

Before the Surface Transportation Board

Supplemental Notice of Proposed	)	Ex Parte 749
Rulemaking	)	(Sub-No. 1)
_____	)	

COMMENTS OF THE RAILS-TO-TRAILS CONSERVANCY

INTRODUCTION

These Comments, filed on behalf of the Rails-to-Trails Conservancy (“RTC”), are in response to the supplemental notice of proposed rulemaking (“SNPR”) served by the Surface Transportation Board (“STB” or “the Board”) on June 6, 2019. RTC supports the proposed changes to 49 C.F.R. § 1152.29 adopting a one-year initial trail use negotiating period and allowing for extensions thereto. RTC also supports the proposal to require a showing of “good cause” for extensions beyond four years. However, RTC opposes any language suggesting that extensions of a notice of interim trail use (“NITU”) beyond four years are “not favored.” This language is not supported by any demonstrated need to discourage such extension requests, creates a higher standard governing extensions of ordinary regulatory deadlines that is unprecedented in this Board’s regulations, and will create uncertainty and invite baseless challenges that could delay and discourage railbanking negotiations. It therefore does not comport with the purpose of Section 8(d) of the National Trails System Act Amendments (“the federal railbanking law”) “to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.” 16 U.S.C. § 1247(d). Alternatively, the negative consequences of this language could be alleviated by changing the language to “additional one-year extensions, beyond three extensions of the initial period, are not favored ~~unless but may be granted if~~ the trail sponsor and the railroad agree and good cause is shown.”

INTEREST OF RTC

RTC is a non-profit corporation with more than 250,570 members and supporters nationwide that facilitates the preservation of inactive rail corridors for continued and future public transportation uses, including for possible future rail reactivation (“railbanking”) and for other compatible interim public uses, including use as trails, pursuant to the federal railbanking law and the Board’s implementing regulations, 49 C.F.R. § 1152.29. To carry out its mission, RTC identifies rail corridors that are not currently needed for rail transportation and facilitates their preservation and continued public use through conversion to public trails, non-motorized transportation corridors, and other public uses. RTC provides technical assistance to communities across the country on rails-to-trails conversions and engages in legal advocacy to support RTC’s mission.

For the past 33 years, RTC has been substantially involved in the interpretation, implementation, and legal defense of the federal railbanking law, 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. One of RTC’s unique resources is its database of rail-trails that includes specific information on railbanked trails gathered through records maintained by the Board and through direct communications with trail managers. This database is the most extensive and authoritative source of information about railbanked corridors in existence and informs RTC’s comments on this proposal.

COMMENT

I. RTC Supports the Issuance of NITUs for Renewable One-Year Periods.

RTC supports the proposal to adopt a one-year initial trail use negotiating period. As

RTC demonstrated in its petition for rulemaking in Ex Parte 753, this proposed change reflects the real-world data presented by RTC, derived from the STB's own records and the actual experiences of railroads and potential interim trail managers, concerning the length of time needed to negotiate and consummate an interim trail use/railbanking agreement. RTC is pleased that the Board has proposed this change, which will promote efficiency, reduce burdens and costs on the Board and interested parties, and advance the policies of the federal railbanking law.

II. RTC Supports Requiring "Good Cause" for Extension Requests Beyond Four Years But Opposes the Additional Language That Such Extensions Are "Not Favored."

The SNPR provides that "additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and the railroad agree and good cause is shown." SNPR, at 8. RTC supports the requirement that the parties make a showing of "good cause" for extensions beyond four years but opposes the additional language that such extensions are "not favored."

According to the SNPR, the "not favored" qualifier was added to address a concern raised by the National Association of Reversionary Property Owners ("NARPO") that the "good cause" standard "may allow a greater number of extensions to be granted than under an 'extraordinary circumstances' standard." SNPR, at 8. As we now discuss, the proposed "not favored" language suggests a limitation that goes beyond the generally-accepted "good cause" standard that ordinarily governs requests to extend most regulatory deadlines and is wholly unsupported by data demonstrating that such extensions are unwarranted, prejudicial to any party or stakeholder, or lack good cause. Imposing a higher standard than "good cause" will invite baseless opposition and introduce uncertainty into the regulatory process that will burden, delay, and impede diligent and good-faith trail use negotiations. This standard will therefore potentially undermine legitimate railbanking negotiations without advancing any legitimate interests of any

party or serving the interests of administrative efficiency.

