

**TIMOTHY E. PETERSON
ATTORNEY AT LAW**

225428

5126 South Harlan Street, Indianapolis, IN 46227 (317) 409-9925

July 30, 2009

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
Mercury Building
395 E Street, S. W.
Washington, DC 20423-0001



RE: Second Motion to Supplement the Record for Petition to Transfer Holder of Notice of Interim Trail Use/Trail Manager/Responsible Party Status for the Nickel Plate Trail Submitted to the Surface Transportation Board June 4, 2009 (the Former Norfolk Southern Railway/Norfolk & Western Railway); Status Granted in STB Docket No. AB-290 (Sub-No. 168X), Norfolk and Western Railway Company - Abandonment Exemption - Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, Indiana

Dear Ms. Quinlan:

Enclosed please find the following pleading: An original and ten copies of a "Second Motion to Supplement the Record for Joint Motion of the Indiana Trails Fund, Inc., the Nickel Plate Trail, Inc. and Hoosier Rails to Trails Council, Inc. for Substitution of New Holder of Interim Trail Use/Trail Manager/Responsible Party Submitted to the Surface Transportation Board June 4, 2009."

Also, please consider this letter to be my appearance in the above captioned proceeding, as an attorney in good standing with the Indiana Supreme Court, Attorney number 14927-49, on behalf of the Hoosier Rails to Trails Council, Inc., Indiana Trails Fund, Inc. and the Nickel Plate Trail, Inc. The addresses of these parties are as follows:

Mr. Richard Vonnegut, President
Indiana Trails Fund, Inc.
P. O. Box 402
Indianapolis, IN 46206-0402

Professor Emeritus Donald E. Sporleder, FAIA, Chair
c/o Richard Vonnegut, Vice Chair
Hoosier Rails to Trails Council, Inc.
P.O. Box 402
Indianapolis, IN 46206-0402

Mr. Michael Kuepper, President
Nickel Plate Trail, Inc.
206 North Cass Street
P. O. Box 875
Peru, IN 46970

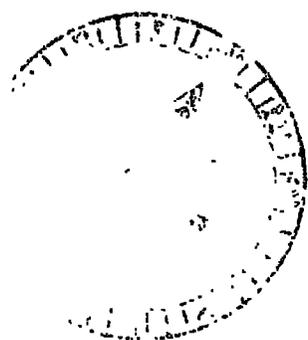
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Office of Proceedings

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Part of
Public Record

Please note the following change in one recipient, the Texas Railroad Commission, on the service list for this docket. In reply to our past two mailings to the service list for this petition, I was called by Mr. Bob Jackson (below), who informed me that the Texas Railroad Commission was merged into the Texas Department of Transportation and that further mailings should be sent to him at the following address:

Texas Railroad Commission
c/o Texas Department of Transportation
Bob Jackson
Office of General Counsel
125 East 11th Street
Austin, TX 78701-2483

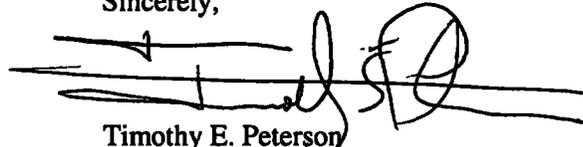


Anne K. Quinlan
July 30, 2009
Page 2

I note this change to facilitate updating the service list for this docket and other applicable dockets on the STB's Website.

Thank you for your consideration of this second motion to supplement the record for the above joint petition. The parties ask that processing of this request be expedited so as to enable the Nickel Plate Trail, Inc. to apply for grant funding in a few weeks. Please call me if you have any questions at 317-409-9925.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy E. Peterson', written over a horizontal line. The signature is stylized and includes a large circular flourish on the right side.

Timothy E. Peterson
Attorney for the Petitioners

TEP:lw

cc: Richard C. Vonnegut
Donald E. Sporleder
Michael. Kuepper
All Parties of Record
Files

Before the Surface Transportation Board

Norfolk and Western Railway Company –)
Abandonment Exemption – Between Kokomo)
and Rochester in Howard, Miami, and Fulton) **AB-290 (Sub-No. 168X)**
Counties, Indiana)
_____)

**Second Motion to Supplement the Record in the Joint Petition of
the Indiana Trails Fund, Incorporated,
the Nickel Plate Trail, Incorporated,
and the Hoosier Rails to Trails Council, Incorporated,
for Substitution of New Holder of Interim Trail Use / Trail Manager / Responsible Party
Submitted to the Surface Transportation Board July 30, 2009**

Comes now the Hoosier Rails to Trails Council, Inc. (“HRTC”), the Indiana Trails Fund, Inc. (“ITF”), and the Nickel Plate Trail, Inc. (“NPT”) to move the Surface Transportation Board (“STB”) to permit them to further supplement the Joint Petition of the Indiana Trails Fund, Incorporated and the Nickel Plate Trail, Incorporated for Substitution of New Holder of Interim Trail Use / Trail Manager / Responsible Party (“Joint Petition”)¹ filed on June 4, 2009 to transfer trail manager status to the NPT. In support of said motion, the joint petitioners set forth the following:

1. In its decision and notice served May 14, 1996, the STB authorized the issuance of a Notice of Interim Trail Use (“NITU-1” attached to the Joint Petition as Exhibit A), which made the right-of-way of the Norfolk and Western Railway Company (“N&W”) subject to various conditions, including employee protective provisions, “. . . environmental, interim trail use/rail banking, and public use conditions” on seventeen miles of the right-of-

¹In a subsequent filing, the HRTC joined in said motion and moved to supplement the record with respect to its participation in the operation of the trail subject to the Joint Petition on June 27, 2009.

way from milepost I-57.2 to milepost I-74.2 between a point near Kokomo and a point at Peru, Indiana. See NITU-1 at 2 & 4.

