

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 690

TWENTY FIVE YEARS OF RAIL BANKING
A REVIEW AND LOOK AHEAD

CNJ RAIL CORPORATION

WRITTEN TESTIMONY OF
ERIC S STROHMEYER

On behalf of CNJ Rail Corporation, I would like to thank the Board for hosting this forum to review the effectiveness and impact of Section 8(d) of the National Trails System Act.

Statement of Interest in the Proceeding

As the Board is well aware, CNJ Rail Corporation has been actively involved in a number of recent abandonment proceedings before the Board, and the undersigned has, on a number of occasions, in testimony previously submitted in other proceedings, has spoke directly on CNJ's concern about loss of the system around the "fringe". In addition, CNJ has been, and is currently active in working with various parties to restore rail service over portions of out of service rail lines. We respectfully present our testimony today in furtherance of our organization's efforts to preserve the national rail network. Because the National Trails Act was designed by Congress to facilitate a goal we wholeheartedly embrace - the preservation of rail corridors for future rail needs - we thank the Board for holding this hearing today and hope our testimony can add to the Board's discussion and conclusions in this proceeding.

In accordance with the Board's Notice in this proceeding, CNJ is prepared today to

discuss any and all of the subjects outlined in the Board's decision. While we may not specifically address all the issues outlined in the decision herein in writing, we are fully prepared to address those question today. More importantly, we would like to focus our testimony on some of our issues and concerns outlined herein below.

Rail Trail - still a Line of Railroad

The first issues CNJ would like to address today is a topic the Board, and the ICC before it, has ruled on previously. It is an issue we feel needs emphasizing today; The legal status of a rail banked corridor. While the Board has well established precedent in this regard, CNJ would like the Board to reemphasize and uphold its previous findings that a rail trail is still subject to the Boards jurisdiction.

To CNJ, it still appears that many parties have this misguided believe that once this Board issues either a CITU or a NITU that the status of the line miraculously changes into something other than what it is: *a line of railroad still subject to this Board's jurisdiction*. CNJ urges this Board to remind the various parties involved in rails to trails project around the country to be mindful of this fact. Many parties today believe that once either a CITU or and NITU are issued, the line ceases to be a line of railroad and becomes something else, a trail. Legally, that is not accurate.

One must remember the processes being invoked. ***The Boards abandonment authority is permissive.*** The Board's regulations require a carrier to formally indicate its desire to utilize that authority by filing with the Board a notice of consummation. However, the issuance of either a CITU or a NITU is, legally, a barrier to consummation. Therefore the rail carrier is barred from exercising fully the authority it was granted.

The issuance of a CITU or NITU does act legally like a *discontinuance of service proceeding*. It does allow the carrier to be relieved of its obligation to provide service upon reasonable demand along the line and it does allow a carrier to remove its track from the right of way. However, it does bar the carrier from exercising fully its abandonment authority.

If there is a legal barrier to consummation, the carrier can not execute its authority. The line still remains a line of railroad subject to the jurisdiction of this Board. CNJ hopes the Board reemphasizes this point in its conclusions in this proceeding.

Because CNJ believes these trails are still legally lines of railroad, that conclusion then shapes our next series of issues we would like to explore with the Board today. These are issues that will likely become issues in the future and we feel need to begin to be discussed today. While our testimony herein is not comprehensive, we believe it can help shape the discussion and dialogue over the issues we raise herein below.

Trail to Rails - Issues Regarding Reactivation

Issue 1: Reactivation of rail service is not new construction

This Board, and the ICC before it, have held that reactivation of previously rail banked lines did not trigger the new construction provisions of 49 USC 10901. We urge the Board to reaffirm those precedents in any conclusion that the Board reaches in this proceeding. CNJ is very concerned that any Board decision that undermines those well established precedents will have an adverse impact on future of rail banking on general.

Issue 2: Trail use agreements should be carefully scrutinized by the Board..

The Board specifically has asked for input on whether a carrier should be required to submit a copy of the trail use agreement to the Board. CNJ believes that carriers should be required to submit copies of the trail use agreements to the Board for inclusion in the record.

