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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

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

**JOINT REPLY IN OPPOSITION TO PETITION FOR
RECONSIDERATION**

Dear Ms. Brown:

West Michigan Railroad Co. (“WMI”) and Michigan Department of Natural Resources (“MDNR”) hereby reply in opposition to the petition (the “Petition”) of the National Association of Reversionary Property Owners (“NARPO”) for the Surface Transportation Board (the “Board”) to reconsider and reverse its decision in this proceeding served on May 10, 2019 (the “May 10 Decision”). NARPO continues through its recent Petition to object to any extension of the notice of interim trails use (“NITU”) negotiation period for the portion of the subject rail line extending between mileposts 26.5 and 30.2 (the “Paw Paw Segment”), due to the abandonment of an intervening section of WMI line between mileposts 25.1 and 26.5 (the “Cora Segment”). NARPO’s Petition re-litigates issues that were fully addressed in the May 10 Decision, and, accordingly, the Petition must be denied.

NARPO’s Petition presents allegedly new evidence and accuses the Board of committing material error. Under the Board’s appellate rules, to prevail on reconsideration, NARPO must not only offer truly new evidence or prove that the Board erred (or both), but it also must demonstrate that such new evidence or Board error “would materially affect the case.”¹ Moreover in alleging material error, the petitioner must do more than simply make a general

¹ Jimmy Lee Waneck and Starr Swearingen Waneck, et al. – Petition for Declaratory Order, Docket No. FD 36167, (STB served Oct. 31, 2018) at 3 (citing to 49 C.F.R. § 1115.3).

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allegation; it must substantiate its claim of material error.² Unless NARPO presents new evidence, changed circumstances, or material error that “would mandate a different result,” the Board will deny reconsideration.³ As explained herein, there is no new evidence or changed circumstances to warrant reconsideration (only newly-introduced, old information), and NARPO’s claim that the Board materially erred by failing to account for WMI’s alleged easement interest in corridor right of way is meritless and immaterial.

NARPO claims to have as members landowners located adjacent to the Cora Segment. NARPO attaches to its Petition a quitclaim deed from one such landowner reflecting an arrangement under which, in foregoing interim trails use arrangements for the Cora Segment and instead consummating abandonment, WMI preserved the option in the future to re-acquire sufficient property rights to re-install tracks and restore rail service. NARPO’s Petition speculates about whether WMI negotiated similar quitclaim deeds with other property owners along the Cora Segment, offering hearsay “evidence” that perhaps other such negotiated instruments do not exist. In fact, WMI’s Cora Segment reactivation rights exist and are of substantial strategic importance to WMI due to the foreseeability of viable rail service opportunities on the Paw Paw Segment. WMI would not have relinquished its interests in the Cora Segment had it believed that lacked the option to resume operations on the Paw Paw Segment. But WMI recognizes that, even if its Cora Segment rights did not exist, it could nevertheless invoke state eminent domain law, were that necessary, to force its way back onto the Cora Segment to restore rail operations.

NARPO’s offered quitclaim deed is not new. Rather, it is a four-year-old document supplied under the mistaken belief that, in newly offering old information, NARPO has reconstituted this old information as “new” for the Board’s evidentiary purposes. NARPO does not explain why it did not introduce, or could not have introduced, this information in an earlier stage in its interim trails use challenge. Moreover, NARPO does not explain why its interested landowner members, some of whom appear now to be intent upon renegeing on their bargain with WMI,⁴ have decided to share details of the deals they struck with WMI four years

² See Can. Pac. Ry. – Control – Dakota, Minn. & E. R.R., Docket No. FD 35081 (STB served May 7, 2009) at 4.

³ See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Atlanta Dev. Auth. – Verified Pet. for Declaratory Order, Docket No. FD 35991 (STB served May 26, 2017) at 5.

⁴ WMI will investigate whether the emergence of the possibility that certain Cora Segment landowners are now to be cooperating with NARPO in order to renege upon a previously-negotiated bargain with WMI warrants reopening this proceeding to withdraw its abandonment consummation notice that Cora Segment landowners may have prompted WMI to file under false pretenses and, thus, in bad faith.

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ago. NARPO has no truly new evidence to offer to support its reconsideration request, and, consequently, its Petition must be denied.⁵

Even if this quitclaim deed is new (it isn't), NARPO has not shown that the bogus "revelation" is material to the Board's extension of the subject NITU negotiation period. While the Board noted that WMI has secured rights to re-establish service over the Cora Segment, it also indicated that such a reservation of right might not be necessary to permit an NITU for the Paw Paw Segment, stating as follows:

The Board's findings here are based on the particular circumstances of this case. The Board 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.⁶

Thus, it does not follow, as NARPO incorrectly seems to assume, that, were WMI without contracted-for reconnection rights for the Cora Segment (rights that it does possess), the Board would terminate the NITU for the Paw Paw Segment. The foregoing quote indicates that the Board would, and could, still uphold the NITU. Moreover, the notion that WMI has reserved rights to reactivate the Cora Segment for a period of years (as is reflected in the quitclaim deed NARPO has supplied), rather than in perpetuity, is determinative of nothing. Should NARPO wish to test the continued applicability of an NITU for the Paw Paw Segment at the expiration of WMI's reactivation rights for the Cora Segment, it may return to the Board at that time, assuming that WMI has not already exercised its rights in the interim.

⁵ See Tongue River R.R. – Constr. & Operation – W. Alignment, FD 30186 (Sub-No. 3), slip op. at 13-14 (STB served June 15, 2011) ("new evidence must in fact be new," rather than newly presented); Canadian Nat'l Ry. – Control – Ill. Cent. Corp., 6 S.T.B. 344, 350 (2002); See also Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, Docket No. 42056 (STB served Sep. 27, 2004), slip op. at 3 ("[T]he Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term "new evidence" refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. See Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989). 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. Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 484 (2d Cir. 1988)").

⁶ May 10 Decision at 4, n.7.

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NARPO's second argument – that the Board committed material error in granting an extension of the NITU for the Paw Paw Segment – is nonsensical, and, thus, meritless. NARPO argues that, prior to its consummation of abandonment for the Cora Segment, WMI only possessed an easement interest in the underlying right of way along that portion of its rail line. NARPO then observes that, as a consequence, in consummating abandonment, WMI's alleged easement interests would have been extinguished. WMI does not take a position at this time as to whether the Cora Segment right of way was in easement or fee, but notes that such a distinction is irrelevant. Whether WMI had fee title to convey or it was simply relinquishing an easement interest for consideration as part of an agreement to forego trails use negotiations for the Cora Segment (the landowners along the Cora Segment were opposed to the idea of a trail through their community, and were willing to pay WMI to forego the option), the fact remains in either case that WMI secured for itself the right to restore service over the Cora Segment. NARPO's argument about the scope of WMI's possessory interest in the Cora Segment right of way is irrelevant to the issuance of the Board's NITU for the Paw Paw segment. Hence, the Board has committed no material error and there is no valid basis for reconsideration.

For the foregoing reasons, the Board must deny NARPO's Petition and sustain the subject NITU in favor of WMI and MNDR.

Respectfully submitted,



Robert A. Wimbish
Attorney for West Michigan
Railroad Co.



Paul Yauk
Trails Section Chief
Michigan Department of Natural Resources

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cc: All Parties of Record