THE STORY OF RAILBANKING
and
RAIL-TRAILS BY THE NUMBERS

prepared for the
Railroads Subcommittee
of the
United States House of Representatives
by the
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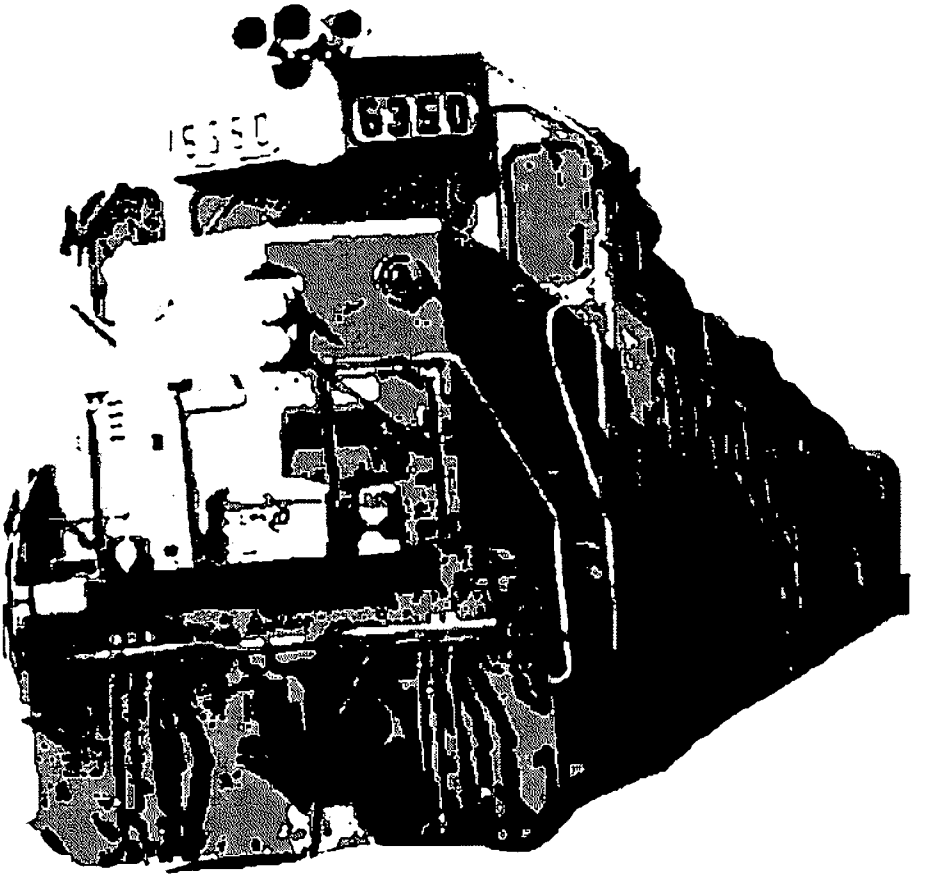


THE STORY OF RAILBANKING

I. Introduction

In 1920, when Congress first began to regulate the abandonment of freight railroad lines, our nation's rail system peaked at more than 270,000 miles of corridor. By 1990, as a result of de-regulation of the railroads and the financial decline of many carriers, the rail system had shrunk to 141,000 miles, with railroads continuing to abandon service at the alarming rate of approximately 2,000 miles per year. Section 8(d) of the National Trails System Act ("the Trails Act") was enacted by Congress in 1983 in response to this crisis of corridor loss. It provides an effective mechanism for preserving railroad rights-of-way for future rail service and for energy efficient alternative transportation use, without imposing additional burdens on rail carriers. The law allows railroads to transfer inactive railroad corridors to qualified trail managers for interim use as trails, until such time as these rights-of-way are needed for future rail service on the condition that trail managers assume all carrying costs (liability, maintenance, and taxes) of the rights of way. This process is known as "railbanking."

