

Before the Surface Transportation Board

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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 REPLY COMMENTS

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

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

already filed timely comments in this proceeding indicating (p. 6) that the agency's rationale for the proposed regulation is based solely on 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.'" Comments at p. 6, quoting STB slip op. at 3. As we indicated, 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.

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

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

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 relies for its proposed rule simply 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 statement, the Board should facilitate railbanking by freely granting extensions rather than foreshortening opportunities with arbitrary cut-offs.

Railroad rights of way converted to trail use are attractive facilities for bicyclists, including bicycle commuters, joggers, and the handicapped. It is hardly surprising that for decades federal commissions and agencies have recognized rail trails as excellent outdoor recreation sites, important to expand to meet the needs of our growing population. E.g., President's Commission on Americans Outdoors,

"Final Report -- Americans Outdoors: The Legacy, The Challenge," section 3 Pt. 3 (1987); Trust for Public Land, "The Economic Benefits of Cleveland Metroparks" (Sept. 2018) attached to comments filed by Isaac Smith (Nov. 1) in this proceeding. At the same time, railroad rights of way are relatively undisturbed by development, and thus function as excellent wildlife habitat. In many areas, they are the sole repositories of many native plant species. E.g., Noss, et al, Nodes, Networks and MUMs: Preserving Diversity at All Scales, 10 Env. Management 299 (1986) (calls for interconnection of habitats via, inter alia, rights of way), W. McCain, Illinois Prairie Past and Future 10 (1986) (railroad rights of way and pioneer cemeteries chief locations for remaining prairie), J. White, "Why Bother to Protect Prairies Along Railroads," paper reprinted in Proceedings of the 2985 North American Prairie Conference 172-73 (arguing that rail corridors "deserve priority for protection"). These important conservation objectives are all accomplished during NITU negotiation periods, however prolonged, just as well as they are in the event of successful completion of preservational negotiations.

Commenters also indorse the comments filed on behalf of Rails to Trails Conservancy (RTC). RTC demonstrates that if there is a burden on the Board flowing from its experience with NITU extensions, the agency rather than creating procedural

barriers to such extensions should instead provide one year for the initial negotiation period (as opposed to the current 180 days), and one year (as opposed to 180 days) for extension requests. This would substantially reduce administrative burdens without negatively impacting corridor preservation projects. Given the heavy support for RTC's proposal,³ the Board should revise its regulations accordingly.

The vast majority of comments filed with the agency opposed the proposed rule.⁴ Comments filed by supporters of the proposed

³ The following other 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.

⁴ RTC filed a spreadsheet with a purported 14,000 opposition comments, but the number of separately submitted opposition comments vastly exceeded those in support as well. For example, it appears that 48 of the non-RTC comments filed on November 1 opposed the proposed rule, another did not state opposition but

rule for the most part simply oppose trails.⁵ That is certainly the motivation behind the original proponent of the rule, NARPO, as indicated on its website. Some of the commenters favoring the rule in fact do not appear to be located adjacent to railbanked trails.⁶ General opposition to trails is not justification for the Board's rule. Railbanking is about conservation of rail corridor for future rail use and interim trail use; it is not a beauty contest between trails and corridor destruction. And to the extent it is, Congress, as the Supreme Court has said, has determined that corridor conservation is the desirable outcome. We have found nothing in the opposition comments which justifies an arbitrary limit on extensions for railbanking negotiations. The one railroad that filed comments on the agency's proposed rule (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

argued against it, 2 supported it, and one does not appear to address it. Of the roughly 55 comments filed on October 31, fifty opposed the proposed rule, three supported it, and one stated that its author strongly supported NARPO but called on STB to "extend all extensions." Of the roughly 36 comments filed on October 30, 34 opposed the proposed rule, one supported "a bicycle trail network that would cover the entire United States" and one from a NARPO member in Anchorage supported the proposed rule.

⁵ E.g., L. Kigore (filed Oct 31), Z. Henderson (filed Oct. 31 and Oct. 29).

⁶ E.g., L. Wilson (filed Nov. 1) and C. Mattson (filed Oct. 31).

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, in the INHF trail project cited by NARPO in connection with this rulemaking (Union Pacific Railroad Co. - Abandonment Exemption - in Franklin County, AB 33 - 316X), requests for multiple extensions 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 cutting off NITU extensions as sought by NARPO.

Conclusion

The Board should reject the proposed rule. If any rule change is adopted, that change should be the one advocated by RTC: initial NITU and CITU interim trail use negotiation periods should be one year in length, and extensions should be granted for one year. No abuse has been shown concerning the negotiation process, and the Board's existing tools can address any abuse if it occurs. Adopting the change advocated by RTC will reduce administrative burdens without prejudicing corridor preservation projects.

Respectfully submitted,

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