2. Subsequently, the Norfolk Southern Railway Company (“NSR”), the successor railroad to the N&W, conveyed in two quitclaim deeds the right-of-way to the ITF between milepost I-58.5 and I-59.4 in Howard County (See Exhibit C attached to the Joint Petition. Please note that the property descriptions read beginning at the north at milepost I-59.4 and then south to milepost I-58.5) and the right-of-way between milepost I-59.4 to milepost I-72.7 in Miami County, Indiana (See Exhibit D, “Parcel 1” attached to the Joint Petition. Please note that the property description reads from south at milepost I-59.4 to north at milepost I-72.7).

3. In response to a subsequent adjudication, the STB denied petitions filed by adjacent landowners for reconsideration, and to reopen and revoke NITU-1. The petitions claimed, inter alia, that the right-of-way had been severed from the interstate rail system at mileposts I-57.2 to milepost I-58.5, and at milepost I-72.7 to milepost I-74.2. In a decision served May 4, 2005, the STB made the following findings and conclusions in denying the petitions to revoke NITU-1:

- A. **Milepost I-57.2 to I-58.5.** The STB determined that it still retained jurisdiction over this segment because NSR had conveyed a section of its right-of-way to the Central Railroad Company of Indianapolis (“CERA”), including the portion from milepost I-57.2 to milepost I-58.5 in Howard County, Indiana as “industrial track” (See Norfolk and Western Railway Company – Abandonment Exemption – Between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN, STB Docket No. AB-290 (Sub No. 168X) (STB served May 4, 2005), attached hereto as Joint Petitioners’ Exhibit I (hereinafter referenced as the “May 4, 2005 Decision”). With respect to this segment, the STB concluded that “. . . it is clear that this segment could continue to be used for rail purposes, and therefore could provide a connection between the remainder of the southern segment (The STB’s shorthand description for the right-of-way between milepost I-57.2 and milepost

I-72.7) to the national transportation system. . . ”

See May 4, 2005 Decision at 11 (citations omitted).

- B. **Milepost I-72.7 to I-72.8.** The STB refrained from determining whether the ownership--which was disputed-- of this segment amounted to a severance of the right-of-way from the interstate rail system. Due to the willingness of the parties involved to provide a connection between the right-of-way owned by the ITF and the interstate rail system, the STB concluded that “. . . [I]t is possible that rail service could be restored over this 0.1-mile segment. . . . We need not decide here whether such a voluntary arrangement satisfies the requirements of the Trails Act, because we have already concluded that the southern segment is connected to the national rail transportation system....

See May 4, 2005 Decision at 12 (reference omitted).

- C. **Milepost I-72.8 to I-74.2.** The 1.4 mile segment is still an active component of the interstate rail system and owned by NSR.

See May 4, 2005 Decision at 10.

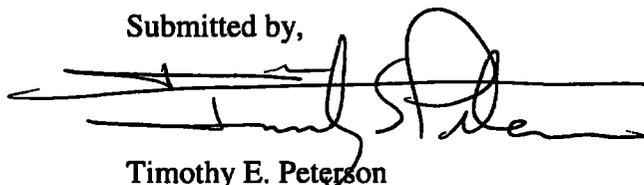
4. The following is a summary of the seventeen (17) miles of the NSR right-of-way rail banked by the ITF in the NITU-1 issued by the STB on April 26, 1996. (See Joint Petition, Petitioners’ Exhibit A):

MILEPOSTS	SUMMARY OF STATUS	MILES
I-57.2 - I-58.5	Still active part of interstate rail system	1.3
I-58.5 - I-59.4.	Owned by the ITF as a trail in Howard County	0.9
I-59.4 - I-72.7	Owned by the ITF as a trail in Miami County	13.3
I-72.7 - I-72.8	Still available to establish a connection to interstate rail system	0.1
I-72.8 - I-74.2	Still active part of interstate rail system	<u>1.4</u>
	TOTAL MILES	17.0

5. A search of the filings and decisions in Docket No. AB-290 (Sub-No. 168X) reveals no substantial changes since the rendering of the May 4, 2005 Decision.

WHEREFORE, The Joint Petitioners respectfully request that STB find that it still has jurisdiction over the right-of-way subject to NITU-1, and that it reopen this proceeding for the sole purpose of transferring the Holder of Interim Trail Use / Trail Manager / Responsible Party status under NITU-1 from the ITF and HRTC to the NPT in accordance with the procedures of 49 CFR 1152.29(f).

Submitted by,

A handwritten signature in black ink, appearing to read 'Timothy E. Peterson', is written over a horizontal line. The signature is stylized and cursive.

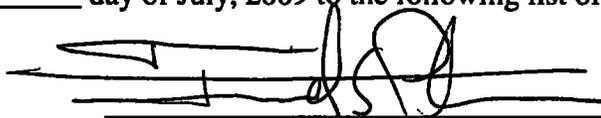
Timothy E. Peterson
Attorney at Law
5126 South Harlan Street
Indianapolis, Indiana 46227

**Surface Transportation Board Docket No. AB-290 (Sub-No. 168X)
Case Title: NORFOLK AND WESTERN RAILWAY COMPANY - ABANDONMENT
EXEMPTION - BETWEEN KOKOMO AND ROCHESTER IN HOWARD, MIAMI AND
FULTON COUNTIES, IN**

Certificate of Service

The undersigned hereby certifies that a copy of the of Second Motion to Supplement the Record for the Joint Petition of the Indiana Trails Fund, Incorporated, the Nickel Plate Trail, Incorporated and Hoosier Rails to Trails Council, Incorporated for Substitution of New Holder of Interim Trail Use/Trail Manager/Responsible Party in Surface Transportation Board Docket No. AB-290 (Sub-No. 168X) Submitted to the Surface Transportation Board June 4, 2009 was

mailed via first class mail on the 30th day of July, 2009 to the following list of recipients.



