

Re: National Trail System Act and
Railroad Rights-of-Way

APR 12 2011

**Part of
Public Record**

STB Ex Parte 702

COMMENTS of MADISON COUNTY TRANSIT

These comments are submitted on behalf of Madison County Transit (MCT) in response to the "Notice of Proposed Rulemaking" ("NPR") published at 76 Fed. Reg. 8992 (Feb. 16, 2011). MCT participated in the oral hearing and filed written testimony in "Twenty Five Years of Railbanking: A Review and Look Ahead," STB Ex Parte 690, which is referred to in the supplementary information for Ex Parte 702, and on which it appears Ex Parte 702 is partly based.

I. Interest of Commenter and Background

To reiterate what MCT explained in Ex Parte 690, MCT is a governmental agency focused on meeting alternative transportation needs in Madison County, Illinois, located across the river from St. Louis, Missouri. MCT operates an extensive bus and trail system serving Madison County.¹ Indeed, MCT believes that it is the only transit system in the country with its own integrated bus and bikeway system. MCT operates over 100 miles of trails,

¹ In MCT's testimony in Ex Parte 690, MCT attached the January 2007 version of the MCT "Bus and Bikeway Map" showing MCT bus routes and trails. MCT also contracts to operate a rideshare program (which includes approximately 100 vans) for the St. Louis metropolitan area.

incorporates bike racks on its buses, and seeks to encourage use of bikes by commuters to reach bus stops for long distance travel.

St. Louis has long been a rail hub, with many rail lines interconnecting in the city. Madison County is located to the east and northeast of the city, essentially on the corridor between St. Louis and Chicago. Not surprisingly, many railroads constructed and maintained parallel lines along the corridor. The post WW II consolidation of the railroad industry and the rise of the trucking industry resulted in the abandonment of many of these lines as duplicative or redundant. Commencing in the early 1990's, MCT has vigorously pursued acquisition of otherwise-to-be abandoned lines, and indeed already abandoned lines, where feasible. Since the inception of its program, MCT has acquired over 115 miles of former railroad corridor.²

MCT views already assembled transportation corridors as a kind of natural resource. New transportation facilities are increasingly hard to form as Madison County switches from agriculture and open space to denser suburban and urban kinds of land use, while at the same time the need for new transportation facilities is increasing. Otherwise-to-be abandoned rail

² The benefits of MCT's comprehensive program are illustrated in the June 2007 version of "Regional Bikeways of Metro St. Louis" supplied in Ex Parte 690. The interconnected network of trails in Madison County stands out as a major component of the regional system.

corridors in our County are excellent candidate rights of way for future needs, as they generally trend toward St. Louis, and connect County towns and cities with same, or with each other. They thus tend to be potential commuter routes, and are ideal for bicycle use, not just for recreation but for linkage to MCT's bus system for long distance commutes. In addition, as the St. Louis light rail system expands, some of the corridors, or parts of the corridors, can serve as passenger rail extensions, and as part of rail with trail systems. The St. Louis light rail system now already has stops in the county directly to our south.³ As the regional population continues to expand and the economy improves, we expect that voters and planners eventually will favorably entertain expansion into Madison County, and MCT will be far more ready for that expansion with our inventory of corridor properties.

Especially in light of tightening energy supplies, increased fuel costs, and concerns with global warming, MCT believes it is only prudent to create as many viable alternatives to single passenger motor cars for commuting and recreational purposes as possible. MCT's approach to preserving otherwise-to-be abandoned rail corridors is in service of that end.

Trail use is not just a compatible interim use for these

³ The "Regional Bikeways" map referenced in note 2 shows the current extensions of the Metrolink light rail system from St. Louis into St. Clair County, Illinois.

corridors pending possible light rail or other rail reactivation. Trail use allows MCT to expand our bicycle and bike/bus commuting opportunities⁴ in addition to providing off-street facilities for non-motorized outdoor recreation and exploration.⁵

For abandonments since the early 1990's, MCT has generally sought to acquire the properties during the ICC, now STB, abandonment process using the federal "railbanking" statute, 16 U.S.C. 1247(d). That statute affords a means to keep rail corridor intact for possible future rail use, including passenger rail use of special interest to MCT, notwithstanding claims of easement extinguishment that might otherwise be made under state law. MCT now owns railbanked lines acquired from Union Pacific and Norfolk Southern, among others.

