

To: Legislative Colleagues

From: Representatives Amy Loudenberg and Mark Spreitzer and Senator Steve Nass

Date: September 26, 2017

Re: Co-sponsorship of LRB 3746/1 relating to: condemnation authority for certain railroad projects.

Deadline: Wednesday, October 3<sup>rd</sup> at noon

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For many, owning a home and land is emblematic of the American dream. Landowners are entitled to the enjoyment of their land, and should not fear that a private entity will take their home or land without meeting a very high standard to demonstrate why the taking is necessary and in the public's best interest. The use of eminent domain, particularly by private entities, should be extremely limited in both frequency and scope.

LRB 3746/1 would require that, in order for a railroad corporation to acquire by condemnation any property or property interest that exceeds 100 feet in width, the legislature must enact a law that states the legislature's findings that the railroad corporation's acquisition serves the public interest and authorizes the acquisition of the property or property interest.

Recently, a newly formed company with no experience in the rail industry proposed building a 261-mile rail line through portions of Wisconsin, Illinois, and Indiana. This highly controversial proposal would be the single largest rail project in the United States in more than 100 years. The proposed project would include a right-of-way that has a minimum width of 200-feet and could reach a maximum width of 2000-feet. The developers have acknowledged that the size and scope of this project will necessitate the use of eminent domain to obtain the lands that they want.

According to Legislative Council (memo attached), "In Wisconsin a railroad corporation may exercise the power of eminent domain for 'any public purpose authorized by its articles of incorporation.' [s. 32.02 (3), Stats.] A railroad may also make its own determination of necessity for the right-of-way of a railroad up to 100 feet in width. [s. 32.07 (2), Stats.] The circuit court judge in the county in which the property is located must make the determination of necessity for a condemnation of a railroad right-of-way that is wider than 100 feet."

Also, according to Legislative Council, Wisconsin courts have been deferential when reviewing legal challenges to necessity determinations. In a number of different cases, the courts have ruled that the scope of their reviews is narrow and that a determination of necessity will be upheld unless there is a showing of "fraud, bad faith, or a gross abuse of discretion." [Kauer v. Department of Transportation, 2010 WI App 139] In cases where the judicial branch is required to make an initial determination of necessity, the courts have been reluctant to become too involved and have emphasized that these determinations are a matter for the Legislature, and characterized the circuit courts as "delegates" of the Legislature.

When a company applies for a permit from the Surface Transportation Board (STB), they must provide an explanation of the purposes of the proposal and an explanation of why the proposal is not inconsistent with the "public convenience and necessity". Simply put, the most fundamental issue that

must be addressed by the STB's review of a permit application is the necessity of the proposed project. However, when addressing the "public convenience and necessity" within STB applications, a confluence of the federal code 49 USC 10901 (c) and the federal court decision *Mid States Coal Progress V. Surface Transportation Board* has led some applicants to assert that there is a "statutory presumption that rail construction is to be approved."

While the STB has recently rejected this corporation's application due to concerns about their finances, we remain gravely concerned that the applicants to the STB claimed that there is a "statutory presumption that rail construction is to be approved." The company can appeal the STB's decision or simply file a new application, and in Wisconsin the determination of necessity carried out by the courts is still not a substantial legal barrier to condemnation of lands using eminent domain.

Wisconsin residents deserve to know that there will be additional scrutiny and review to determine the necessity of proposed rail projects. Rail lines are long with the ability to impact many landowners and hundreds of acres of land through multiple counties. As the courts have already acknowledged, these determinations of necessity are a matter for the Legislature. LRB 3746/1 will ensure that the Legislature makes a determination that proposed land acquisitions using eminent domain are in the public interest.

If you are interested in co-sponsoring LRB 3746/1, please email [rep.loudenbeck@legis.wisconsin.com](mailto:rep.loudenbeck@legis.wisconsin.com) or call 266-9967.

#### ***Analysis by the Legislative Reference Bureau***

This bill requires that, in order for a railroad corporation to acquire by condemnation any property or property interest that exceeds 100 feet in width, the legislature must enact a law that states the legislature's findings that the railroad corporation's acquisition serves the public interest and authorizes the acquisition of the property or property interest. Generally, under current law, a railroad corporation may acquire property or a property interest by condemnation when that corporation is not able to acquire the property by gift or at an agreed price.