Timothy E. Peterson, Attorney at Law

Jul 30th, 2009
Date

Party of Record	Filed by:	Nels Ackerson Ackerson Kauffman Fex PC 1250 H Street, NW Suite 850 Washington, DC 20005
	Filed for:	William C. Friend, Steven Furnivall and Linda Schanlaub
Party of Record	Filed by:	Eric Bolton Ackerson Kauffman Fex, PC 1250 H Street, NW, Suite 850 Washington, DC 20005
Party of Record	Filed by:	Howard P. Cohen 17 Rollins Rd. Warwick, RI 02886
Party of Record	Filed by:	Howard R. Cohen Locke Reynolds 1000 Capital Center South 201 North Illinois Street Indianapolis, IN 46204
	Filed for:	Indiana Trails Fund, Inc.

Party of Record	Filed by:	Daniel R. Elliott III United Transportation Union 14600 Detroit Avenue Cleveland, OH 44107-4250
Party of Record	Filed by:	Cecilia Fex Ackerson Kauffman Fex 1250 H Street NW Suite 850 Washington, DC 20005
	Filed for:	William C. Friend
Party of Record	Filed by:	Thomas F. McFarland Thomas F. Mcfarland, P.C. 208 South Lasalle St., Suite 1890 Chicago, IL 60604
Party of Record	Filed by:	Charles H. Montange 426 NW 162nd Street Seattle, WA 98177
	Filed for:	Nickel Plate Trail, Inc.
Party of Record	Filed by:	Norfolk & Western Railway Co. Three Commercial Place Norfolk, VA 23510-2191
Party of Record	Filed by:	James R. Paschall Norfolk Southern Railway Company Three Commercial Place Norfolk, VA 23510-9241
	Filed for:	Norfolk Southern Railway Company
Party of Record	Filed by:	Donald J. Tribbett Starr Austen Tribbett Myers & Miller 201 S. Third Street Logansport, IN 46947
Party of Record	Filed by:	Richard C. Vonnegut P. O. Box 402 Indianapolis, IN 46206-0402
Non-Party	Filed by:	Governor of Indiana State Capitol Indianapolis, IN 46204

Non-Party **Filed by:** **Governor of Texas
State Capitol Building
Austin, TX 78711**

Non-Party **Filed by:** **Kyle J. Hupfer
Indiana Division of Historic Preservation
402 W. Washington Street, W274
Indianapolis, IN 46204-2748**

Non-Party **Filed by:** **Indiana Department of Environmental Management
Indiana Government Center- North
100 North Senate Avenue
Indianapolis, IN 46204**

Non-Party **Filed by:** **Indiana Department of Natural Resources
Division of Water
402 West Washington Street
Indianapolis, IN 46204**

Non-Party **Filed by:** **Indiana Department of Transportation
Railroad Section
100 N Senate Ave., 1GC-N, Room N901
Indianapolis, IN 46204**

Non-Party **Filed by:** **Natural Resources Conservation Service
U.S. Department of Agriculture
Poage Federal Building
101 South Main Street
Temple, TX 76501-7685**

Non-Party **Filed by:** **Natural Resources Conservation Service
U.S. Department of Agriculture
6013 Lakeside Blvd.
Indianapolis, IN 46278**

Non-Party **Filed by:** **Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087**

Non-Party **Filed by:** **Texas Office of Budget, Planning, and Policy
P.O. Box 12428
Austin, TX 78711-2428**

Non-Party	Filed by:	Texas Public Utility Commission P. O. Box 13326 Austin, TX 78711-3326
Non-Party	Filed by:	Texas Railroad Commission c/o Texas Department of Transportation Bob Jackson Office of General Counsel 125 East 11th Street Austin, TX 78701-2483
Non-Party	Filed by:	U.S. Army Corps of Engineers Galveston District P.O. Box 1229 Galveston, TX 77553-1229
Non-Party	Filed by:	U.S. Fish and Wildlife Service Ecological Services Field Office Stadium Centre Bldg. 711 Stadium Drive E, Suite 252 Arlington, TX 76011-6247
Non-Party	Filed by:	U.S. Fish and Wildlife Service 620 S. Walker Street Bloomington, IN 47403-2101
Addition to STB Service List		James R. Walker, Mayor City of Peru 35 South Broadway Peru, IN 46970
Addition to STB Service List		Michael R. Fitch, P.E. LPA Review Engineer Consultant Services Section Fort Wayne District Indiana Department of Transportation 5333 Hatfield Road Fort Wayne, IN 46808
Addition to STB Service List		Bob Bronson, Chief Grants Section Division of Outdoor Recreation Indiana Department of Natural Resources 402 West Washington Street, Room W271 Indianapolis, IN 46204

EXHIBIT I

34723
EB

SERVICE DATE – LATE RELEASE MAY 4, 2005

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY–ABANDONMENT
EXEMPTION–BETWEEN KOKOMO AND ROCHESTER IN HOWARD, MIAMI, AND
FULTON COUNTIES, IN

Decided: May 3, 2005

This decision denies petitions for reconsideration filed by adjacent landowners claiming that the Board committed material error by issuing a Notice of Interim Trail Use (NITU) authorizing rail banking/interim trail use under 16 U.S.C. 1247(d) (Trails Act) in this proceeding in March 2004. The decision also denies petitions to reopen and revoke the NITU issued in May 1996 for a different portion of this railroad right-of-way.