Because of the many positive ends served by 16 U.S.C. 1247(d), STB should continue to pursue policies which render the statute readily available, and which minimize punitive or unnecessary procedural or substantive requirements which discourage its applicability.

⁴ Use of bikes to reach bus stops expands the territory served by each bus stop.

⁵ Because of the comprehensive nature of MCT's trail system, MCT is able to offer recreational users a variety of off-street bicycle trail "loops" of varying distances for outdoor exercise and enjoyment. MCT supplied the 2006 version of its "Bikeway Map and Trail Guide" illustrating seven possible loops from 10 to 31 miles in length on MCT's trail system as part of its submission in Ex Parte 690.

II. Comments on Issues Referenced in NPR

1. Joint notification. STB proposes to require a joint notification by the interim trail manager and the railroad when a trail use agreement has been reached. MCT agrees that it is useful to have something in the administrative file indicating that a trail use agreement has been reached. MCT has long followed the practice of either providing notice when it has reached an agreement with a railroad, or relying upon the railroad to do so. So long as these notices are served upon both the interim trail manager and the railroad, the extra level of coordination required for a "joint" filing is unnecessary. The agency should simply require notification by either the interim trail manager or railroad with service on the other party, or at least allow such filings to serve as an alternative to a "joint" filing.

The more interesting question is when this notice is due. The proposed regulation requires notice within ten days of an agreement. But the notion of an agreement is not explained. Does the agency mean achievement of an agreement in principle (even if that "agreement" may not yet be legally enforceable under state law, but is an agreement to agree); or upon execution of a definitive contract for sale, subject perhaps to customary due diligence or to financial conditions; or - in the usual event of a sale of a railbanked corridor to the interim trail manager -

upon closing? If the notice is not due until closing, does that in turn mean that the NITU negotiation period must be officially extended to encompass the date of closing, for many times closing does not occur until months after an agreement has been reached? If the agency is going to require notice upon achievement of an agreement, it probably needs to address what parties can count as an "agreement." The more narrowly the agency defines "agreement," then the more important it becomes to address how that in turn relates to the NITU negotiation period and any requirement for the parties to seek extensions in the NITU negotiation period until they reach the level of agreement the agency thinks amounts to agreement.

In addition, the requirement for notification (especially if joint) should be prospective only. Some smaller railroads that have railbanked their lines may no longer exist to provide notice.

2. Modification of NITU to encompass less line than original NITU. MCT does not oppose the requirement for modification of the NITU to encompass less than the original right of way when an agreement ultimately provides for railbanking of less than the original right of way, so long as the requirement is purely ministerial (non-discretionary). A NITU currently authorizes railbanking or abandonment, with the ultimate election how much of a line is railbanked or abandoned

up to the parties. STB in essence would simply record what the parties have agreed to railbank, if the agency is now planning to maintain information on corridor status.

3. Possible future reactivation acknowledgment for substitute trail managers. As MCT understands STB practice, the agency requires substitute trail managers to file the same "statement of willingness" as any other trail manager. That practice seems to be acknowledged in the version of the "supplemental information" to the NPR which the agency placed on its website, served Feb. 16, 2011. The "statement of willingness" seems to cover any "awareness" issue that the property is subject to possible future rail reactivation.

The more interesting issue is what the agency means by the acknowledgment concerning future rail reactivation that it seeks. There is considerable confusion around the concept of rail reactivation. When STB's predecessor (ICC) first adopted the original 49 C.F.R. 1152.29, that agency in its final rules said that it lacked authority to require a railroad to transfer its property to an interim trail manager because this might raise a takings (compensation) issue. ICC provided that railbanking was voluntary on the part of the abandoning railroad, just as it is voluntary on the part of the interim trail manager. Both must reach an agreement. But it follows that the statute does not authorize the agency to "take" an interim trail manager's

property for transfer to a railroad without compensation, either under state law or by voluntary agreement. An interim trail manager basically stands in the position of a railroad. Thus, while the agency can authorize reactivation, it cannot require a transfer of the rail property interest without compensation. Presumably such compensation would be arranged voluntarily between the parties by agreement, or by use of state law eminent domain pursuant to STB's reactivation authorization, as is the case in other service authorizations, except where the agency has its own mechanism to adjudicate compensation for use or transfer of the rail interest, as in alternative service, OFA's, and feeder line program situations.