1. There is No Precedent In This Board's Regulations for Adopting a Higher Standard Than Good Cause for Routine Extension Requests (Even Those Beyond Four Years).

As this Board specifically acknowledged in the SNPR, “a ‘good cause’ standard of review for additional extensions (beyond three) would be more appropriate than the ‘extraordinary circumstances’ standard” originally proposed. SNPR, at 8. A “good cause” standard is consistent with the treatment of routine requests for extensions of other similar regulatory deadlines. *See, e.g.*, 49 C.F.R. § 1104.7 (“Any time period...may be extended by the Board in its discretion, upon request and for good cause.”); *id.* § 1108.7(d) (“The Board may extend any deadlines in the arbitration timetable provided in this part upon agreement of all parties to the dispute.”); *id.* § 1110.6(b) (extending comment deadline for informal rulemaking where “the petitioner shows a substantive interest in the proposed rule and good cause for the extension, and if the extension is in the public interest.”); *id.* § 1151.2(k) (“Extensions of filing dates may be granted for good cause.”). The “good cause” standard therefore introduces no uncertainties that could disrupt settled expectations of the parties engaged in railbanking negotiations.

None of this Board’s regulations governing requests for extensions suggest or state that at any point extensions of regulatory deadlines are “not favored.” Most notably, the regulatory provision governing extensions of the deadline for filing a notice of consummation of abandonment authority provides only that, “For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.” 49 C.F.R. § 1152.29(e)(2). The regulation contains no language suggesting any presumption against such extensions, despite the fact that such extensions presumably prolong

this Board’s jurisdiction over corridors to the same extent as NITU extensions. According to this Board’s records, there are at least four corridors with active authority to abandon in which the deadline for consummating abandonment authorization has been extended for more than four years under the “good cause” standard.¹ The need to allow the parties flexibility and broad latitude in undertaking complex interim trail use/railbanking transactions is just as great.

Contrary to this Board’s stated reason for rejecting the “extraordinary circumstances” standard proposed in the original notice of proposed rulemaking, the proposed “not favored” qualifier appears to reflect a presumption against granting such extensions. The “not favored” language is used in STB regulations (other than routine extensions) to signify an action that will not be granted except under “exceptional circumstances.” *See, e.g.*, 49 C.F.R. § 1115.1(c) (interlocutory appeals “are not favored” and “will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.”); *id.* § 1011.6(b) (appeals to the Board are “not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.”). As these regulations make clear, the use of similar “not favored” language is confined to requests for exceptional administrative relief, such as requests for reconsideration of final agency decisions, which are not favored due to the need to preserve the finality of administrative decisions. There is no such administrative principle disfavoring routine requests for extensions of regulatory deadlines. To the contrary, such requests are commonplace, have been granted “liberally” in the past,² and do not undermine any core principles of administrative law.

Accordingly, the “not favored” language in the SNPR suggests the possibility that extensions beyond four years will be denied even if “good cause” is demonstrated. This

¹ Docket Nos. AB 6 (Sub-No. 485X); AB 290 (Sub-No. 341X); AB 290 (Sub-No. 361X); AB 1032X.

² *See* NPR in Ex Parte 749 (Sub-No. 1), at 5 (STB served Oct. 2, 2018)

interpretation is compounded by the language in the SNPR stating that further extensions are “not favored *but may be granted if the trail sponsor and the railroad agree and good cause is shown.*” SNPR, at 14 (emphasis added). The purpose and policies of the federal railbanking law require the opposite presumption, *i.e.*, that extensions will be denied *only* if the proponents fail to demonstrate “good cause” or lack the required consent.

2. The “Not Favored” Language Will Not Serve Any Demonstrated Administrative Need Or Prevent Prejudice To Any Interested Stakeholder.