BACKGROUND

By decision and NITU served on May 14, 1996 (1996 Decision or 1996 NITU),¹ the Board granted an exemption under former 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10903 to allow what is now Norfolk Southern Railway Company (NSR)² to abandon 38.4 miles of rail line between Kokomo (at milepost I-57.2) and Rochester (at milepost I-95.6), IN, and for Central Railroad Company of Indianapolis (CERA) to discontinue service over approximately 51.4 miles of rail line between Kokomo (at milepost I-57.2) and Argos (at milepost I-108.6), IN.

Requests for a NITU had been filed by the Hoosier Rails-To-Trails Council, Inc. and Indiana Trails Fund, Inc. (ITF) under 49 CFR 1152.29 for the entire 38.4 miles of railroad right-of-way between Kokomo and Rochester, and NSR had agreed to negotiate with the potential trail sponsors. In the 1996 Decision, the Board issued a NITU for the 17-mile southern segment of

¹ The 1996 Decision also embraced Docket No. AB-289 (Sub-No. 3X), Central Railroad Company of Indianapolis–Discontinuance of Service Exemption–Between Kokomo and Argos in Howard, Miami, Fulton, and Marshall Counties, IN.

² Effective September 1, 1998, NSR, through merger, became the successor to Norfolk and Western Railway Company (N&W). See Norfolk Southern Railway Company–Merger Exemption–Norfolk and Western Railway Company, STB Finance Docket No. 33648 (STB served Aug. 31, 1998). For the sake of convenience, we shall refer to N&W as NSR throughout this decision.

the right-of-way between Kokomo (at milepost I-57.2) and Peru (at milepost I-74.2). However, because Indiana Hi-Rail Corporation (IHRC) (which was operating in bankruptcy)³ still had trackage rights over the 21.4-mile segment of line between Peru and Rochester, the abandonment authority could not be exercised for that segment until the bankruptcy court authorized the discontinuance of IHRC's trackage rights, and the Board concluded that it would be premature to issue a NITU for that portion of the line. NSR was directed to inform the potential trail sponsors if and when IHRC's trackage rights were discontinued, and the Board "reserved jurisdiction to impose a trail use condition for this line segment if an appropriate request [was] made following IHRC's discontinuance." 1996 Decision at 4. The Board stated that, if no trail use condition was sought within 10 days after NSR notified the potential trail sponsors of IHRC's discontinuance, NSR "may complete the abandonment process as to that portion of the line." Id.

IHRC received discontinuance authority for its trackage rights from the bankruptcy court on December 18, 1997.⁴ NSR then executed an interim trail use agreement with ITF for 14.2 miles of the southern segment (from mileposts I-58.5 to I-72.7) and for 20.1 miles of the northern segment (from milepost I-75.5 to I-95.6) on August 31, 1998, and ITF acquired those portions of the right-of-way in January 1999. NSR states that it exercised its authority to abandon a 1.3-mile segment (between mileposts I-74.2 and I-75.5) referred to here as the Northern Peru segment. The carrier explains that the southernmost 1.3-mile portion of the southern segment (between mileposts I-57.2 and I-58.5) has not been abandoned and remains available to serve a Chrysler plant at Kokomo in the event Chrysler requests rail service.

Despite having entered into an interim trail use arrangement with NSR for the 20.1-mile northern segment, ITF inadvertently failed to make a formal request for a NITU for that portion of the right-of-way until February 20, 2004. Because NSR had not consummated the abandonment of the northern segment and the requirements for a NITU had been met, we issued a NITU for that segment (between mileposts I-75.5 and I-95.6) by decision and NITU issued on March 10, 2004 (2004 Decision or 2004 NITU).

On March 30, 2004, William C. Friend, Steven Furnivall, and Linda Schanlaub—landowners who reside along the northern segment—filed a timely petition under 49 CFR 1115.3 for reconsideration of the 2004 Decision. They claim that NSR consummated the abandonment of this segment prior to the issuance of the 2004 NITU and that the Board, therefore, lacked jurisdiction to issue the NITU for that portion of the right-of-way. On April 19, 2004, petitioners supplemented their petition to argue that the 1996 NITU for the 17-mile southern segment should be revoked on the grounds that the trail sponsor is not fit and that

³ See In Re: Sagamore National Corporation and Indiana Hi-Rail Corporation, Case No. IP94-08502-RLB-11 (Bankr. S.D. Ind.).

⁴ See Indiana Hi-Rail Corporation Trustee's Amended Plan of Reorganization and Disclosure Statement, STB Finance Docket No. 33491 (STB served Dec. 12, 1997).

segment has been severed from the interstate rail system. Sam Hoover, another adjacent landowner, filed a separate petition on April 19, 2004, making similar arguments. On May 10, 2004, NSR and ITF submitted separate replies.

PRELIMINARY ISSUES

Petitioners' motion to add Armstrong. On May 19, 2004, petitioners Friend, Furnivall, and Schanlaub filed a motion requesting that another landowner, Tedd Armstrong who had supplied an affidavit attached to their petition for reconsideration, be added as a named party to the petition. In a reply submitted on May 27, 2004, ITF (the current trail sponsor) and Nickel Plate Trail, Inc. (Nickel Plate)— an organization that evidently plans to replace ITF as the trail sponsor in the near future under the procedures of 49 CFR 1152.29(f)— opposed the motion. They argue that Mr. Armstrong does not have standing to challenge the 2004 Decision, which addressed interim trail use on the 17-mile northern segment, because Mr. Armstrong resides along the southern segment of the right-of-way.

Because the history of the two segments in dispute here is based in the same series of facts and evidence, and all the challenging landowners live in the vicinity of both segments, it is best if all challenges to these segments are examined simultaneously, rather than separately. Moreover, adding Mr. Armstrong to the group of petitioners will not unduly disrupt or prolong this proceeding or unduly broaden the issues that have been raised. Therefore, we grant the motion to add Mr. Armstrong to the group of petitioners.