This in turn raises another issue. The agency has issued only a handful of opinions on service reactivation over railbanked rail corridors. In those opinions, of recent vintage, the agency has purported to vacate the NITU, reinstating the service obligation over the corridor. But essentially all STB service authorizations are permissive, not mandatory. That is, the agency authorizes Railroad A to acquire a line (and common carrier obligation) from Railroad B, but does not require the acquisition. A railroad seeking to reactivate rail service on a railbanked line may never do so, or may do so on a portion less than the entire railbanked line. Rather than vacate the NITU, the agency should simply authorize reactivation. If service is

in fact reactivated (that is, if the reactivating entity in fact acquires the line or a portion thereof), then upon being so informed, STB can vacate the NITU in its entirety if the entire line is in fact reactivated, or issue a modified NITU for the portion of the line over which no service is reactivated.

4. State sovereign immunity issues. 16 U.S.C. 1247(d) on its face requires STB to authorize railbanking when, among other things, state or local governments or private organizations to "assume full responsibility ... for any legal liability arising out of [interim trail use]." In particular, the statute does not use the words "indemnify" or for that matter "hold harmless" anywhere. It thus on its face does not require that a state or local government or a private organization indemnify a railroad, or hold it harmless, for anything. In probably 99% of instances of railbanking,⁶ the railbanking agreement involves the sale by the railroad of all of its interests to the interim trail manager. The interim trail manager, as the new owner, by accepting the deed automatically assumes full responsibility for taxes, legal liability, and management. "Once the purchaser of

⁶ All of MCT's trails are purchases. In addition, MCT's counsel has represented numerous parties across the country in railbanking arrangements since the inception of ICC's railbanking regulations, and has seen only two instances (neither of which involved MCT), in which the railbanking was accomplished by an agreement that provided for something other than sale of the entirety of the railroad's property interest to the interim trail manager.

land takes title and possession, he becomes responsible for dangers to himself or others on the land; and correspondingly the vendor is freed from responsibility." D.Dobbs, The Law of Torts 624 (West 2000). The are only possible exception to this rule of relevance in railbanking arises where some form of joint venture is created, as might be the case if less than the entire property interest is deeded (as, for example, perhaps in some forms of leases or licenses). In those cases, where a railroad retains a fee interest and merely leases or allows use of its property for a trail, some special language may be necessary to ensure that the state or local government, or private organization, is assuming full responsibility, as that may not be controlled by common law.

The purpose of the "responsibility" language in the statute is to ensure that the rail industry is not burdened by liability for accidents on trails; the purpose is not to require the interim trail manager to assume more liability than exists under state law for its own use of the property. The fact that a state or local entity may have sovereign immunity does not affect the fact that it has "full responsibility" for liability arising from the property. In other words, sovereign immunity of a buyer does not mean that the railroad as seller remains liable for anything; it only places a limitation on the liability (not the responsibility) of the buyer. Absent some kind of joint

venture, the act of title transfer will hold the railroad harmless, at least so long as the interim trail manager bears the burden of litigation challenging the railbanking of the corridor.

STB's predecessor adopted the word "indemnification" in its statement of willingness evidently as a generic term to fit all situations, including those that did not involve deeded transfers of property interest, but STB's predecessor allowed governments with sovereign immunity to "hold harmless" a railroad, as opposed to indemnifying it. Holding harmless was and is accomplished simply by assuming ownership, and in a way misstates or misleads as to what is going on. Upon transfer of the property, the railroad is divorced from responsibility for the property, and the new owner (the interim trail manager) assumes the responsibility. The common law holds the seller harmless. The seller of a property to a state or local government does not remain responsible for what the government does with the property, any more than a railroad employee or STB employee or MCT employee remains responsible for his house if he sells it to another. In other words, entities with immunity satisfy the hold harmless notion simply by accepting title, just like all other entities or individuals. Title transfer includes transfer of responsibility for liability on and after closing, thus fully satisfying the language and intent of 16 U.S.C. 1247(d). The situation is analogous to what happens when a rail line is

transferred pursuant to an STB transfer authorization (either voluntary or OFA). The prior carrier no longer has a common carrier obligation on or liability for the line.

