

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

PETITION OF RAILS-TO-TRAILS	)	EX PARTE (EP)
CONSERVANCY TO INSTITUTE A	)	NO. 753
RULEMAKING PROCEEDING	)	

March 22, 2019
Part of
Public Record

PETITION FOR RULEMAKING

Pursuant to 49 C.F.R. § 1110.2(b), Rails-to-Trails Conservancy (“RTC”) hereby petitions the Surface Transportation Board (“STB” or “the Board”) to institute a rulemaking proceeding to revise this Board’s regulations implementing the federal railbanking law (49 C.F.R. § 1152.29) to establish a one-year period for any initial interim trail use negotiating period and codify the Board’s authority to grant extensions of the negotiating period for good cause shown.

I.

INTEREST OF RTC

RTC is a nonprofit corporation with more than 162,000 members and supporters nationwide and a grassroots network of over one million 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 Section 8(d) of the National Trails System Act Amendments, 16 U.S.C. § 1247(d) (“the federal railbanking law”) and the Board’s regulations implementing the statute, 49 C.F.R. § 1152.29. 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 corridors gathered through records maintained by the STB and through direct communications with trail managers. Since 1987, RTC has tracked all abandonment filings by the Board-assigned docket number, filing and decision dates, status before the Board, corridor location, length, abandoning railroad, and parties to the proceeding. For corridors where the Board has issued a Notice of Interim Trail Use (“NITU”) or Certificate of Interim Trail Use (“CITU”) to allow interim trail use/railbanking negotiations between a potential trail manager and a railroad, RTC collects information about the NITU/CITU filer, whether the railroad agrees to negotiate, whether the Board grants the NITU/CITU request, negotiation begin and end dates, negotiation success or failure, and the names of any trails opened on the corridor or planned to open in the future. While this process relies on accurate information put before the Board, consistency from RTC staff in tracking abandonment filings and decisions, and precision in entering data—and some records may suffer from minor inaccuracies or omissions—RTC’s database is widely acknowledged to be the most authoritative source of information on rail-trails and railbanking in existence. RTC’s Petition for Rulemaking is informed by this real-world data and information.

II.

BACKGROUND

The federal railbanking law, 16 U.S.C. § 1247(d), was enacted by Congress in 1983 to preserve America’s rapidly disappearing railway corridor infrastructure for future rail service and energy-efficient transportation uses by permitting inactive railroad corridors to be used on an interim basis as public trails. 16 U.S.C. § 1247(d); *see also Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 4–9 (1990).

Under the present regulations governing the railbanking process, upon issuance of notice of an abandonment, a qualified potential trail sponsor may submit a statement that it is willing to act as interim trail manager, and to assume financial and managerial responsibility for the line until such time as it is needed for future rail service. If the railroad chooses to enter negotiations, the STB issues a Notice of Interim Trail Use (“NITU”) or a Certificate of Interim Trail Use (“CITU”). 49 C.F.R. §§ 1152.29(c),(d).¹ The railroad is permitted to fully abandon a line subject to a NITU “if no agreement is reached 180 days after the NITU is issued,” assuming the satisfaction of all other imposed conditions. 49 C.F.R. §1152.29(d)(1). In cases where a timely trail use statement is filed, but the STB authorizes abandonment or issues an exemption notice or decision instead of a NITU due to the railroad’s initial failure to consent, but where the railroad and trail use proponent are later willing to negotiate an interim trail use agreement and the abandonment has not yet been consummated, the STB will reopen the proceeding, vacate the decision or notice partially or in full, and similarly issue a NITU for a negotiation length “not to exceed 180 days.” *Id.* § 1152.29(g).

While not codified in the regulations, interim trail use negotiations before the Board that require an extension typically proceed as follows: the trail use proponent files a Request for Extension of Time with the STB. If the railroad concurs with this request, the STB typically grants the requested extension, most commonly for an additional 180 days but also for longer periods of time. There is presently no limit on the number of extensions that may be granted.