Nature of the Petitions. NSR and ITF object to the attempt by petitioners Friend, Furnivall, Schanlaub, and Armstrong to embrace the 1996 Decision (addressing the southern segment) in their supplemented petition for reconsideration filed April 19, 2004. They note that the 20-day time period for seeking reconsideration of the 1996 Decision has long expired. They assert that both the portion of that joint petition addressing the 1996 Decision and the untimely Hoover petition should be treated as a petition to reopen under 49 CFR 1115.4, not a petition for reconsideration under 49 CFR 1115.3.

The distinction is significant. As NSR notes, petitions to reopen are subjected to a higher level of scrutiny than a timely filed petition for reconsideration, because of the need to balance concerns of administrative finality, repose, and detrimental reliance against whatever factors may favor reopening. In addition, as ITF notes, the availability of judicial review of a Board decision denying a petition to reopen is more limited than judicial review of a Board decision addressing a petition for reconsideration. See ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 311 (1987); Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663 (9th Cir. 1989).

We find that petitioners' supplemented petition is a proper, timely filed petition for reconsideration under 49 CFR 1115.3 to the extent that it challenges the 2004 Decision. The petitioners had requested an opportunity to submit additional "evidence and/or arguments on the

issues presented in [their original] petition, and on any additional issues that may prove relevant to the matter on which reconsideration is sought.” The Board granted this request in a decision served April 6, 2004, and extensions of the 20-day period for seeking reconsideration (not to exceed 20 days) are expressly permitted by the Board’s regulations at 49 CFR 1115.3(e). Therefore, to the extent that they address the 2004 Decision, the additional arguments raised in the April 19, 2004 supplemental pleading were properly submitted as a petition for reconsideration.

However, petitioners’ challenges relating to the 1996 Decision must be treated as a petition to reopen. The petitioners suggest that they can seek reconsideration of the 1996 Decision now because the 2004 NITU merely affirmed the 1996 NITU. But while the two NITUs were issued in the same docket, the record here shows that the two NITUs were issued independently for different segments of this railroad right-of-way. Thus, petitioners cannot use a timely petition for reconsideration of the 2004 Decision to raise arguments about the 1996 Decision that could have been raised earlier. Accordingly, petitioners’ challenges to the 1996 Decision will be treated as a petition to reopen.

Finally, the April 6, 2004 extension decision did not apply to petitioner Hoover. Accordingly, his petition was not a timely petition for reconsideration, and, therefore, it will be treated as a petition to reopen.

DISCUSSION AND CONCLUSIONS

I. The Board’s Role Under The Trails Act.

The Trails Act “is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails.” Preseault v. ICC, 494 U.S. 1, 5 (1990) (Preseault). Under the Trails Act, the Board must “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor agrees to assume full managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001) (CART). The statute expressly provides that “if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for [any] purposes . . . as an abandonment . . .” 16 U.S.C. 1247(d). Instead, the right-of-way is “rail banked,” which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail service provider) may reassert control over the right-of-way to restore service on the line in the future. See Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996) (Birt); Iowa Power–Const. Exempt.–Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990) (Iowa Power); 49 CFR 1152.29.

The Board's role under the Trails Act is limited and ministerial. See CART; Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). Our only responsibility when a request for a NITU is filed is to confirm that the trail sponsor agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service. 16 U.S.C. 1247(d); 49 CFR 1152.29(a)(3). We do not decide whether interim trail use is desirable for a particular line. Moreover, we have no involvement in the type, level, or condition of the trail that is used for a particular right-of-way, and we are not authorized to regulate activities over the actual trail. See Georgia Great Southern Division – Abandonment and Discontinuance Exemption – Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA, Docket No. AB-389 (Sub-No. 1X) (STB served May 16, 2003) (Georgia Great Southern) at 5-6. We have authority to revoke a trail condition only if it is shown that the statutory requirements are not being met (i.e., the Trails Act was not available or the trail sponsor is not meeting its financial obligations for the property and its use as a trail). See Jost v. STB, 194 F.3d 79, 89-90 (D.C. Cir. 1999) (Jost); Central Kansas Railway, Limited Liability Company–Aband. Exemption–In Marion and McPherson Counties, KS, STB Docket No. AB-406 (Sub-No. 6X) (STB served Dec. 8, 1999) (Central Kansas I) reconsid'n denied (STB served May 8, 2001) (Central Kansas II); Idaho Northern et al.–Abandonment & Discon. Exemption, 3 S.T.B. 50 (1998) (Idaho Northern).

II. Authority to Issue a NITU for the 20.1-Mile Northern Segment (milepost I-75.5 to I-95.6) in the 2004 Decision.

The petitioners argue that the Board committed material error in the 2004 Decision, as, in their view, the Board no longer had authority to issue a NITU for the northern segment. Specifically, the petitioners allege that NSR had fully exercised its authority to abandon this segment, or, alternatively, that this segment had been severed from the interstate rail network prior to the 2004 Decision and thus was no longer available for rail banking under the Trails Act. We will address petitioners' arguments in turn.

A. The Consummation Issue

Abandonment authority issued by the Board is permissive, not mandatory. To exercise that authority and "consummate" an abandonment, some further action is needed by the railroad manifesting a clear intent to abandon in order for the property to be removed from the agency's jurisdiction.⁵ See Birt, 90 F.3d at 585-86. In determining whether a railroad has abandoned a

⁵ When the request to abandon this line was filed, there was no requirement that a railroad consummate abandonment authority within a set time period. Under current Board regulations, a railroad choosing to exercise abandonment authority must file a notice of consummation with the Board within 1 year. 49 CFR 1152.29(e)(2). See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996), modified, 2 S.T.B. 311

(continued...)

line, “one must focus on the railroad’s objective intent.” See Becker v. STB, 132 F.3d 60 (D.C. Cir. 1997) (Becker). There is no rigid formula for determining intent; rather, the Board examines the broad spectrum of facts in each case. Birt, 90 F.3d at 585.