STB's apparent focus on sovereign immunity is based on a failure to attend to what happens automatically on title transfer, and possibly on a misconstruction of the language and intent of the statute. Properly viewed, the statute affords the agency no basis almost thirty years after adoption of the statute to purport to disenfranchise many and maybe most state and even local agencies from use of the railbanking statute on the ground that they have sovereign immunity when this sovereign immunity does not shift liability for trail use back to the rail industry. Moreover, the agency's construction of sovereign immunity as a bar to railbanking is not consistent with 16 U.S.C. 1247(d), which says that STB is to encourage state and local governments to form trails. Additionally, it makes no sense for STB to suggest that, contrary to its precedent, a public entity (especially with taxing authority) taking title to a rail corridor - thereby assuming full responsibility for liability (if any), taxes (if any) and management -- cannot do so under the railbanking statute because it has sovereign immunity, but that a private entity -- which may be judgment proof (holding only the rail corridor it has acquired as an asset and having no ability to address any liability beyond its insurance limit) -- can take

title to the right of way.

If the railroad is satisfied that it has sufficient protection from liability for trail use, then STB should be satisfied. STB, like its predecessor, has treated railbanking as voluntary on the part of the railroad. This minimizes the burden on the industry. There is no rational basis to eliminate state and local governments with some kind of sovereign immunity from the railbanking program and insist that the industry instead rely on possibly underfunded private entities to provide public bikeways. The agency does not exclude state or local governments from owning railroads if they have sovereign immunity, even if the liability of rail operation is generally regarded as significantly greater than the liability of operation of a trail. It is particularly strange if a state with sovereign immunity owning a rail line cannot railbank the rail line with another entity with sovereign immunity.

MCT is unaware of any complaints from the rail industry that state or local governments with sovereign immunity are operating railbanked trails that are imposing burdens on the rail industry. If the agency (or a railroad) has evidence of any such burden, MCT respectfully requests that the agency (or railroad) produce the evidence for comment. Until there is evidence of a problem, the agency should not impose requirements that go well beyond the language of the statute, do not serve its intent, do not address

any identified problem, and appear to ignore the common law of property and tort.

5. Indirect notification of CITU's/NITU's to reversionary property owners. The agency's policies concerning newspaper notice have been upheld by the Courts of Appeals. The agency does not propose any new rule in this regard, but notes that NARPO, which opposes railbanked trails, claims that more notice is constitutionally required due to Tucker Act limitations. NARPO cites no case so holding. The transfer and abandonment of rail lines have been regulated by this agency or its predecessor for decades. In no instance has this agency required personal notice to all entities or individuals claiming an interest in adjoining property. The mere act of identifying such parties would take months and greatly increase the cost of abandonment proceedings. The time-honored approach has been that adjoining landowners are responsible to be aware of federal regulation. In addition to newspaper notice of abandonment or railbanking proceedings, STB maintains a user-friendly website encompassing all filings and decisions in rail transfer and abandonment proceedings. Any person can receive notice and filings by applying to STB to be made a party to a proceeding. There is no non-burdensome way to provide additional notice on an individual basis to property claimants in railroad rights of way, especially in the timeframes provided in any of the various forms of STB

abandonment proceedings. In addition, if the agency were to impose an individual notice requirement, and the process server missed someone, then the entire proceeding might have to be redone if that person some years later objected. Parties suggesting individual notice are simply seeking to burden the railbanking process so that railroads will seldom if ever consent to railbanking because of the time and expense of providing notice. If the agency were to require individual notice in railbanking situations, then it should require individual notice in all abandonments and rail transfer proceedings. Any such proceedings could affect the interests of an adjoining landowner as much or more than the subset possibly involving railbanking.

III. Conclusion

MCT appreciates this opportunity to provide comment, and reserves its right to reply.

Respectfully submitted,

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