II. The Need for Railbanking

Rail abandonments have been subject to extensive federal regulation since 1920, when Congress gave the Interstate Commerce Commission (ICC) broad authority to prohibit any freight railroad operating in interstate commerce from abandoning its common carrier obligations, or to impose conditions on abandonment to protect the public interest in continued rail service. This enabled the ICC to ensure that railroad corridors, which were frequently assembled at great public cost through state or federal land grants or loan guarantees and powers of eminent domain, remained dedicated for transportation purposes so vital to the economies of many communities.

Since 1976, Congress has specifically recognized the need to encourage the preservation of rail corridors for public use, including the need to create a "national rail bank" of railroad corridors, as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).[1] The 4-R Act provided for mandatory transfers of corridors proposed for abandonment to other carriers, and directed the ICC to impose conditions barring the disposition of railroad rights of way for 180 days in order to allow for possible transfers for public use, including for trails.[2]

Notwithstanding these regulatory tools, the declining fortunes of the rail industry began to result in an increasing loss of railroad corridor through abandonment. Then in 1980, Congress passed the Staggers Rail Act,[3] which required the ICC to exempt most rail abandonments from regulation. As a result, the rate of rail abandonments by major carriers accelerated to between 4,000 to 8,000 miles per year.[4] This alarming rate of rail abandonments made corridor preservation a critical issue of national policy.

Once the ICC granted abandonment authorization, the railroad was free to remove the tracks and ties, sell the right of way piecemeal to private owners, or simply allow the right of way to be claimed by adjacent landowners. Our nation's rail corridor system, "painstakingly created over several generations," was at risk of becoming irreparably fragmented due to the present high cost of land and the difficulties of assembling right-of-way in our increasingly populous nation.[5]

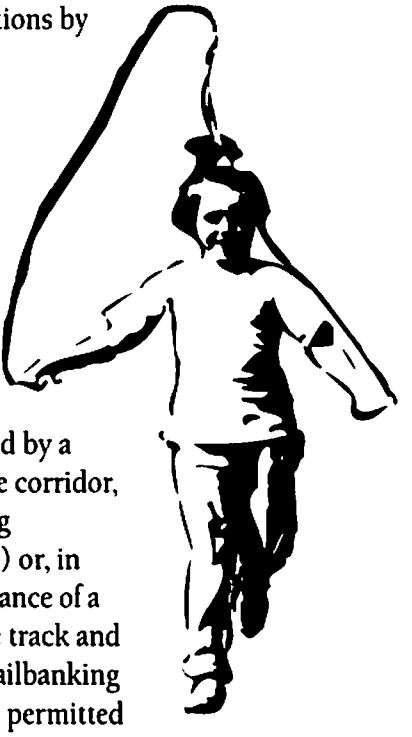
Alarmed by the potential loss of this valuable national resource, Congress began to look for ways to facilitate the preservation of these corridors for alternative public transportation uses, without interfering with

the ability of the financially-beleaguered railroad industry to shed duplicative or unprofitable lines. The possibility of transferring these surplus rights of way to third parties for use as trails began to emerge as an efficient method of preserving these corridors.

However, efforts by potential trail managers to purchase corridors that had received ICC abandonment authorization for public use as trails faced a number of difficulties. The biggest difficulty was the faulty perception by many adjacent landowners that an ICC order authorizing a railroad to abandon its common carrier obligations also meant that the railroad had abandoned its property interest in the right of way itself under state law. With state law ill-equipped to address this new animal called a "rail-trail," trail opponents began to institute legal actions against the railroad and the new trail manager to determine the ownership of the right of way. Defending against this litigation proved costly and time consuming, and was a significant disincentive to rails-to-trails conversions.