Petitioners argue that NSR intended to consummate abandonment of the northern segment prior to the 2004 Decision. Petitioners note that, in the deeds conveying the rights-of-way to ITF for interim trail use, the phrase “now abandoned” is used. Petitioners also attach an affidavit from petitioner Schanlaub in which she claims that parts of the track from the northern segment were removed in August or September 1997, before NSR and ITF entered into their interim trail use agreement in 1998. According to petitioners, these facts show an intent by NSR to fully abandon the northern segment, rather than convey the line for rail banking/interim trail use under the Trails Act. Pursuant to the court’s decision in Becker, petitioners maintain, the Board should therefore find that it lost jurisdiction over the property prior to the 2004 Decision.

But the record before us here shows that NSR’s consistent intent since 1996, when this proceeding began, has been for the northern segment to be rail banked. NSR specifically agreed in 1996 to negotiate for interim trail use over the entire line,⁶ and it consented to every trail use negotiation or extension request. NSR executed its Trails Act agreement with ITF prior to the expiration of the last NITU extension and never indicated that it intended to consummate abandonment of any portion of the line (other than the Northern Peru segment, which was not part of either the 1996 or 2004 NITU). Thus, this case is nothing like Becker, where the railroad had specifically stated that it would not agree to an extension of the NITU. It also differs from RLTD Ry. v. STB, 166 F.3d 808 (6th Cir. 1999), where the line was no longer linked to the interstate rail system at the time abandonment authority was sought.

Furthermore, as NSR notes, the deeds specifically conveyed the property to ITF for rail banking/interim trail use under the Trails Act. Although petitioners are correct that the deeds contain the phrase “now abandoned,” NSR explains that use of this phrase was a drafting error and was intended only to refer to the fact that service over the line had ceased. In Birt, similar careless use of the term “abandoned” was not enough to demonstrate that the property was no longer part of the national transportation system when weighed against other facts which showed the railroad’s intent to rail bank. 90 F.3d. at 586-87.

Petitioner Schanlaub has not supported her claim that track materials were removed before the parties reached their interim trail use agreement in 1998. (NSR has presented a salvage contract executed on January 22, 1999, after NSR and ITF reached their agreement for rail banking/interim trail use in 1998 and after NSR had conveyed the right-of-way to ITF pursuant to the Trails Act.)⁷ But even if some rails and other materials were removed before that time, such action would not necessarily mean that the line segment had been abandoned. As

(...continued)
(1997).

⁶ See NSR Reply, Exhibit 1.

⁷ See NSR Reply, Exhibits 10 and 11.

noted in Birt, 90 F.3d at 585-86, a railroad may discontinue rail service and salvage track materials while preserving the rail right-of-way for possible reactivation of rail service in the future. See Preseault, 494 U.S. at 5-6 n.3. Furthermore, both the legislative history of the Trails Act⁸ and the Board's regulations at 49 CFR 1152.29(d) expressly permit a railroad to conduct salvage activities while negotiating under the Trails Act. Thus, removal of the track materials is entitled to little weight where, as here, other evidence shows a lack of intent to abandon. Birt, 90 F.3d at 586.

Once IHRC's trackage rights officially ended, it appears that NSR and ITF were able to enter into a Trails Act agreement for both the northern and southern segments on August 27, 1998. NSR's agreements to extend the 1996 NITU until September 1998 supports the conclusion that Trails Act negotiations were taking place until the parties executed the Trails Act agreement. Thus, contrary to the petitioners' claims, the actions taken by NSR did not demonstrate an intent to consummate abandonment of the northern segment, but rather were consistent with a continuing intent to convey the entire right-of-way at issue here for interim trail use under the Trails Act.

Petitioners argue that, because ITF did not comply with the Board's directive in the 1996 Decision to file another request for a NITU within 10 days of learning that IHRC's trackage rights had terminated, interim trail use on the northern segment could no longer be pursued. ITF acknowledges that it should have refiled its NITU request within 10 days of receiving that notification. NSR and ITF assert, however, that ITF's failure to do so is not dispositive because NSR had not consummated the abandonment of the northern segment prior to the issuance of the NITU for that segment in 2004.

It is true that the expiration of the 10-day period following the termination of IHRC's trackage rights meant that the railroad could have chosen to consummate the abandonment of the northern segment. However, that does not mean that an abandonment occurred automatically upon the expiration of the 10-day period, as petitioners suggest. Rather, the railroad had to take action to exercise that permissive authority.⁹ The Board's purpose in imposing the 10-day deadline was to protect NSR from being unnecessarily delayed if the carrier chose to abandon the northern segment. In this case, however, NSR chose instead to continue negotiations for interim trail use and did not take any action to abandon the northern segment prior to the issuance of the NITU for that segment. Thus, the Board retained jurisdiction to issue the 2004 Decision. See Birt, 90 F.3d at 587 (participation in Trails Act negotiations is evidence that the railroad did not intend to abandon); SSW Ry. Co.—Aban. In Smith & Cherokee Counties, TX, 9

⁸ H.R. Rep. No. 98-28 (1983) at 8.

⁹ See Hayfield N. R.R. v. Chicago & N.W. Transp., 467 U.S. 622, 633 (1984) (Hayfield) (holding that it is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction over a rail line ends).

I.C.C.2d 406 (1992) (ICC reopened proceeding more than 3 years after abandonment became effective to impose a Trails Act condition where railroad determined a line, which had been preserved intact for active rail use in connection with ongoing negotiations to sell the connecting rail segment, would not be required by the buyer of the connecting segment). See also Grantwood Village v. Missouri Pac. RR., 95 F.3d 654, 659 (8th Cir. 1996) (specifically finding that the ICC had authority to issue extensions to a NITU where the 180-day period had lapsed but the line had not been abandoned).

