an anti-trail group. It opposes trails, and specifically rail trails. See note 3. NARPO in general takes the position that rail corridor reverts, or should revert, to adjoining property owners upon abandonment, or presumably be available to adjoining property owners to occupy by way of adverse possession if it does not otherwise revert. NARPO's basic interest is contrary to virtually all of federal rail

abandonment from the Surface Transportation Board ("STB"). A railroad wishing to cease service on a line has two major alternatives to seeking abandonment authority: (a) discontinuance and (b) railbanking/interim trail use under 16 USC 1247(d). In discontinuances, STB authorizes termination of the current common carrier obligation so the railroad need not provide service on the line, but the line itself remains subject indefinitely to STB jurisdiction. In railbankings, the same thing happens except the line may also be leased or transferred to an "interim trail manager" for use as a trail until and unless rail use is resumed. STB issues abandonment, discontinuance, and railbanking through use of the same kind of proceedings (namely, applications, petitions or notices of exemption for abandonment/discontinuance). In the case of railbanking, STB requires the interim trail manager to agree that if railbanking is implemented, it will assume liability for the corridor, and the agency will only implement railbanking if the railroad voluntarily consents to negotiate a deal. The agency initially provides a 180-day negotiation period once an abandonment authorization is effective. The agency in the past has granted extensions upon request so long as the railroad sought or agreed to the extension. Thus railbanking during the "negotiation" period is largely identical to what happens when STB authorizes "discontinuance." For so long as the agency retains jurisdiction over a rail corridor, either per a discontinuance or a railbanking order, state law easement extensions and reversionary rights do not apply. See generally Preseault v. ICC, 494 U.S. 1, 2-6 and esp. 5 n.3 (199) (upholding constitutionality of 16 U.S.C. 1247(d)).

abandonment law, for federal law favors preservation of rail lines for viatic use⁵ or (per 49 U.S.C. 10905) any public use, if that is possible without involuntary subsidy from rail carriers or their shippers. This principle has long been recognized.⁶ In the context of trails, the Supreme Court has indicated that 16 U.S.C. 1247(d) is "the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." Preseault v. ICC, 494 U.S. 1, 5 (1990). Under this statute, STB has "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use." Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990). In contrast to federal policy on rail abandonments,

⁵ See, e.g., 49 U.S.C. 10904 (offers of financial assistance), 16 USC 1247(d) (railbanking).

⁶ To take an example from the First Circuit, the Court of Appeals in Reed v. Meserve, 487 F.2d 646, 649-50 (1973), upheld an ICC order requiring preference to a purchaser of a right of way who would keep it intact, explaining that

"[E]ven a tiny scenic railroad might be thought to contribute much more to [national transportation] objectives than uses that would require the rails and right-of-way to be destroyed. To assemble a right-of-way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights-of-way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations."

NARPO evidently prefers that state law apply, at least if it will more speedily allow break-up of rail lines for private use.

NARPO's only "injury" from the federal rail regulatory process is that flowing to its "members" (assuming arguendo it has any other than Mr. Welsh) from the existence of federal statutes like 49 U.S.C. 10501(b) (federal preemption) and 49 USC 10904 (OFA) & 10905 (public use), 16 U.S.C. 1247(d) (railbanking option), and from federal policies like 49 C.F.R. Part 1150 subpart C (modified certificates) that favor keeping rail corridors intact. But that is not an "injury" that is specific to an implementing regulation; it is generalized opposition to preemptive federal rail abandonment jurisdiction. That is something for Congress to address, but Congress left preemptive federal abandonment jurisdiction in place (including ICC policy on extensions of trail use negotiation periods) when it adopted the ICC Termination Act. In its petition for rulemaking, NARPO supplied no instance where its members suffered any harm from an extension of the trail use negotiation period other than to NARPO's generalized opposition to federal policy favoring keeping corridors intact where that can be done without involuntary subsidies from the railroads or their shippers.

In this light, the proposed limitation on extensions put forward by STB for railbanking/trail use negotiations makes no sense. Since this Board only grants extensions if the railroad

voluntarily agrees, there is and can be no involuntary subsidy from the railroad (or its shippers) for the extension. The general federal policy favoring keeping the rail line intact thus applies. To repeat, while an extension of the railbanking/trail use negotiation period may still not yet produce a trail, it does not interfere with the railroad's ability to discontinue its former common carrier obligations,⁷ and thus serves as a kind of discontinuance authority. No one takes the position that discontinuance authority cannot be indefinite, or at least far more than six 180-day periods in length.

