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June 28, 2019

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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings
June 28, 2019
Part of
Public Record

Re: **Docket No. AB 1107X, *West Michigan Railroad Co. –
Abandonment Exemption – in Van Buren County, Mich.***

JOINT REPLY IN OPPOSITION TO REBUTTAL, AND SURREBUTTAL

Dear Ms. Brown:

As discussed herein, the recent rebuttal filing (the “Rebuttal”) tendered in this proceeding by the National Association of Reversionary Property Owners (“NARPO”) is procedurally defective and unjustified, and, accordingly, it should be stricken. If the Rebuttal is neither rejected nor stricken, then WMI hereby requests leave to respond as set forth below.

On May 21, 2019, NARPO filed a petition (the “Petition”) asking for the Surface Transportation Board (the “Board”) to reconsider and reverse its decision served in this proceeding on May 10, 2019 (the “May 10 Decision”). NARPO has argued that the Board erred materially in permitting the continuation of interim trails use negotiations between West Michigan Railroad Co. (“WMI”) and the Michigan Department of Natural Resources (“MDNR”) under a previously-issued notice of interim trails use (“NITU”) for a section of rail line extending between mileposts 26.5 and 30.2 (the “Paw Paw Segment”), and that allegedly new evidence (a document dating from 2015) supports such a reversal. On June 11, 2019,¹ WMI and MDNR replied jointly in opposition to the Petition, pointing out that the newly-offered evidence

¹ NARPO incorrectly alleges that WMI and MDNR filed their joint reply 31 days after NARPO filed its Petition (Rebuttal at 3), as the procedural record readily reflects. However, WMI and MDNR acknowledge having filed their reply a day late, a time calculation oversight that the undersigned WMI counsel discovered only upon re-visiting the record. WMI and MDNR hereby request leave, after-the-fact, to late file their June 11 Reply, noting that NARPO’s nearly instantaneous response thereto indicates that the one-day delay was in no way prejudicial.

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does not qualify as truly new under applicable Board precedent, and that the Board has committed no material error to warrant reconsideration of the May 10 Decision.

Explaining that it does not know whether or not it is entitled to do so, NARPO has filed on June 12, 2019, a Rebuttal, claiming as “good cause” that it must be afforded an opportunity to respond to WMI/MDR “accusations” on “some issues,” and to address NARPO’s assertion that “WMI really do not answer the questions NARPO raised in its original Petition.”² The Board’s rules of procedure prohibit a reply to a reply,³ which is sufficient basis to strike the Rebuttal out-of-hand. NARPO’s claim that it needs to address “some issues” and to argue that WMI’s response to NARPO’s Petition for Reconsideration was, in NARPO’s view, unsatisfactory does not support the continuation of NARPO’s running diatribe. As it is, NARPO’s Rebuttal merely rehashes its Petition arguments, and casts unwarranted invective at WMI (and its counsel) and MDNR, contrary to the Board’s expectations of civility and its prohibition of scandalous material.⁴ If the Board nevertheless chooses to accept such an abusive and unwarranted NARPO filing, then WMI responds as follows:

NARPO’s objective and strategy are both relatively straightforward. NARPO hopes to ensure that all of the WMI rail line west of milepost 25.1 never returns. It contends that, because WMI filed on February 4, 2014, a notice of abandonment consummation for the portion of the subject railroad line between mileposts 25.1 and 26.5 (the “Cora Segment”), the adjoining Paw Paw Segment extending westward from milepost 26.5 must be deemed to be legally abandoned, also. Such a development would render the Paw Paw Segment ineligible for interim trails use. That is all in keeping with NARPO’s overarching objective of blocking interim trails use arrangements in any way that it can. Although not quite as clear, NARPO seems to that WMI has no legal right or ability whatsoever to reconnect the Paw Paw Segment to active portions of its system via its original route along the former Cora Segment.

But NARPO cannot explain, and probably does want the Board to consider, why WMI would have agreed to exclude the Cora Segment from trails use discussions, and why WMI would have agreed voluntarily to abandon the Cora Segment instead. The answer relates back to the interim period between February 27, 2013 (the effective date of WMI’s abandonment authority in this proceeding) and February 4, 2014, when WMI filed the Cora Segment abandonment consummation notice. As WMI understands the circumstances then – WMI was at the time a holding of Pioneer Railcorp., but in the later part of 2015 came under the control of individual investors (who do not own or control any other rail common carriers) via a stock purchase agreement – property owners within a lakefront community along the Cora Segment

² Rebuttal at 1.

³ 49 C.F.R. § 1104.13(c).

⁴ 49 C.F.R. § 1104.8.

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did not like the idea of having a public recreational rail trail traversing their community, and they had a plan to eliminate the prospect of such a trail.

The plan was simple. The Cora Segment property owners urged WMI to forego trails use negotiations for that portion of the rail corridor in exchange for cash. WMI was receptive to the proposal, but also desired to preserve its options for negotiating a rail banking arrangement for the segments of line authorized for abandonment connecting at both ends of the Cora Segment. Accordingly, as the record in this proceeding long has reflected, WMI agreed to forego trails use negotiations strictly for the Cora Segment in exchange for, among other things, a right to re-acquire a sufficient right of way along the Cora Segment to allow WMI to reactivate service as far west as Paw Paw.⁵

It now appears that landowners along the Cora Segment, with NARPO's cooperation, have devised a scheme intended to renege on the deal they had struck with WMI, and, in the process, defeat trails use on the Paw Paw Segment. NARPO argues that WMI was duped into reaching an unenforceable or void agreement with the Cora Segment community, and that whatever reactivation rights WMI may have presumed to have negotiated were illusory or disappeared when WMI filed its Cora Segment notice of consummation. NARPO's idea, incidentally, seizes upon the possibility that WMI had only an easement interest in the Cora Segment right of way – a factor that, even if true, is meaningless to the trails use issues here. That is, even if it were true that the Cora Segment railroad right of way existed only as easement (and WMI has taken no position on the property interest it had or has), WMI has secured sufficient contractual rights to restore the Cora Segment right of way.

NARPO has not proven that WMI lacks the contract rights to restore a right-of-way along the former Cora Segment, and there is no need for WMI to disclose evidence of each such agreement establishing its rights. NARPO has been unable to prove that such arrangements do not exist despite its newfound alliance with Cora Segment landowners who appear now to intend to renege on the deals they struck. And even if such agreements did not exist, the Board has indicated in its May 10 Decision that such a circumstance would not necessarily imperil interim trail use west of milepost 25.1.⁶ Indeed, WMI has an overarching non-contractual right to re-establish a railroad line along the Cora Segment route if need be. Specifically, WMI possesses the authority under Michigan law to compel the acquisition of the necessary right-of-way through state eminent domain law to reconnect the line segments, forcibly if need be.

⁵ In its Rebuttal, NARPO repeatedly accuses WMI of “greed” in connection with the deal it struck with the Cora Segment community. In truth, the community had its own self-centered reasons to agree to terms with WMI. The allegations that WMI is “greedy” and that it has perpetrated a fraud upon the Board are patently false, and, while NARPO is within its rights to feel very strongly about its position, such dialogue is unbecoming of NARPO and of this forum.

⁶ May 10 Decision at 4, n.7.

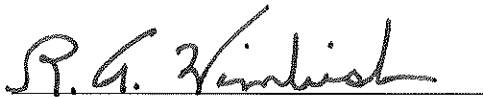
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WMI is confident that the Board will reject NARPO's efforts figuratively to pull the rug out from under WMI and deprive the railroad of carefully-crafted terms intended to protect its option (for at least a term of years) to restore rail service all the way back to Paw Paw. The Board acted correctly in continuing trails use negotiations in its May 10 Decision. There is no genuinely new evidence for the Board to consider (and that evidence is inconclusive and ultimately irrelevant anyway), and there has been no material error to warrant reconsideration. But in the event that the Board is inclined to reconsider the NITU west of milepost 26.5 as a consequence of NARPO's filings, WMI hereby advises the Board that it would, in such a case, seek to reopen this abandonment proceeding based upon materially-changed circumstances.

Specifically, in the unlikely event that the Board were inclined to consider the Paw Paw Segment to be ineligible for interim trails use due to Cora Segment considerations, then WMI would ask the Board to rule that its February 4, 2014 consummation notice is void *ab initio*. Such action would be appropriate in light of new developments showing that the Cora Segment landowners' had induced WMI in bad faith to file an abandonment consummation notice for the Cora Segment, hoping under this previously-concealed plan to evade interim trails use on both the Cora Segment, and to undermine WMI's trails use plans for the Paw Paw Segment. Such a ruling, which appears to be appropriate in light of the new information and changes circumstances deriving from NARPO's latest filings, would maintain all but the small section of line west of milepost 30.2 as un-abandoned rail line within the scope of the Board's jurisdiction. Such a ruling would, in turn, permit WMI to proceed with interim trails use negotiations to include the Cora Segment.

Respectfully submitted,



Robert A. Wimbish
Attorney for West Michigan Railroad Co.

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cc: All Parties of Record