

SERVICE DATE – NOVEMBER 27, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1107X

WEST MICHIGAN RAILROAD CO.—ABANDONMENT
EXEMPTION—IN VAN BUREN COUNTY, MICH.

Digest:¹ This decision denies a request by the National Association of Reversionary Property Owners to reconsider an earlier Board decision.

Decided: November 25, 2019

The National Association of Reversionary Property Owners (NARPO) has filed a petition for reconsideration of the Board's May 10, 2019 decision in this case (May 10 Decision), which extended the time period for negotiating interim trail use previously established on two portions of the line at issue here. For the reasons stated below, the Board will deny the petition for reconsideration.

BACKGROUND

On January 8, 2013, West Michigan Railroad Co. (WMI) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon approximately 10.67 miles of rail line between milepost 19.88 (west of the line's crossing of 56th Street near Lawrence) and milepost 30.55 (east of Kalamazoo Street in Paw Paw), in Van Buren County, Mich. (the Line). Notice of the exemption was served and published in the Federal Register on January 28, 2013 (78 Fed. Reg. 5867). On June 7, 2013, the Board issued a notice of interim trail use or abandonment (NITU) to provide time for Friends of the Kal-Haven Trail and Van Buren County Board of Park Trustees to negotiate with WMI for interim trail use/rail banking under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). The abandonment exemption became effective on June 8, 2013.

By letters filed on January 31, 2014, and February 4, 2014, WMI notified the Board that it had consummated the abandonment of two portions of the Line: (1) between mileposts 30.2 and 30.55, and (2) between mileposts 25.1 and 26.5. On February 21, 2014, in response to a request to extend the NITU negotiating period, WMI notified the Board that it was willing to extend the negotiating period with respect to the remaining portions of the Line between

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

mileposts 19.88 and 25.1, and between mileposts 26.5 and 30.2 (the NITU Segments). WMI further indicated that, “[i]n recognition of the rail restoration provision in trails use agreements,” the sale agreement for the consummated portion of the Line between milepost 25.1 and milepost 26.5 (the Intermediate Segment) “did include a provision for the re-acquisition of the property by WMI, which would allow for restored rail service” in the future for the portion of the Line east of milepost 25.1. (WMI Letter 1, Feb. 21, 2014.) By decision served on April 15, 2014, the Board, through the Director of the Office of Proceedings, noted WMI’s discussion of the aforementioned re-acquisition provision and granted the request to extend the NITU negotiating period over the NITU Segments. By decision served on June 6, 2014, the Michigan Department of Natural Resources (MDNR) was substituted for Friends of the Kal-Haven Trail and Van Buren County Board of Park Trustees as interim trail sponsor,² and thereafter, by a series of decisions, the NITU negotiating period was further extended to November 12, 2018.

On November 8, 2018, MDNR timely filed a request for an additional extension of 180 days to negotiate for interim trail use over the NITU Segments.³ That same day, NARPO filed a letter opposing MDNR’s request, arguing that one of the NITU Segments, the segment between mileposts 26.5 and 30.2, was disconnected from the national rail system in 2014 when WMI consummated abandonment of the Intermediate Segment.

The May 10 Decision granted MDNR’s request and extended the negotiating period on the NITU Segments to May 11, 2019.⁴ The Board found that when WMI consummated abandonment of the Intermediate Segment and sold the property, WMI specifically retained the right to reacquire a sufficient property interest to allow for restored rail service for the portion of the Line east of milepost 25.1, should it be needed in the future. May 10 Decision, AB 1107X, slip op. at 4.⁵

On May 21, 2019, NARPO filed a petition for reconsideration of the May 10 Decision. NARPO alleges new evidence or changed circumstances, claiming that there are some NARPO members along the Intermediate Segment that never signed agreements to allow the return of rail

² That decision again noted WMI’s explanation that the sale agreement transferring the Intermediate Segment included a re-acquisition provision to allow for restored rail service. W. Mich. R.R.—Aban. Exemption—in Van Buren Cty., Mich., AB 1107X (STB served June 6, 2014).

³ On November 20, 2018, WMI filed a letter stating that it did not oppose MDNR’s request.