The proposed new standard for securing NITU extensions beyond four years is wholly untethered to any data demonstrating that extensions in excess of four years are prejudicial to any party or interested person or that the proposed limitation would serve any articulated public policy or administrative need. The sole justification offered by the SNPR is NARPO’s concern that the “good cause” standard “may allow a greater number of extensions to be granted.” SNPR, at 8. However, since NARPO’s mission is focused on opposition to the statutory purposes and policies of the federal railbanking law, its reflexive opposition to regulatory proposals to facilitate implementation of the law cannot justify the adoption of damaging rules that would undermine implementation of these policies and goals.

Nor are opponents correct that a standard higher than “good cause” is needed for extensions beyond four years because otherwise adjacent landowners will not “know” when to file “Fifth Amendment compensation claims” if negotiations are repeatedly extended, as NARPO’s constituents have suggested. The U.S. Court of Appeals for the Federal Circuit has made it clear that compensation claims for a “temporary taking” accrue and compensation may be awarded from the date the first NITU is issued, regardless of the number of extensions that are issued, and, indeed, even if the railbanking negotiations are ultimately unsuccessful. *See Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010), *reh’g and reh’g en banc denied*, 646 F.3d 910

(2011). Thus, allowing NITUs to be extended beyond four years for good cause shown does not delay the ability of adjacent landowners to pursue any compensation claims.

The data on railbanking orders collected and analyzed by RTC does not indicate that there is any need for extreme language to discourage dilatory tactics on the part of the negotiating parties. According to RTC's data, of the 416 railbanking orders that have been issued, representing both completed and ongoing negotiations, only a small portion—63 (or 15 percent)—have taken more than four years to negotiate. Contrary to the SNPR, the small number of negotiations extending beyond four years is not evidence that a higher standard for granting such extensions is needed. Rather, the small number of railbanking negotiations requiring more than four years demonstrates that there is *not* a problem with excessive extensions. Accordingly, the “not favored” language serves no recognized agency interest in increasing administrative efficiency.

RTC's analysis of the 63 cases requiring extensions beyond four years demonstrates that each of these cases involves complexities, whether due to the length of the corridor, the need to satisfy other regulatory requirements, or a variety of other legitimate challenges. In nearly every case, good cause was provided in the parties' requests for extensions, despite no current or historic regulatory requirement to provide such justification. Legitimate reasons provided as good cause for NITU extension requests beyond four years include the need to complete complex environmental or engineering studies,³ delays related to negotiating intergovernmental agreements where corridors cross multiple jurisdictions,⁴ appraisal disagreements common to complex real estate transactions,⁵ or delays related to securing federal or state funding for

³ See, e.g., Docket Nos. AB 6 (Sub-No. 482X); AB 12 (Sub-No. 184X); AB 33 (Sub-No. 263X).

⁴ See, e.g., Docket Nos. AB 167 (Sub-No. 1132X); AB 1068 (Sub-No. 3X).

⁵ See, e.g., Docket Nos. AB 33 (Sub-No. 93X); AB 33 (Sub-No. 126X); AB 55 (Sub-No. 670X); AB 290 (Sub-No. 266X).

corridor acquisition.⁶

Review of these relatively few extended negotiations indicate that for the most part, extension requests are unopposed by anyone, apart from the occasional generic and ideologically-based opposition filed by NARPO, which is invariably unsupported by any real evidence that the extensions lacked good cause or that there was any lack of diligence on the part of the negotiating parties. In some cases, this Board has responded to such filings by requiring that negotiating parties provide “more detailed information” in subsequent NITU extension requests; consistent with such guidance, parties have provided information demonstrating that progress is being made in advancing the negotiations and/or securing any conditions predicate to finalizing them.⁷

The data presented above demonstrates that an interim trail use negotiating period that extends beyond four years signifies only the complexity of these processes and externalities beyond the parties’ control rather than the viability of the transaction or the diligence and good-faith of the parties. As the foregoing data demonstrates, the showing of “good cause” and the requirement that both the railroad and trail manager consent to extensions beyond four years provide sufficient assurances that the parties are proceeding with diligence in pursuing an interim trail use/railbanking agreement. Rather than discouraging such extensions by additional statements that such extensions are “not favored,” the rules should ensure that those complex railbanking transactions with demonstrated good cause for extensions beyond four years are not prematurely curtailed.