III. Section 8(d) of the National Trails Systems Act

In 1983, Congress enacted Section 8(d) of the National Trails System Act (the Trails Act") to promote railbanking as an effective tool for corridor preservation. The Trails Act facilitated rails-to-trails conversions by preserving the ICC's jurisdiction over inactive railroad corridors that were dedicated to interim trail use and subject to future reactivation of rail service. At the same time, the Trails Act created an incentive for railroads to enter into interim trail use/railbanking negotiations by allowing the railroad to liquidate its entire interest in the rail line where a qualified governmental or private organization agreed "to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way."[6]



The ICC issued rules interpreting the Trails Act in 1986. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986). Under these rules, an interested trail manager could request a railbanking order from the ICC within 30 days after the railroad files an application for an abandonment (or, in the case of "exempt abandonments," within 10 days of publication of a Notice of Exemption in the Federal Register).[7] If the request is filed by a qualified entity who is willing to assume all legal and financial responsibility for the corridor, and the railroad agrees to enter into negotiations for an interim trail use/railbanking agreement with the entity, the ICC issues a Certificate of Interim Trail Use ("CITU") or, in the case of "exempt abandonments," a Notice of Interim Trail Use ("NITU").[8] Issuance of a NITU or CITU allows the railroad to discontinue service, cancel tariffs, and salvage track and material consistent with interim trail use and railbanking.[9] If an interim trail use/railbanking agreement is not reached within 180 days, or any extensions thereof, the railroad is permitted (but not obligated) to fully abandon the corridor.

IV. Railbanking in the Courts

Not surprisingly, the ICC's rules and implementation of the Trails Act were promptly the subject of litigation by both proponents and opponents of railbanking. In response to challenges filed by trails groups, who asserted that railbanking was mandatory when a trail group agreed to assume all carrying costs, the courts upheld the ICC's interpretation of the Trails Act as authorizing only voluntary transactions between railroads and trails groups.[10] At the same time, trail opponents challenged the constitutionality of the Trails Act, and alleged that the Trails Act effected a "taking" of reversionary property interests without just compensation, in violation of the Fifth Amendment.[11]

In 1989, the U.S. Supreme Court agreed to review the question of the constitutionality of the Trails Act in Preseault v. ICC. In 1990, the Court unanimously upheld the Act as a valid exercise of Congress' power under the Commerce Clause of the U.S. Constitution, stating "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable."[12] However, the Court declined to rule on whether the Trails Act took the Preseaults' property without just compensation, on the grounds that such "takings" claims against a federal agency must be brought first in the U.S. Court of Federal Claims.

Several compensation claims were then filed by trail opponents in the U.S. Court of Federal Claims (then called the U.S. Claims Court). The Claims Court ultimately ruled in one case, again Preseault v. ICC, that the Trails Act did not effect a taking of any property interest.[13] The property owners appealed this decision, and the case remains pending before the U.S. Court of Appeals for the Federal Circuit.

In the meantime, trail opponents have filed a number of challenges in an attempt to curtail the authority of the ICC (now called the Surface Transportation Board) to issue railbanking orders. In one recent case, the court held that a public use condition, in and of itself, could not preserve ICC jurisdiction to accept a railbanking request filed after the effective date of abandonment authorization.[14] However, the courts have uniformly rejected efforts by trail opponents to attack railbanking orders indirectly through challenges to an interim trail manager's ownership or use of a railbanked corridor.[15] The courts have also rejected efforts by trail opponents to add burdensome procedural requirements to the railbanking process.[16]

V. Railbanking Today

The Trails Act has, in fact, been serving its intended function of preserving inactive railroad corridors intact for public use. Since 1983, the ICC has issued 221 railbanking orders under the Trails Act, resulting in the acquisition of 110 railbanked corridors in 26 states representing 3,128.1 miles. Some 1,146.5 miles of railbanked corridors are presently open trails, with an additional 1,848.5 miles of trail under development on railbanked corridors.[17] Railbanking enjoys the full support of most railroads, with every major carrier participating in railbanking negotiations and acquisitions under the Trails Act.

Moreover, railbanking through interim trail use has in fact assisted in preserving railroad corridors for active rail use. For example, in 1993, ICC approved the reactivation of a corridor in Ohio that had been railbanked in 1990.[18] In addition, legislation recently passed in Washington State will enable 100 miles of Washington's John Wayne Trail to be returned to rail service.[19] Without the public policy favoring corridor preservation set forth in the Trails Act, these corridors would likely have been lost for future rail transportation use.