The Board does not base its proposed rule on NARPO's general anti-government ownership, anti-bike philosophy, for that would violate the purpose of federal rail regulation, let alone 16 U.S.C. 1247(d). The Board's proposed rule is based on the assertion that "courts"⁸ have noted that "extensions 'ad infinitum' could have the undesirable effect of 'allowing the

⁷ This Board has recognized that voluntary extensions of trail use negotiation period do not burden the rail industry: "During the negotiating period, the railroad is authorized to discontinue service and salvage track materials from the line, as such actions are fully consistent with railbanking/interim trail use. Preseault, 494 U.S. at 7 n.5; Birt, 90 F.3d at 583, 586." National Trails System Act and Railroad Rights of Way, Ex Parte 702, served Feb. 16, 2011, slip op. at 4.

⁸ Actually, the Board cites only one court in one decision for its assertion, namely, Birt v STB, 90 F.3d 580, 583 (D.C. Cir. 1996).

railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use.” STB slip op. at 3, quoting from Birt, supra. The statement from Birt on which the Board relies for its proposed rule is purely dicta. It was not the basis for any holding in Birt. Moreover, the Birt court pulled the dicta out of thin air; it is not based on any analysis of federal rail regulatory law. To the contrary, the dicta reflects a misunderstanding of federal rail law. For example, the Birt court appears to have been unfamiliar with discontinuances and likewise unaware of the adverse abandonment remedy, or that it was available at any time to any party which feels that failure of a railroad completely to abandon its rail line is an abuse of STB jurisdiction. STB and its predecessor ICC have long allowed railroads to stop (discontinue) services (a) without relinquishing their rights to “easements” or otherwise reversionary property, and (b) without putting the right of way to productive use, through granting “discontinuances” rather than abandonments. E.g., Norfolk Southern Rwy. Co - Disc. Ex. - between Newark and Kearny, NJ, AB 290-242X, served Jan. 18, 2005. Accord, Preseault, supra. In discontinuance situations, the rail carrier may simply hold the line in its inventory for possible future rail use or other disposition, without any current use at all, and indefinitely, while enjoying federal preemptive authority over easement

extinguishments or other reversions at state law. Congress by providing for discontinuance authority in the first place, let alone reaffirming it in the ICC Termination Act, appears to have no problem with this outcome. Holding a corridor for future rail use (discontinuance rather than abandonment) has long been recognized as a legitimate exercise of railroad discretion and federal regulatory power. In the words of the Birt court, this status has been recognized as "productive" for decades. The Birt court's dicta suggesting that repeated "extensions" for the negotiations under 16 U.S.C. 1247(d) may not be "productive" use of a rail corridor thus fails to recognize that such extensions are for all practical purposes equivalent to periodically renewed discontinuance authorizations. Since discontinuance is an unquestionably legitimate regulatory outcome for a corridor, the dicta on which STB bases its proposed rule thus fails to consider long standing principles in federal rail law. The proposed rule therefore must be rejected. Alternatively, STB presumably must expand the rulemaking to confine discontinuance authorizations to three years in length, absent some special showing by the railroad seeking discontinuance authority, and perhaps also require railroads to seek abandonment for all rail corridors inactive for three years or more, absent some sort of special showing. But the expanded rulemaking would be as

unfounded as this narrower one, if more logically consistent with the rationale offered by the agency.