In addition to submitting a copy of the trail use agreements, those agreements also need to be scrutinized by the Board to ensure that those agreements do not convey enough control or interest, by their construction, to allow a trail user to prohibit or significantly impede the restoration of rail service over the corridor. In some cases, the underlying real estate for the right of way and other assets may be conveyed to the trail operator. CNJ would urge the Board to be mindful of those agreements and make sure they comply with existing Board precedent.

Remember, since the line is legally not abandoned, the carriers may be conveying assets to trail operators that are critical to railroad operations, such as title to the land under the right of way. These transactions should be scrutinized much like the Board, and the ICC did, in the *State of Maine* and *Wisconsin DOT* cases and the numerous cases that have been based on those two decisions.

Issue 3: Impact and use of 49 USC 10907 for compelling reactivation of a railbanked line.

In researching cases for this proceeding, it became clear to CNJ that when Congress first made the modifications to the Trails Act that are being discussed here today, they did not have a clear picture on how the process should be reversed.; i.e what procedures should be used to turn the corridors back into active rail lines again. As such, the regulations promulgated to date did not adequately address such concerns as who may seek reactivation, or for what reasons rail service may seek to be re-instituted over a rail banked line.

Today, the nations rail network is vastly different from the one Congress was familiar with back in 1983 when it passed this legislation. Mergers and acquisitions have left shippers with stronger healthier carriers capable of meeting their needs. However, the downside was the loss of competitive options for some shippers and certain regions of the country are now heavily dominated by just one the nations 7 Class 1 railroads.

In addition, railroads presently have vastly different objectives today then they did 25 years ago. The concentration of market power, combined with the today's efforts by the railroads

to seek additional government sponsored investment in infrastructure, or a concern over a competitive shift in the market place, produce an environment that might lead a carrier to not seek reactivation of a rail banked for reason that may not be obvious at first glance.

Because the OFA provisions will have long since passed when many of these trails might be needed as rail lines again, and absent a voluntary agreement with the railroad retaining the residual common carrier obligation, the only provision currently available to effected shippers, railroads, or other effected parties, would be to use the provisions of 49 USC 10907 to compel the sale of the residual common carrier obligation in order to seek reactivation of a rail banked line.

However, to use those provisions to compel or facilitate a reactivation of a rail banked line, while legally possible, might be viewed by some as going way beyond the intent of Congress when it passed those regulations many years ago. However, absent clear instruction from Congress, the Board has the ability to interpret and apply those statutes themselves.

Because CNJ believes the Board has the ability to recognize the unique circumstances of today, and has a mechanism it can use to possibly address issues related to competitive access, CNJ urges the Board to solicit debate on the subject of possibly using rail banked corridors as a mechanism to providing relief for captive shippers and / or competitively restrained sections of the country.

Should the Board decide to review the possibility of using the feeder line provisions of 49 USC 10907 to compel an unwilling carrier to divest themselves of those residual common carrier obligations when they may not be inclined to permit reactivation of a rail banked corridor if they perceive that corridor as being used by a competing carrier to gain access to captive shippers, CNJ hopes that the Board will keep open this proceeding long enough to permit parties to weigh in on the subject and facilitate a robust debate about this topic.

Need for Rulemaking

CNJ Rail urges the Board to consider instituting a limited rule making proceeding to address all, or some, of the concerns mentioned above. Requiring carriers to submit trail agreements would not pose a significant burden on the carrier, since most carriers usually always submit a letter to the Board indicating a trail use agreement has been reached.. To include a copy of the trail agreement would pose minimal additional costs.

Furthermore, CNJ requests that the Board consider developing a minimum standard for a trail use agreement to avoid extensive additional legal expenses. In addition, where a carrier is conveying significant assets to the trail operator, CNJ respectfully asks that the Board review those conveyances like it would a *State of Maine* type case.

In addition, CNJ would like the Board to explore and address what options a shipper, another railroad, or other party wishing to seek reactivation of a rail banked line might have if a voluntary agreement with a carrier who holds the residual common carrier obligation can not be reached. CNJ would hope that the Board might possibly consider holding open the proceeding a

little longer to allow other parties to weigh in on some of the issues we raised in our testimony today.

Once again, CNJ thanks the Board for holding this hearing today. We are prepared to answer any questions you may have.

Executed on behalf of CNJ Rail Corporation,

Respectfully submitted,

Eric S. Strohmeyer /s/

Eric S Strohmeyer
Vice President, COO

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