⁴ Thereafter, by decision served on July 5, 2019, the NITU negotiating period was further extended to November 7, 2019.

⁵ The Board also specifically noted that its findings were “based on the particular circumstances of this case” and that it “need not, and does not, decide here whether any other connection between a line authorized for abandonment and the rest of the national rail system would suffice, or whether any connection is needed at all, to permit rail banking under the Trails Act.” May 10 Decision, AB 1107X, slip op. at 4 n.7.

service in the future. (Pet. 1-2.) NARPO also points to language in a corporate quit claim deed issued to certain landowners and recorded with Van Buren County on April 29, 2015 (Deed), which states that WMI's right to reacquire the property expires 22 years from the date of the Deed. (*Id.* & Ex. 1.) NARPO argues that this expiration should be enough to invalidate the NITU beyond milepost 26.5. (*Id.* at 2.) NARPO further argues that the Board materially erred by not considering that neither WMI nor its predecessors ever acquired fee title to most, if not all, of the Line's right-of-way. (*Id.* at 2-3.) According to NARPO, under Michigan property law, when WMI consummated abandonment of the Intermediate Segment in 2014, the property automatically reverted to the abutting property owners, making the Deed and any others "worthless." (*Id.* at 2.)

On June 11, 2019, WMI and MDNR filed a joint reply in opposition to NARPO's petition, arguing that NARPO is relitigating issues that were fully addressed in the May 10 Decision and that therefore the petition should be denied. (WMI & MDNR Reply 1.) WMI and MDNR argue that "reactivation rights" exist for the Intermediate Segment, and that the Deed does not constitute new evidence, as it is a four-year-old document and NARPO does not explain why it did not present, or could not have presented, this argument earlier. (*Id.* at 2.) WMI and MDNR further argue that, even if the Deed were new evidence, NARPO has not shown that it is material to the Board's extension of the NITU negotiating period, because the Board indicated in the May 10 Decision that rights to reacquire the property might not be necessary. (*Id.* at 3.) WMI and MDNR also argue that it is irrelevant whether WMI had fee title to convey or was simply relinquishing an easement because, in either case, WMI secured for itself the right to restore service over the Intermediate Segment. (*Id.* at 4.) WMI and MDNR argue that NARPO's argument about the nature of WMI's property interest is irrelevant to the issuance of the Board's NITU for the Line. (*Id.*)

On November 1, 2019, WMI and MDNR filed a joint request for an extension of the NITU negotiating period for 180 days, until May 5, 2020. On November 4, 2019, NARPO filed a reply and corrected reply in opposition to the extension request, reiterating its opposition to previous extension requests.⁶

PRELIMINARY MATTERS

On June 12, 2019, NARPO filed a request to be allowed to file rebuttal for good cause as well as a rebuttal to WMI and MDNR's reply. In its rebuttal, NARPO reiterates its arguments for why the Board should reconsider the May 10 Decision.

⁶ NARPO's arguments in its November 4, 2019 submissions are unsupported and unavailing for the reasons given in the May 10 Decision and below in this decision, including that NARPO waived its arguments by failing to raise them previously. On November 13, 2019, WMI filed a request for leave to file a surreply and a surreply, and NARPO filed a response. Those November 13, 2019 filings, however, raise no additional substantive arguments and therefore need not be considered; accordingly, WMI's request for leave to file a surreply will be denied and NARPO's November 13, 2019 response will be rejected.

On June 28, 2019, WMI and MDNR filed a joint reply in opposition to NARPO's rebuttal, arguing that NARPO's rebuttal was procedurally defective and unjustified and therefore should be stricken. In the alternative, WMI and MDNR request leave to file a surrebuttal if NARPO's rebuttal is allowed. WMI and MDNR argue that the Board's rules prohibit a reply to a reply, which is sufficient basis to strike the rebuttal, and further that NARPO merely rehashes the arguments from its petition. (Surrebuttal 2.) Substantively, WMI and MDNR state that the landowners adjacent to the Intermediate Segment did not want a recreational trail in their community, and that therefore, WMI agreed to forego trails use negotiations strictly for this segment in exchange for, among other things, a right to reacquire a sufficient right-of-way to allow WMI to reactivate rail service. (Id. at 3.)

Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant both NARPO's request to file a rebuttal and WMI and MDNR's request to file a surrebuttal.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the prior decision; or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. A petition for reconsideration may not be based on a "new argument that could have and should have been presented in the earlier stages of the proceeding." Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 24 n.29 (STB served Aug. 2, 2018) (citing Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004)). "Nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process." Tex. Mun. Power Agency, 7 S.T.B. at 805 (citing Conn. Trust for Historic Pres. v. ICC, 841 F.2d 479, 484 (2d Cir. 1988)). See also New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC, FD 35842, slip op. at 5 (STB served Apr. 26, 2018) ("[T]he cases establishing that the Board will not consider arguments or evidence that should have been submitted at an earlier stage . . . apply to any materials that could and should have been presented prior to reconsideration, regardless of whether the petitioner alleges new evidence, changed circumstances, or material error."). Moreover, no matter which type of reconsideration claim is presented (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Can. Nat'l Ry.—Control—EJ&E West Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018); see also 49 C.F.R. § 1115.3.

Here, NARPO has not shown that reconsideration is justified by new evidence or changed circumstances. NARPO could and should have raised its arguments about the Deed, any other sale agreements, and the alleged absence of agreements between WMI and unknown landowners prior to the May 10 Decision. WMI first referenced the agreements it made with landowners in its letter to the Board dated February 21, 2014, and NARPO itself argued in its December 17, 2018 filing that "[i]t makes no difference if in fact WMI put some kind of

verbiage in the land sale agreements that supposedly allows reinstitution of rail service in the future.” (NARPO Reply 2, Dec. 17, 2018.) NARPO, therefore, by its own admission was aware of the agreements, and indeed argued that their terms were irrelevant, months before the May 10 Decision was issued. The fact that NARPO apparently now wishes to raise different arguments regarding the agreements does not mean that the evidence and arguments NARPO presents for the first time on reconsideration constitute new evidence or changed circumstances. See Consumers Energy Co., NOR 42142, slip op. at 24 n.29; New Eng. Cent. R.R., FD 35842, slip op. at 4-5. Therefore, the Board will not grant reconsideration of the May 10 Decision on those grounds.

For the same reason, NARPO has not shown that reconsideration is justified based on material error. NARPO argues that the Board’s error was in failing “to explore . . . the fact that WMI or their railroad predecessors never acquired fee title to most if not all of the right of way,” as opposed to holding an easement permitting WMI to provide rail service. (Pet. for Recons. 2.) NARPO, however, waived this argument by failing to raise it prior to the May 10 Decision. See New Eng. Cent. R.R., FD 35842, slip op. at 6, 11. The Board will not consider arguments or evidence that should have been submitted at an earlier stage regardless of whether the petitioner alleges new evidence, changed circumstances, or material error. See id. at 5.⁷ Accordingly, the Board will not grant reconsideration of the May 10 Decision on the grounds of material error.

For these reasons, NARPO has failed to demonstrate new evidence, changed circumstances, or material error. Accordingly, NARPO’s petition for reconsideration will be denied. Additionally, because the Board is denying NARPO’s petition for reconsideration and because WMI is willing to continue negotiating for trail use with MDNR, the request to extend the negotiating period under the NITU will be granted, and the negotiating period will be extended to May 5, 2020.

It is ordered:

1. NARPO’s request to file a rebuttal is granted.
2. WMI and MDNR’s request to file a surrebuttal is granted.
3. The petition for reconsideration is denied.

⁷ Furthermore, to the extent that NARPO’s untimely material error arguments raise issues concerning Michigan property law, the Board has often held that state law property questions are more appropriately decided by courts than by the agency. See, e.g., Ingression Inc.—Pet. For Declaratory Order, FD 36014, slip op. at 4 (STB served Sept. 30, 2016); V&S Ry.—Pet. For Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 7 (STB served July 12, 2012); Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore, FD 35388, slip op. at 4 (STB served Apr. 25, 2011).

4. WMI's November 13, 2019 request for leave to file a surreply is denied and NARPO's November 13, 2019 response is rejected.

5. WMI and MDNR's request to extend the negotiating period under the NITU is granted, and the negotiating period is extended to May 5, 2020.

6. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.