The Trails Act is needed now more than ever. Fueled by recent railroad mergers and other factors, railroads are continuing to seek STB authorization to abandon corridors at a rapid rate. Since October 15, 1995 alone, 92 corridors, representing 1,344.8 miles, have been proposed for abandonment. Of these proposed abandonments, 44 corridors representing 843.3 miles are being considered for railbanking and interim trail use.

Most rail-trail conversions enjoy broad public and private support from the community. Moreover, most initial opposition by adjacent landowners is short-lived, and even the most vigorous opponents of rail-trails become ardent supports or users of the trail. For example, a study of the Root River and Luce Line trails in Minnesota showed that the percentage of adjacent landowners who opposed the rail-trail projects significantly decreased after the trail was actually developed and became functional, and almost all new owners purchasing property adjacent to an already-developed rail-trail viewed it as a desirable feature.[20]

Research also shows that rail-trails can be a significant stimulus to the local economy. A 1991 study undertaken by the National Park Service found that the total annual economic impact for each of the three rail-trails studied was a net gain of $1.2 million per trail.[21] A 1986 study of the effect of Seattle, Washington's Burke-Gilman rail-trail on adjacent property values found that housing in the vicinity of the trail brought an average of

six percent increase in the purchase price because of the existence of the trail.[22] Rail-trail users generate additional business for the local community and rail-trails are attractive to new businesses seeking to relocate to the area. In general, rail-trails and linear parks serve to enhance the quality of life in the communities in which they are located, offer an energy-efficient transportation alternative, and, above-all, help to preserve railroad corridors as valuable national resources for our Nation's future rail and transportation needs.

[1] Pub. L. No. 94-210, 90 Stat. 31

[2] See 49 U.S.C. §§ 10905, 10906.

[3] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[4] Association of American Railroads, Railroad Facts (1992).

[5] See Reed v. Meserve, 487 F.2d 646, 649-50 (1st Cir. 1973).

[6] 16 U.S.C. § 1247(d).

[7] 49 C.F.R. § 1152.29(b).

[8] Id. § 1152.29(d)(1).

[9] Id. §§ 1152.29(c), (d)(1).

[10] National Wildlife Federation v. ICC, 850 F.2d 695 (D.C. Cir. 1988).

[11] See Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988); Glosemeyer v. ICC, 879 F.2d 316 (8th Cir. 1989), cert denied, 494 U.S. 1003 (1990).

[12] Preseault v. ICC, 494 U.S. 1, 19 (1990).

[13] Preseault v. USA, 27 Fed. Cl. 69 (1992).

[14] Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert. denied, sub. nom CSX Transportation v. Fritsch, 116 S.Ct. 1262 (1996).

[15] See, e.g., Dave v. Rails to Trails Conservancy, 863 F. Supp. 1285 (E.D. Wash. 1994), aff'd, 79 F.3d 940 (9th Cir., Mar. 27, 1996).

[16] National Ass'n of Reversionary Property Owners v. ICC, C.A. No. 94-1581 (D.C. Cir., Nov. 3, 1995).

[17] Statistics compiled by the Rails-to-Trails Conservancy from STB records, as of June 25, 1996.

[18] Norfolk and Western Railway Co.--Abandonment Between St. Mary's and Minster in Auglaize County, OH, Dkt. No. AB-290 (Sub-No. 68), 9 I.C.C.2d 1015 (1993).

[19] See Senate Bill 6592, State of Wash., 54th Legislature, 1996 Regular Session.

[20] While only 44% to 63% of adjacent landowners supported the rail-trail projects before trail development, about three-quarters (73%) of all landowners viewed the rail-trails as a desirable feature after trail development. Moreover, 71 % to 87% of all new owners purchasing property adjacent to an already-developed rail-trail viewed it as a desirable feature. See Mazour, Leonard P., "Converted Railroad Trails: The Impact on Adjacent Property" (1988) (available from the Rails-to-Trails Conservancy).

[21] National Park Service, "The Impacts of Rail-Trails: A Study of the Users and Property Owners From Three Trails," (1991).

[22] See Seattle Engineering Department, Office for Planning Evaluation of the Burke-Gilman Trail's Effect on Property Values and Crime, (May 1987) (reprints available from Rails-to-Trails Conservancy).