The customary remedy afforded by this Board and its predecessor to third parties, including the adjoining landowners (and presumably the anti-conservation advocates NARPO claims to represent) -- if the third party feels that the Board's preemptive jurisdiction is being abused -- is the so-called "third party" or "adverse" abandonment proceeding. See, e.g., Consolidated Rail Corp., 29 F.3d 706, 709 (D.C. Cir. 1994); Kansas City Pub. Serv. Freight, 7 ICC2d 216, 225 (1990); Modern Handcraft, Inc., 363 ICC 969, 972 (1981). If a third party feels that a railroad is unreasonably thwarting its property rights, whether by failing to seek abandonment authority, or by seeking only discontinuance authority, or by abusing 16 U.S.C. 1247(d) authority, the third party can move for exemption from the detailed requirements for filing an application for abandonment,⁹ apply for (unchallengeable) waivers from the expensive abandonment licensing fees,¹⁰ and file an abandonment application to terminate the Board's jurisdiction over the line,

⁹ E.g., New York State Dept. of Env. Conservation - Ad. Ab. - Saratoga and North Creek Railway, AB 1261, served Feb. 27, 2018; State of South Dakota - Ad. Disc. - Napa-Platte Regional Railroad Authority, AB 1253, served May 31, 2017.

¹⁰ Hartwell First United Methodist Church - Ad. Ab.& Disc. - The Great Walton R.R., AB 1242, served June 2, 2017.

whatever its status (operating, discontinued, subject to a railbanking/interim trail use order or modified certificate).

Neither NARPO nor the Board show why the traditional adverse abandonment procedure has lost its appropriateness to deal with abuse, if there is abuse of concern to the Board, in the railbanking context.

NARPO's singling out railbanking for attack is particularly mystifying. The Federal Circuit appears to allow adjoining landowners broad latitude to file claims for compensation under the Tucker Act in the event of railbanking.¹¹ But we are aware of no situations in which adjoining landowners have been successful in obtaining access to Tucker Act damages when the Board authorizes discontinuance, or where a railroad never applies for abandonment authority and sits idly on a line. Because of the Federal Circuit's willingness to provide compensation, railbanking from the point of view of NARPO's alleged supporters should be the most satisfying form of federal rail abandonment regulatory outcome consistent with the public interest in preserving rail corridors. The Federal Circuit's administration of the Tucker Act assures them that they sustain no legally recognizable injury from railbanking for any actual landowner is fully compensated.

¹¹ Indeed, NARPO happily broadcasts that situation on its website.

II. The Proposed Limitation Has No Basis in the Statute

16 U.S.C. 1247(d) does not contain any limit on the negotiation period, nor on its face authorizes STB (or STB's predecessor) to establish one. This agency's predecessor arbitrarily adopted the 180-day period presumably based on then-Revised Interstate Commerce Act, 49 U.S.C. 10906 (repealed, public use conditioning) which authorized the Board to impose public use conditions on any abandonment for 180 days (ICC and now STB arbitrarily treat that as a limit), but ICC and STB have consistently noted that they would freely grant extensions to the negotiation period upon consent of the railroad. The basic idea behind 16 U.S.C. 1247(d) is that a line may not be deemed abandoned for purposes of state or local law so long as, and however long, it used as a trail subject to this Board's jurisdiction for reinstitution of rail service. This purpose is served by allowing negotiations; it is not served by limiting the negotiation period even if the railroad consents to continued negotiation. STB's rule thus not only has no basis in rail policy to preserve corridors where it can be done without involuntary shipper or railroad subsidy, but also has no basis in the statute.

III. Delays

Based on experience (which in the case of the undersigned goes back to the inception of the railbanking process), delays

in railbanking flow not from the "interim trail manager" side but are either an artifact of this Board's regulatory process (delays due to NHPA or ESA conditions) that prevent alienation or salvage, or from the railroad side (sometimes railroads use the railbanking process to explore whether they can make more money selling the property piecemeal). Traditionally the STB does not interfere with railroad efforts to sell property piecemeal once it has been authorized for abandonment, and NARPO does not cite this as a basis for the proposed rule (and presumably would welcome piecemeal sales). If the delay does seem inexplicable on lawful grounds, there is always the adverse abandonment remedy and/or the Tucker Act.

Conclusion

Given (1) the similarity of railbanking to discontinuance and (2) the availability of the adverse abandonment and Tucker Act remedies, there is no reason for this Board to limit railbanking negotiations, and certainly no reason has been cited by NARPO. The Board's reliance on the dicta in Birt is misplaced because the dicta has no basis in federal rail law or policy to preserve rail corridors and did not take into account the adverse abandonment remedy. Ironically, railbanking is the least harmful method to preserve otherwise-to-be-abandoned rail corridors from the perspective of the interests "reversionary property owners."

Respectfully submitted,

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