⁶ See, e.g., Docket Nos. AB 33 (Sub-No. 268X); AB 33 (Sub-No. 284X); AB 57 (Sub-No. 61X); AB 156 (Sub-No. 23X).

⁷ See, e.g., STB order in AB 33 (Sub-No. 262X), served April 24, 2018.

3. The “Not Favored” Language Will Undermine the Statutory Goals and Purposes of the Federal Railbanking Law.

To the extent that the “not favored” language reflects a presumption against granting extensions beyond four years even where good cause has been demonstrated and all parties consent, such a presumption will inject new uncertainty into the process that will potentially disrupt ongoing, productive efforts to secure all the conditions necessary to consummate an interim trail use agreement. These conditions precedent—salvage, environmental due diligence, regulatory compliance, financing—cannot be initiated in advance of the filing of an abandonment application, and yet these necessary steps can involve lengthy processes and multi-year time frames influenced by externalities over which the parties have little control, such as the filing of an Offer of Financial Assistance, salvage activities that are delayed and complicated by environmental and historic preservation conditions, the extensive public notice required by public agency trail sponsors, or the extended timetables for securing legislative and administrative approvals for funding and acquisition.

Indeed, the “not favored” language will introduce new, potentially detrimental uncertainty into the negotiating process by suggesting that a showing of “good cause” and due diligence by the parties may not be sufficient to justify an extension of the NITU. Rather than encourage diligent negotiations, this uncertainty will have the opposite effect of discouraging essential financial and other necessary support for railbanking/interim trail use agreements from local authorities or funders. If otherwise productive negotiations may be arbitrarily curtailed through no fault of the trail manager, potential trail managers may be reluctant to initiate the complex administrative and legislative procedures necessary to secure required governmental approvals or sources of public funding that are often required for trail acquisition and development. To the extent that the more extended timelines for these necessary governmental

approvals have been cited as a factor in the need for extensions beyond four years, a possible negative consequence if the “not favored” language is adopted is that interim trail use/railbanking efforts will be discouraged or even abandoned.

The “not favored” language will also encourage the ideological opponents of railbanking to burden STB proceedings with baseless challenges to legitimate and good-faith extension requests regardless of the good cause stated. This opposition typically presents no evidence that railbanking negotiations are being undertaken in bad faith or for improper purposes nor is it based on any evidence that the stated “good cause” is pretextual. To the contrary, opponents of railbanking have demonstrated that they will simply take advantage of any opportunity to obstruct legitimate and lawful railbanking transactions based on nothing more than their opposition to the congressional policies embodied in the law. Such illegitimate attacks on lawful railbanking procedures should not be encouraged by this Board.

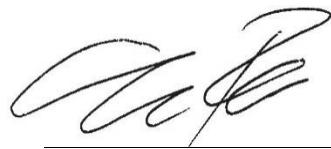
Certainty in the regulatory procedures for securing the protections of the federal railbanking law is critical to the ability of potential trail managers to secure local bond financing or public grants or persuade government decision-makers to invest in the acquisition or development of a rail-trail. The “not favored” language will inject uncertainty into this process, and as a result will not further the congressional policies and objectives set forth in the federal railbanking law to promote and encourage interim trail use and railbanking.

CONCLUSION

RTC supports the SNPR’s establishment of a one-year period for any initial interim trail use negotiating period and the proposed “good cause” standard governing requests for extensions in excess of four years. However, RTC opposes the language stating that such extensions are “not favored,” as this language would not serve the interests of administrative efficiency and

clarity in administering the railbanking law and would not be consistent with the language, goals, and articulated public policy of the railbanking statute to promote and encourage interim trail use and to preserve these hard-to-reassemble corridors for continued and future transportation use. The uncertainty and negative consequences introduced by this language is best alleviated by eliminating the “not favored” language altogether. Alternatively, the negative consequences of this language could be alleviated by changing the language to “additional one-year extensions, beyond three extensions of the initial period, are not favored *unless but may be granted if* the trail sponsor and the railroad agree and good cause is shown.”

Respectfully submitted,



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