Finally, the fact that NSR and ITF entered into an agreement for interim trail use before the NITU actually was issued did not deprive the Board of continuing jurisdiction over the property. Rather, as stated in the 2004 Decision at 2 (footnote omitted), “trail use requests may be accepted as long as the Board retains jurisdiction over the right-of-way and the carrier is willing to enter into negotiations.”

B. The Severance Issue

Petitioners claim here that the northern segment has been severed from the interstate rail network at both ends. They claim that at one end, NSR allegedly has abandoned the segment from milepost I-72.7 to I-75.5. The other end is severed, they claim, because the current owner of the line that connects to the northern segment only uses the line to store rail cars.

NSR acknowledges that it has abandoned the portion of track connecting the northern and the southern segments (the Northern Peru segment from milepost 1-74.2 to 1-75.5). But it asserts that the northern segment remains available for eventual rail service because it connects with another rail line on the northern end. That other line (from milepost I-95.6 to I-108.6) is now owned and operated by Fulton County Railroad (Fulton County), formerly Fulton County, LLC, which acquired that line from NSR¹⁰ and has never sought to abandon it. Petitioners state that Fulton County now uses this line only to store rail cars, that some of the ties have been removed from the track, and that there is a public grade crossing located between the northern segment and Fulton County’s line. However, Fulton County remains a common carrier with an obligation to provide rail service upon request, and the Fulton County line remains a link by which the northern segment could connect to the interstate rail network if active rail service on this rail banked line were to be restored. See Roaring Fork Railroad Holding Authority—Abandonment Exemption—in Garfield, Eagle, and Pitkin Counties, CO, STB Docket No. AB-547X, slip op. at 3 (STB served May 21, 1999). Therefore, we find that the northern segment has not been severed from the interstate rail network.

¹⁰ See Fulton County, L.L.C.—Acquisition and Operation Exemption—Norfolk and Western Railway Co., STB Finance Docket No. 33477 (STB served Oct. 31, 1997).

C. Other Arguments Relating to the Northern Segment

i. Potential Taking.

Petitioners' claim that issuance of the 2004 NITU for the northern segment resulted in a taking of their property, if true, would not make the 2004 NITU unlawful. Petitioners' remedy is to seek compensation for any alleged taking in an appropriate court under the Tucker Act, 28 U.S.C. 1491(a)(1). See Preseault.

ii. Procedural Due Process Claim.

Finally, petitioner Hoover, who is being sued by ITF in Indiana state court for trespassing on the right-of-way,¹¹ argues that he should have been provided with prior notice of ITF's NITU request and an opportunity to respond prior to issuance of the 2004 Decision. However, as NSR and ITF note, there is no requirement that the Board, trail sponsor, or railroad notify parties that would be potentially affected by the issuance of a NITU (assuming that it would even be possible to identify all such parties). See National Assoc. of Reversionary Property Owners v. STB, 158 F.3d 135, 138 (D.C. Cir. 1998).

III. Petition to Revoke the 1996 NITU for 17-Mile Southern Segment (Milepost I-57.2 to I-74.2).

The petitioners argue that the Board erred in not revoking the 1996 NITU for the 17-mile southern segment in the 2004 Decision. They claim that the Board had lost jurisdiction over the southern segment because a trail use agreement for this segment was not reached until after the 1996 NITU had expired, or, alternatively, that this segment has been severed from the interstate rail network. We address these arguments in turn.

A. The Timing of the Trail Use Agreement

The 1996 NITU authorizing negotiations for interim trail use on the southern segment was extended three times, with the final extension granted in a decision served on March 27, 1998, extending the negotiating period to September 27, 1998. The petitioners claim that NSR and ITF did not reach a Trails Act agreement until after that date. They note that the three deeds conveying the various portions of the right-of-way for trail use were not executed until January 21, 1999.

¹¹ Indiana Trails Fund, Inc. v. Hoover, Cause No. 52D01-0301-PL-0002 (Miami Superior Court, IN, filed Jan. 3, 2003).

However, in its reply, NSR states that the written trail use agreement with ITF (attached to NSR' reply)¹² was entered into on August 31, 1998, well before the NITU was scheduled to expire. As ITF notes, there is no requirement that the right-of-way actually be conveyed at that time. Thus, petitioners have failed to show that NSR intended to abandon the southern segment.

B. The Severance Issue

Petitioners also assert that the southern segment has been disconnected from the interstate rail network. But as discussed below, petitioners have not shown that the southern segment has been disconnected from the interstate rail network.

i. Segment I-72.8 to I-74.2.

Petitioners assert that NSR has abandoned the 1.4-mile segment from milepost I-72.8 to I-74.2, based on a statement made by NSR in a February 20, 2004 letter, in which it refers to a handwritten, unsigned and undated note found in its files describing the 2.8-mile segment from milepost I-72.7 to I-75.5 as "fully abandoned." But NSR argues that the handwritten note by itself is insufficient to show that NSR abandoned this segment, see Birt, and we agree. As petitioners themselves indicate, in that same February 2004 letter, NSR specifically stated that it had abandoned only the Northern Peru segment (from milepost I-74.2 to I-75.5) which, as discussed above, was not part of either the 1996 or 2004 NITU.

Moreover, NSR has submitted evidence that the 1.4-mile segment from I-72.8 to I-74.2 is still in active use. According to NSR, it owns and operates an active line that runs east-west and perpendicularly intersects the railroad right-of-way at issue in this case (which runs north-south). NSR has attached a map to its reply, which shows that the east-west line overlaps this north-south line along a portion of this 1.4-mile segment between milepost I-72.8 and I-74.2, and that those portions that do not overlap are still connected to the east-west line.¹³ Accordingly, we agree with NSR that the language in the note in NSR's files referred only to the fact that service on the north-south line had been discontinued.

ii. Segment I-57.2 to I-58.5.