¹ A NITU is issued pursuant to abbreviated abandonment procedures applicable in “exempt” or “notice” abandonment cases, whereas a CITU is issued in cases governed by fully regulated abandonment applications. 49 C.F.R. §§ 1152.29(c)(1), 1152.29(d)(1). This petition often refers only to NITUs since the vast majority of railbanking requests occur in the context of exempt abandonment proceedings.

In October 2018, the STB granted in part a Petition for Rulemaking filed by the National Association of Reversionary Property Owners (“NARPO”) and opened a proceeding to consider modifying “its regulations to limit the number of 180-day extensions of a trail use negotiating period to a maximum of six extensions, absent extraordinary circumstances.” *Limiting Extensions of Trail Use Negotiating Periods*, STB Docket No. EP 749 (Sub-No. 1) (served October 2, 2018). RTC submitted detailed comments in opposition to this notice of proposed rulemaking. As RTC demonstrated in these comments, the standard proposed by Docket No. EP 749 (Sub-No. 1) that no more than six extensions will be permitted except under undefined “extraordinary circumstances” was not supported by any actual data or evidence showing that any statistically significant number of railbanking requests were extended beyond this timeframe. No commenter, including NARPO, provided any evidence that those few cases where this Board granted extensions exceeding the proposed limit of six extensions were unjustified or prejudicial to any stakeholder, including NARPO’s constituency. As RTC further noted, the NARPO proposal would complicate a process that has worked efficiently and promptly over the last 30 years, would introduce greater uncertainty over the disposition and use of rail corridors proposed for abandonment, discourage trail use negotiations, and fundamentally undermine the statutory and regulatory objectives and policies of the federal railbanking law.

To the contrary, RTC’s comments pointed out that RTC’s data and analysis of railbanking orders instead supported the need for an entirely different regulatory change: the establishment of a one-year period for any initial interim trail use negotiating period and codification of the current regulatory practice of granting extensions of the railbanking negotiating period for good cause shown. Accordingly, RTC proposed such a rule change in its comments on the rulemaking proceeding premised on NARPO’s proposal (STB Docket No. EP

749 (Sub-No. 1)). However, to the extent that this Board may view RTC's proposal as outside of the scope of the notice of proposed rulemaking in STB Docket No. EP 749 (Sub-No. 1), RTC submits this petition for rulemaking as an alternative vehicle for making the regulatory changes recommended by RTC. As will be demonstrated below, RTC's proposed rule, unlike the rule change proposed by NARPO, would be in keeping with the statutory language, policies, and purpose of the federal railbanking law, and would promote administrative efficiency and reduce regulatory burdens on stakeholders.

III. DISCUSSION

I. The STB Should Amend Its Rules to Establish An Initial One-Year Period for Negotiating An Interim Trail Use/Railbanking Agreement.

A. The Board has the Authority to Establish an Initial One-Year Negotiating Period.

The railbanking law does not mandate any particular time limit on trail-use negotiations. *See* 16 U.S.C. § 1247(d). An initial negotiating period of 180 days was established in the first Trails Act rulemaking proceeding in 1986 to mirror the same timeframe for post-abandonment public use conditions. *See* 49 U.S.C. § 10905. Because the process was so new at the time, no real data regarding the length of time needed to negotiate an interim trail use/railbanking agreement informed the decision to establish 180 days as the initial trail use negotiating period.

The STB's actions over the past 30 years in implementing the railbanking law make clear that this Board has broad discretion to allow railbanking negotiating periods to continue for longer than 180 days. Although the STB regulations do not explicitly address the process of extending NITUs or establish specific standards governing such requests, the STB has routinely entertained extension requests. Indeed, authority to extend NITUs and CITUs was explicitly delegated to the Director of Proceedings to expedite these decisions. *Rail Abandonments—Use of*

Rights-of-Way as Trails—Supplemental Trails Act Procedures, Ex Parte No. 274 (Sub-No. 13), at 3 (Served Dec. 9, 1987) (reported at 4 I.C.C.3d 152). The Board’s authority to extend NITUs and CITUs has been upheld by the courts. *Birt v. STB*, 90 F.3d 580 (D.C. Cir. 1996).

Further, the Board has exercised this discretion to grant NITU extensions for periods of time in excess of 180 days. *See, e.g., Missouri Central Railroad Company—Abandonment Exemption—in Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, Mo.*, Docket No. AB 1068 (Sub-No. 3X) (served January 19, 2018) and *BNSF Railway Company—Abandonment Exemption—in Flathead County, Mont.*, Docket No. AB 6 (Sub-No. 495X) (served February 22, 2019) (granting extensions of one year). These decisions to extend NITUs/CITUs in one-year increments have not been the subject of litigation, or even administrative appeals.

Thus, this Board clearly has the authority and discretion under the law to establish a one-year initial trail use negotiating period. Additional reasoning and data supporting the establishment of a one-year period for any initial interim trail use negotiating period follows.

B. Establishing an Initial One-Year Period for Negotiating an Interim Trail Use/Railbanking Agreement Would Further the Purpose of the Railbanking Law and Ease Administrative Burdens, Without Any Prejudicial Impacts.

1. RTC’s Data Demonstrates That the Vast Majority of Interim Trail Use/Railbanking Negotiations Require More than 180 Days to Complete.

RTC proposes that the STB institute an initial railbanking negotiating period of one year based on data establishing that the vast majority of railbanking negotiations require more than 180 days to complete. As of November 2018, RTC’s database contains records for 718 issued NITUs and CITUs dating from 1987 to the present.² This figure includes dockets in active

² The data presented in this petition was assembled and analyzed by Eli Griffen, RTC’s Manager of Trail Development Resources, and is presented in Mr. Griffen’s declaration submitted in

railbanking negotiations, as well as dockets where railbanking negotiations failed, where abandonments were withdrawn, and where successfully railbanked corridors were reactivated. Of these 718 NITUs/CITUs, at least 393 corridors were successfully railbanked and remain railbanked today. These 393 railbanked corridors represent 5,895.53 miles that have been preserved for future rail use and interim use as trails. Of the 370 railbanked corridors with negotiating lengths in our database, 289 (78.1%) required more than 180 days to consummate.

Further, approximately half of all railbanking agreements (183 of the 370) were consummated within one year. The data thus supports the conclusion that an initial railbanking negotiating period of one year, rather than 180 days, would much more closely reflect the actual length of time required to complete even relatively straightforward railbanking negotiations.

Finally, it is worth noting that the establishment of one-year interim trail use negotiating periods is supported by the STB's decision to adopt this timeframe for the railroads to file a notice of consummation of abandonment authority. 49 C.F.R. §1152.29(e)(2). As the STB explained in its final rulemaking order adopting this one-year period, "[w]e believe that a 1-year period is appropriate. That time period...is long enough to give carriers that do not want to exercise their abandonment authority immediately time to hold open the possibility that new shippers will seek rail service or that the right-of-way could be used for interim recreational or conservation purposes under 16 U.S.C. 1247(d)..." *Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. § 10903*, STB Ex Parte No. 537, at 9 (served Dec. 24, 1996). Notably, the STB specifically rejected comments suggesting that a 180-day period would suffice. *Id.*

connection with RTC's comments opposing the notice of proposed rulemaking in STB Docket No. EP 749 (Sub-No. 1). A copy of Mr. Griffen's declaration is attached hereto.

2. Establishing an Initial One-Year Negotiating Period Would Promote Administrative Efficiency and Reduce Burdens on the Board and the Parties.

Establishing one year as the initial interim trail use negotiating period would promote greater administrative efficiency and reduce the burdens on the trail use proponent and railroad to file extension requests, and on the Board to review and approve these requests. The benefits of lengthening the initial railbanking negotiating period from 180 days to one year are numerous. The administrative time required to review railbanking extension requests is a significant burden on the Board that could be alleviated with the establishment of one-year negotiating periods. These requests for extensions are largely uncontroversial and are granted as a routine matter consistent with the STB's policy that "[a]n extension of the negotiating period promotes the establishment of trails and rail banking consistent with the purpose of Section 1247(d)." *Missouri Pacific Railroad Co. – Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnson, Atoka, and Bryan Counties, OK*, Docket No. AB 3 (Sub-No. 63), 1989 ICC Lexis 380, * 8 (Dec. 18, 1980).

Data from RTC's database confirms this. Over a recent one-year period (February 1, 2018 to February 1, 2019), 374 abandonment-related filings were filed with the Board, and 59 of them (15.8%) were categorized as requests for an extension of time in railbanking negotiations. More pointedly, 168 abandonment-related decisions were handed down by the Board over this same time period, with 53 of them (31.6%) approvals or denials of railbanking extension requests. Clearly, establishing an initial railbanking negotiating length of one year (instead of 180 days) would reduce the number of filings before the Board in need of action, and in turn significantly decrease the Board's workload and contribute to administrative efficiency.

A one-year initial negotiating period would also reduce the burdens on the trail use proponent and railroad to file extension requests. Filing fees—currently set at \$300 to file a

request for a trail use condition and \$500 to file a request to extend the trail use negotiating period—are not an insignificant amount of money, particularly for smaller trail groups that lack a consistent income and may be relying on donation of the corridor and/or significant future fundraising activities for corridor acquisition and management. Funds expenditure is further increased by attorneys’ fees, as counsel is often engaged by trail use proponents (and always engaged by railroads) when making filings to the Board. The preparation of extension requests, while usually routine, can still be burdensome, particularly for the many nonprofit trail groups lacking counsel and unfamiliar with the Board’s requirements. Implementing railbanking negotiating periods of one year (instead of 180 days) would substantially reduce both the fees and amount of time parties would be required to spend on these administrative matters.

II. This Board Should Adopt A Rule That Codifies this Board’s Existing Practices and Procedures Governing Requests to Extend NITUs.

A. This Board’s Existing Policy of Liberally Extending NITUs for Good Cause Shown Furthers the Policies Underlying the Railbanking Law.

As the foregoing demonstrates, this Board has the authority to extend NITUs beyond the initial 180-day period and the discretion to do so upon good cause shown where such extensions serve the policies underlying the 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). This Board has exercised this discretion upon request on a case-by-case basis, without an explicit rule codifying this authority.

The Board’s authority to extend NITUs and CITUs “when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor” was upheld by a court decision, which found that the policy serves “the goal that a CITU is intended to advance—providing a defined window of opportunity for reaching agreement on a trails conversion.” *Birt*

v. *STB*, 90 F.3d at 589. The same decision acknowledges that this Board has “significant leeway in reviewing” the interpretation of the ambiguity in its rules as to whether extensions may be granted. *Id.* at 589. This Board’s practice of granting extensions where the railroad remains willing to negotiate an interim trail use agreement is also fully in accord with the Board’s interpretation of the railbanking law as giving it “no power to compel a conversion between unwilling parties, and, conversely, *no discretion to refuse one if voluntarily negotiated.*” *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990) (emphasis added).

In furtherance of these policies, the Board has adopted the practice of liberally granting extensions of a CITU or NITU while interim trail use/railbanking negotiations are pending in recognition of the “strong Congressional policy favoring trails use/rail banking.” *St. Louis S.W. R.R. Co.—Abandonment—in Smith and Cherokee Counties, Texas*, Docket No. AB 39 (Sub-No. 12), 1992 ICC WL 457275 at *3 (Mar. 23, 1992). Indeed, the D.C. Circuit relied on this Board’s stated policy of accepting (and by implication extending) trail use requests “so long as it still retains jurisdiction to do so” in rejecting a challenge brought by RTC claiming that the timeframes afforded in exempt abandonment proceedings were inadequate to carry out the purposes and policies of federal railbanking law. *Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988).

This liberal standard for extending NITUs whenever this Board retains jurisdiction to do so is articulated in numerous prior decisions by this Board. As one decision explained, this liberal extension policy is “[a]nalogous to...our policy of accepting late-filed trail use statements when good cause is shown and our jurisdiction has not lapsed.” *Missouri Pacific Railroad Co. – Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnson, Atoka, and Bryan Counties, OK*, Docket No. AB 3 (Sub-No. 63), 1989 ICC Lexis 380 * 9 (Dec. 18, 1980). In the

over thirty years in which this policy has been applied, there is no evidence that such extensions have caused any demonstrable or measurable harm to any legitimate interests or objectives of the Board or any stakeholders, nor have these extensions resulted in any administrative burdens or inefficiency.

B. RTC's Data Demonstrates No Abuses of This Policy.

RTC's data shows that this liberal policy has not been abused by trail managers, nor is there any evidence that the need for extensions is due to any lack of due diligence. Rather, RTC's data shows that the vast majority of railbanking agreements (305 of the 370) were consummated within three years. *See* Griffen Declaration, at ¶ 8.

Railbanking negotiations often require more than one year to complete due to innumerable factors not attributable to any lack of diligence or good faith on the part of the negotiating parties. Negotiating an interim trail use agreement can be a complex undertaking, requiring the potential trail manager to assume extensive liabilities and long-term financial responsibilities for the management of the corridor. Rail corridors can go through multiple jurisdictions, requiring coordination across several localities or even states, and involving multiple public agencies. Public agencies are constrained by existing, legislatively-approved budgets, and so must go through often extensive public procedures to secure expenditure authorizations or make budgetary changes. Available public funding mechanisms necessary to acquire a corridor, such as bond referenda or federal grants, likewise take time to secure. Timeframes for securing public funding often do not align with the timeframes in the abandonment process—for example, funding cycles in some cases occur only in alternative years—and consideration of applications by funding agencies takes additional time.

On the regulatory side, significant time is often needed in order to comply with environmental and historic preservation conditions. Negotiations for Offers of Financial Assistance, and the time required for railroads and the STB to evaluate offers, can also halt concurrent railbanking negotiations. In some cases, regulatory and public-involvement requirements on the trail managers cause delays. Delays inherent to any acquisition negotiation, including appraisal disagreements, personnel turnover, and the need to complete engineering or design work, or complete complex salvage operations, are also a common reason why more than 180 days may be required. In short, RTC's experience over more than 30 years has shown that it is reasonable and realistic to liberally grant NITU extensions to allow negotiating parties sufficient time to conclude an often complex real estate transaction that must take place within the context of an unpredictable and equally complex regulatory environment.

C. "Good Cause" is the Established Regulatory Standard Governing Extensions and Waivers Under the STB's Rules.

This Board's decisions on other regulatory matters routinely utilize the standard of "good cause shown" to govern requests for waivers or extensions. *See, e.g., Buckingham Branch Railroad Company—Change in Operators Exemption—Buckingham Branch Railroad Company*, STB Docket No. FD 3620 (served July 21, 2018). STB regulations provide further support for utilizing a "good cause" standard for granting extensions. For example, the STB's regulations provide that the Board will accept late-filed railbanking requests "supported by a statement showing good cause for late filing." 49 C.F.R. § 1152.29(b)(3). Likewise, the STB's regulations in other contexts specifically provide that requests for extensions will be granted based on a showing of "good cause." *See, e.g., id.* § 1152.29(e)(2) (allowing a railroad to request extensions of the time for filing a "consummation notice" for "good cause shown."); *id.* § 1152.25(d)(5)

(requiring “good cause” for late pleadings); *id.* § 1113.7(c) (late intervention petitions accepted for “good cause shown.”).

IV.

CONCLUSION AND REQUESTED RELIEF

As demonstrated above, the establishment of a one-year period for any initial interim trail use negotiating period and codification of authority for the Board to grant extensions of this negotiating period for good cause shown would serve the interests of administrative efficiency and clarity in administering the railbanking law without violating its statutory language, goals, and articulated public policy to promote and encourage railbanking and interim trail use. Particularly in light of the uncertainty introduced by the harmful NARPO-proposed rulemaking proceeding currently pending before this Board, this Board should act promptly to initiate a rulemaking proceeding to codify the changes sought in this petition in order to provide improved administrative clarity for all parties and stakeholders involved in railbanking negotiations.

To aid the Board’s consideration of this request, we respectfully submit proposed amendments to the relevant section of the Code of Federal Regulations in the Appendix, attached hereto.

Respectfully submitted,



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APPENDIX

For the reasons set forth in the preamble, Rails-to-Trails Conservancy petitions the Surface Transportation Board to amend part 1152 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

1. The authority citation for Part 1152 continues to read as follows: 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 1301, 1321(a), 10502, 10903-10905, and 11161.
2. Amend § 1152.29 as follows:
 - a. In paragraph (c)(1) remove the words “180 days” and add in their place “one year”.
 - b. Add the following sentence to the end of paragraph (c)(1): “Parties may request a Board order to extend the interim trail use negotiating period for good cause shown.”
 - c. In paragraph (d)(1) remove the words “180 days” and add in their place “one year”.
 - d. Add the following sentence to the end of paragraph (d)(1): “Parties may request a Board order to extend the interim trail use negotiating period for good cause shown.”
 - e. In paragraph (g) remove the words “180 days” and add in their place “one year”.

Before the Surface Transportation Board

National Association of Reversionary)
Property Owners – Petition for a) Ex Parte 749
Rulemaking) (Sub-No. 1)
)
Limiting Extensions of Trail Use)
Negotiation Periods)
_____)

DECLARATION OF ELI GRIFFEN

1. My name is Eli Griffen. I have been employed by Rails-to-Trails Conservancy (RTC) since 2012, and I have served in my current capacity as Manager of Trail Development Resources since 2016.
2. As part of my responsibilities at RTC, I manage RTC’s comprehensive database of rail-trails and rail corridors that includes information gathered through records maintained by this Board and through direct communications with trail managers. Each week, RTC staff under my direction monitors the website of the Surface Transportation Board (“STB” or “Board”) for railroad abandonment filings, and inputs relevant information into our database. Among many other fields inputted for these corridors, RTC tracks the Board-assigned docket number, filing and decision dates, status before the Board, corridor location (state, county, zip code, endpoints), length, abandoning railroad, parties to the proceeding, and RTC’s engagement on the abandonment. Corridors are inputted into our database whether or not we anticipate railbanking occurring, resulting in a near-comprehensive listing of corridors filed for abandonment since we began our tracking efforts in 1987.
3. For corridors where a Notice of Interim Trail Use (NITU) or Certificate of Interim Trail Use (CITU) has been issued, we collect additional information: NITU/CITU filer, whether the railroad agrees to negotiate, negotiation begin and end dates, negotiation success or failure, and the names of any trails opened on the corridor or planned to open in the future. While this process relies on accurate information put before the Board, consistency from RTC staff in tracking abandonment filings and decisions, and precision in entering data—and some records may suffer from minor inaccuracies or omissions—RTC’s database is widely acknowledged to be the most thorough source of information on rail-trails and railbanking in existence.
4. RTC’s database contains records for 718 issued NITUs and CITUs dating from 1987 to the present. This figure includes dockets in active railbanking negotiations, as well as dockets where railbanking negotiations failed, where abandonments were withdrawn, and where successfully railbanked corridors were reactivated.

5. Of these 718 NITUs/CITUs, at least 393 corridors were successfully railbanked and remain railbanked today. These 393 railbanked corridors represent 5,895.53 miles that have been preserved for future rail use and interim use as trails.
6. RTC's data enables a deeper examination of the hypothetical effect of this Board's proposed rule in Docket No. EP 749 (Sub-No. 1) to limit NITU/CITU extensions to six if it had been enforced on previous negotiations. Because the interest of RTC primarily revolves around trail potential, our records on successfully railbanked corridors are much more complete than our records for dockets with issued NITUs/CITUs but which are not currently railbanked. For that reason, we've limited our analysis to the 393 corridors we've identified as currently railbanked.
7. The STB Library has yet to digitize most filings and decisions from abandonment dockets originating prior to the late 1990s. Further, Interstate Commerce Commission filings and decisions often did not include the level of detail related to railbanking negotiations, such as a consistent record of extension requests and approvals, as modern STB dockets do. For these and other reasons, we are missing information on the length of railbanking negotiations for 23 railbanked corridors and have thus omitted these from our analysis.
8. Of the remaining 370 railbanked corridors, 305 were railbanked before six 180-day negotiating periods were concluded, while 65 required extensions past six negotiating periods. These 65 dockets represent 886.88 miles; miles that would have been lost not only for interim trail use, but also for future rail use, were this proposed rule to have been adopted previously. Notably, of these 65, nearly all negotiations (53) were completed before six years had lapsed, representing 668.32 railbanked miles.

A full breakdown of these 370 railbanked corridors is presented in the table below:

NITU/CITU Negotiations for Railbanked Corridors			
<i>Negotiation Length</i>	<i>Railbanking Agreements Consummated</i>	<i>Percentage of Total Agreements</i>	<i>Railbanked Miles</i>
0 – 180 days	81	21.9%	995.5
180 days – 1 year	102	27.6%	1,728.38
1 year – 2 years	79	21.4%	1,110.43
2 years – 3 years	43	11.6%	597.39
3 years – 4 years	22	6%	257.16
4 years – 5 years	20	5.4%	266.92
5 years – 6 years	11	3%	144.24
6 years +	12	3.2%	218.56
<i>Total</i>	<i>370</i>	<i>100.1%¹</i>	<i>5,318.58</i>

¹ The total percentage exceeds 100% due to rounding.

9. Additionally, RTC's data identifies 32 dockets in active railbanking negotiations, representing 409.41 miles. Of the 32 active NITU/CITU negotiations, 23 have extended beyond six negotiating periods, representing 325.47 miles that could be lost for interim trail use and future rail use should this proposed rule be enacted.
10. All told, 88 railbanking dockets (consummated and in negotiation) have extended beyond six negotiating periods, representing 1,212.35 miles that would have been permanently unavailable for future rail use and interim trail use had this rule been enforced from railbanking's inception in 1983.
11. In response to this Board's Notice of Proposed Rulemaking in Docket No. EP 749 (Sub-No. 1), I examined Board filings and decisions, where available, and conducted outreach to trail managers and other railbanking parties, where possible, for each of the 65 completed negotiations that persisted beyond six negotiating periods. Because the Board generally does not require reasoning for NITU/CITU extension requests, most railroads and trail proponents did not offer it in their filings. However, I was able to identify 23 dockets that included reasons accompanying one or more NITU/CITU extension requests.
12. Of these 23, identified delays fit into three broad categories: becoming compliant, most often with environmental or historic preservation conditions; securing support, such as governmental or private funding, legislative action, or sign-off from elected officials; and other procedural delays, such as appraisal disagreements between the trail proponent and the railroad or typical personnel turnover. Examples follow.
13. In Docket No. AB-33 (Sub-No. 268X), railbanking negotiations between the Wisconsin Department of Transportation (Wisconsin DOT) and Union Pacific Railroad Company lasted just over six years before their successful consummation. In their final request for an extension of time to negotiate for interim trail use, Wisconsin DOT explained the primary reason for the length of the negotiating period—the awarding of a federal Congestion Mitigation and Air Quality Improvement Program (CMAQ) grant for acquisition of the corridor:²

“Land acquisition through the CMAQ Program is a lengthy and complex process. The first step was the completion of an Environmental Report and a Design Study Report. These reports, which were submitted before formal negotiations with the UP Railroad could commence, ensured that potential issues/problems (environmental, structural, historical) that might have necessitated modifications to the preliminary trail alignment were identified before an agreement for transfer of ownership of the land was reached.”

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[https://www.stb.gov/FILINGS/all.nsf/c72552abc289f85285257515007219bd/ecec6d42e7750e1485257e2f0068ffd0/\\$FILE/238255.pdf](https://www.stb.gov/FILINGS/all.nsf/c72552abc289f85285257515007219bd/ecec6d42e7750e1485257e2f0068ffd0/$FILE/238255.pdf)

14. Trail proponents in Docket No. AB-33 (Sub-No. 263X), whose negotiations also lasted for more than six years, similarly identified the fulfillment of CMAQ requirements as the primary impediment to successfully completing their railbanking agreement expeditiously.³
15. In Docket No. AB-290 (Sub-No. 192X), this Board granted more than six extension requests filed by RTC and subsequent trail proponents due, in part, to a need “to deal with issues related to the transfer of a large bridge on the corridor,” including securing federal historic preservation designation (and state approval for the designation) for the structure.⁴
16. In Docket No. AB-12 (Sub-No. 184X), the Bureau of Land Management’s Alturas Field Office identified the need to complete a Phase I Environmental Site Assessment as one of several reasons why more than six extension requests were required to successfully consummate a railbanking agreement with Union Pacific Railroad Company.⁵
17. In Docket No. AB-156 (Sub-No. 23X), railbanking negotiations between Albany County, New York, and Canadian Pacific Railway Company lasted for nearly six years before an agreement was reached. Among other reasons cited, Albany County identified delays related to “securing acquisition funding assistance through a New York State parks grant award” as a primary reason for their extension request.⁶
18. In Docket No. AB-167 (Sub-No. 1132X), where National Pike Trail Council (NPTC) and Consolidated Rail Corporation were engaged in railbanking negotiations for more than five years, this Board granted NPTC’s extension request for, among other reasons, the need “to build political support.”⁷
19. In Docket No. AB-876 (Sub-No. 0X), this Board granted NITU extensions spanning more than six years to enable the Commonwealth of Kentucky Tourism, Arts, and Heritage Cabinet and R.J. Corman Railroad Company to successfully consummate a

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⁷ [https://www.stb.gov/Decisions/readingroom.nsf/UNID/C8E28440A26B47EA8525658600420F7E/\\$file/28786.pdf](https://www.stb.gov/Decisions/readingroom.nsf/UNID/C8E28440A26B47EA8525658600420F7E/$file/28786.pdf)

railbanking agreement. Both the railroad and trail proponent agreed to defer “further negotiations pending commitment to funding by the Commonwealth of Kentucky.”⁸

20. The most commonly cited reasons for extension requests reported to this Board can broadly be categorized as delays inherent in negotiations.
21. In Docket No. AB-33 (Sub-No. 93X), extension requests were granted due, in part, to the City of Whittier and Union Pacific having “a material disagreement regarding the value of the line” that ostensibly took time to resolve.⁹ Similar appraisal disagreements or other general negotiating delays were cited as reasons for extension requests beyond six in Docket No. AB-55 (Sub-No. 670X),¹⁰ Docket No. AB-33 (Sub-No. 126X)¹¹ and Docket No. AB-290 (Sub-No. 266X).¹²
22. “The turnover of key personnel on both sides of the negotiating table” contributed to delays that resulted in more than six extension requests being requested by Albany County, New York, and subsequently granted by this Board, in Docket No. AB-156 (Sub-No. 23X).¹³ Other reasons cited by trail proponents for why more than six extension requests were needed include those related to concurrent Offers of Financial Assistance (Docket No. AB-303 (Sub-No. 13X)),¹⁴ the railroad’s need to use a portion of the track subject to a NITU condition for active rail operations while replacement track was constructed (Docket No. AB-33 (Sub-No. 112X))¹⁵ and events external to the railbanking process that redirected the priorities and staff resources of trail proponents, including a

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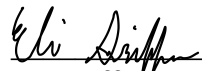
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¹⁵ [https://www.stb.gov/Decisions/readingroom.nsf/UNID/572C19682BB2FF90852568A4007F94E6/\\$file/30895.pdf](https://www.stb.gov/Decisions/readingroom.nsf/UNID/572C19682BB2FF90852568A4007F94E6/$file/30895.pdf)

homicide (Docket No. AB-55 (Sub-No. 401))¹⁶ and tornado (Docket No. AB-55 (Sub-No. 613X)).¹⁷

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Eli Griffen

11/01/18

November 1, 2018

¹⁶

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