Petitioners claim that NSR has reclassified the 1.3-mile segment of line from milepost I-57.2 to I-58.5 as industrial track under 49 U.S.C. 10906. According to petitioners, this segment is thus now beyond the Board's regulatory reach.

We note, first, that the reclassification of this track as industrial track would not mean that the track would be removed from the interstate rail network or placed beyond the Board's

¹² See NSR Reply, Exhibit 10.

¹³ See NSR Reply, Exhibit 13.

regulatory reach, nor that it could not be used in the future as a link for the southern segment to tie into the national rail system. The categories of track covered by section 10906, including industrial track, are fully subject to the Board's jurisdiction, although the Board's authorization is not needed for acquisition or abandonment of section 10906 track.

This track segment was clearly included in the sale of a longer, 7-mile line segment from milepost I-51.5 to I-58.5 to CERA by a deed executed June 12, 2002. See deed attached as Exhibit A to NSR's reply dated May 10, 2004. CERA wanted that line segment so that it could provide rail service to a new Chrysler factory that was opening nearby should Chrysler request service. CERA filed a notice of exemption to acquire that line, see Central Railroad Company of Indianapolis—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34221 (STB served July 12, 2002). CERA's notice identified the track being acquired as extending from milepost I-51.5 to milepost I-57.2. This could indicate that CERA considered the segment from I-57.2 to I-58.5 to be industrial track, and thus not required to be included in its acquisition notice. The record is not clear on this point. NSR first suggests that the I-57.2 to I-58.5 segment had been reclassified to industrial track (NSR letter dated Feb. 17, 2004, at 4); and later contradicted this (NSR reply dated May 10, 2004, at 9, 14). Under these circumstances, we conclude that CERA clearly acquired the segment between I-57.2 to I-58.5 from NSR; and apparently considered it to be industrial track which did not need to be included in its acquisition notice. This appears reasonable based on what the record reveals about the nature and use of this track.

Petitioners claim that a portion of the segment has been paved over. NSR acknowledges that there may be some paving, because the line segment is currently dormant, but it argues that this would not preclude use of this segment to link the southern segment to the interstate rail network at some point in the future.

While the segment that was sold to CERA is no longer eligible for a NITU, this does not mean that NSR intended to abandon the remainder of the southern segment or that the restoration of rail service on the remainder of the southern segment is precluded, as petitioners suggest. Rather, based on the evidence before us, it is clear that this segment could continue to be used for rail purposes, and therefore could provide a connection between the remainder of the southern segment to the national transportation system.¹⁴

¹⁴ Because we find that neither the southern segment nor the northern segment (see discussion in section II.B., above), has been severed from the interstate rail network, we need not determine whether, if either segment had been severed, the right-of-way would be eligible for rail banking under the Trails Act.

iii. Segment I-72.7 to I-72.8.

NSR states that the segment from milepost I-72.7 to milepost I-72.8 has not been abandoned, and that it had agreed to convey that segment to the City of Peru (City) for interim trail use but no formal Trails Act agreement for this segment has been executed.

ITF, however, states that the segment is now owned by Mr. Bill Bean, the successor in interest to the Lear Corporation. According to ITF, the City and Mr. Bean have indicated they would make this property available to provide a connection for the southern segment to the interstate rail network, should rail service eventually be restored.¹⁵

As previously discussed, when determining whether a railroad has consummated abandonment of a line or has held open the option of conveying the line for interim trail use, the Board must look to the railroad's intent, which is evidenced by its statements and actions. Given the sale of the property to Mr. Bean outside the auspices of the Trails Act, we find that this segment no longer qualifies for a NITU. However, it is possible that rail service could be restored over this 0.1-mile segment, if the City and Mr. Bean would voluntarily provide a connection from the southern segment to the interstate rail network in the event rail service is restored. We need not decide here whether such a voluntary arrangement satisfies the requirements of the Trails Act, because we have already concluded that the southern segment is connected to the national rail transportation system (subsection ii, above).

IV. Trail Manager Claim.

Petitioners argue that the trail sponsor, ITF, has failed to perform adequate maintenance of the trail on the southern segment, and that, as a result, the 2004 NITU for the northern segment should not have been issued and the 1996 NITU for the southern segment should be revoked because ITF is an unfit trail sponsor. The Board applies a rebuttable presumption that an organization willing to meet the statutory requirements is fit to be a trail sponsor. Jost, 194 F.3d at 88-90; Central Kansas I; Central Kansas II; Idaho Northern. Here, petitioners have not rebutted that presumption.

Petitioners have not introduced specific evidence to show that ITF has violated any Indiana laws, or that their concern that this right-of-way may not be adequately maintained while it is used as a trail cannot be appropriately addressed at the state or local level. Given the Board's limited role under the Trails Act (discussed above), we leave it to the individual states to interpret and enforce any state or local requirements applicable to a particular trail. Central Kansas II at 5. Should an Indiana state court determine that ITF has in fact failed to properly manage the trail in a lawful manner, then the Board would be available to consider whether the

¹⁵ ITF supplement to its reply, May 10, 2004, included letters from both Mr. Bean and Jim Walker, the mayor of the City.

interim trail use authority should be revoked. At this point, however, neither reconsideration of the 2004 NITU nor reopening and revocation of the 1996 NITU on the ground that ITF is an unfit trail sponsor has been shown to be warranted.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion filed by petitioners Friend, Furnivall, and Schanlaub to add Tedd Armstrong as a party to their petition for reconsideration is granted.
2. The petitions for reconsideration and reopening of the 1996 and 2004 NITUs are denied.
3. This decision is effective 30 days from the date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary