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

Re: Ex Parte No. 749, *National Association of Reversionary Property Owners --
Petition for Rulemaking*

Dear Ms. Brown:

Hereby transmitted is a Petition for Leave to File a Reply to Reply and Tendered Reply
for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
*Attorney for National Association of
Reversionary Property Owners*

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BEFORE THE
SURFACE TRANSPORTATION BOARD

NATIONAL ASSOCIATION OF)
REVERSIONARY PROPERTY OWNERS) EX PARTE
-- PETITION FOR RULEMAKING) NO. 749
)

**PETITION FOR LEAVE TO FILE A REPLY
TO REPLY AND TENDERED REPLY**

NATIONAL ASSOCIATION OF
REVERSIONARY PROPERTY OWNERS
Richard Welsh, Executive Director
227 Bellevue Way NE PMB 719
Bellevue, WA 98004

Petitioner

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Attorney for Petitioner

DATE FILED: July 23, 2018

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SURFACE TRANSPORTATION BOARD

NATIONAL ASSOCIATION OF	)	
REVERSIONARY PROPERTY OWNERS	)	EX PARTE
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**PETITION FOR LEAVE TO FILE A REPLY
TO REPLY AND TENDERED REPLY**

Pursuant to 49 C.F.R. § 1117.1, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS (NARPO) hereby petitions for leave to file a tendered Reply to the Reply filed by ASSOCIATION OF AMERICAN RAILROADS (AAR) on July 5, 2018.

The requested leave to file Reply is grounded on a need to address new matter contained in the AAR Reply, and on the Board's oft-stated desire for a more complete record.

The tendered Reply consists largely of personal experiences of Mr. Richard Welsh, Executive Director of NARPO, in regard to the three rule changes sought by NARPO. Mr. Welsh's statements in the NARPO Reply are informed by that experience.

REPLY

**ISSUE 1 - Limit the number of Interim Trail Use Extensions to Six
180 Day Extensions**

In NARPO's prior filing in this rulemaking, we cited a few of the Interim Trail Use extensions that have been ongoing for over 10 plus years. They illustrate the inequities that are being forced on abutting property owners.

There is another aspect to this issue that should be brought out. The primary reason for allowing railroads to abandon a right of way is because supposedly the railroads are losing

money on the rail line and that money could be spent on their existing rail lines. If the foregoing is correct, why are railroads not consummating abandonments and salvaging the lines and putting those funds towards improving the other rail lines? Where trail use negotiations are drawn out for 3, 4, 10, or 20 years, the supposed savings are not happening, so there must be another reason for the railroads to agree to these numerous extensions.

NARPO would like to expand on this now that the AAR has opened up the issue again. The railroads designed a new scheme for milking the U.S. taxpayers by using the Interim Trail Use gimmick.

Here is how their scheme works:

The railroad petitions the STB for an abandonment.

A trail use proponent agrees to the 49 C.F.R. § 1152.29 rules on Interim Trail Use.

The railroad tells the trail use entity to come up with many dollars; sometimes in the millions of dollars.

The trail use entity doesn't have the money so they keep asking for extensions.

The railroad then offers a donation letter for millions of dollars of corporate tax deductions.

The railroad gets an appraisal firm to write an appraisal for the right of way.

The railroad also tells the appraisal firm that the railroad owns all the right of way, which it doesn't in many cases.

The trail use group in the meantime is attempting to get a grant of funds from the U.S. Gas Tax Enhancement Fund so they can give it to the railroad.

After 3, 4, 5, or 10 years, the trail entity finally gets their money from the Gas Tax Enhancement Fund.

The railroad has an appraisal and gets a donation letter from the trail entity.

The railroad signs the Interim Trail Use agreement and notifies the STB.

This has been documented in a filing before the STB in 1998, *see Burlington N. & Santa Fe Ry.—Aban. Exemption—in King Cty., Wash.*, AB-6 (Sub-No. 380X). In that case there was an allegation by RIRPA (a short-line railroad trying to acquire the line on an OFA) that King County got a \$41 million donation from BNSF in conjunction with an Interim Trail on the right of way. That \$41 million donation got BNSF a \$15.1 million tax deduction as they were in the 39.5% corporate tax bracket. Later, an individual petitioned the IRS to sanction BNSF for a violation of 26 U.S.C. § 170 et seq., and 26 C.F.R. § 1.170A1 et seq., for a tax deduction that cannot be taken if you still own an interest in the property. BNSF still had a residual common carrier interest by virtue of its ability to restore rail service over the right-of-way. Two years later, the IRS wrote to the individual who challenged the BNSF deduction, stating that the IRS forced BNSF to relinquish the deduction.

Sometime around the year 2000, the New York Times financial page had an article about the IRS telling Union Pacific Railroad that they could not take a corporate tax deduction for a railroad right of way that they still had a residual common carrier interest in.

In 1990, Union Pacific petitioned for abandonment of a rail line between Durant and Tulsa, OK. UP had an agreement with the Oklahoma Department of Parks and Recreation to abandon the line and agree to Interim Trail Use, with the Parks Department agreeing to pay \$5 million, with UP to write a donation letter for another \$6 million. The Oklahoma House of

Representatives discovered what the Park Department was up to. The governor of Oklahoma squashed the trail plan. The entire right of way reverted to the farmers along the line.

In summary on ISSUE 1, NARPO brings these cases to the forefront to show how the railroads are manipulating the STB process to collect not only state and county monies, but copious amounts of the U.S. Taxpayers money. And on top of that, the U.S. taxpayer gets whacked again when the U.S. Claim Court requires payment of billions of dollars for the takings of the reversionary rights. See *Haggart v. United States*, 116 Fed. Cl. 131 (2014), where the US Court of Claims awarded 52 property owners \$247 million. This is assuming that the number of NITU extensions is limited to six or less, in which case abutting property owners might get notice early enough to protect their interests.

ISSUE 2 - Notification to Abutting Property Owners of Interim Trail Use

The STB is an agency of the United States and as such it is bound by the United State Constitution. The Fifth and Fourteenth Amendments of the United States Constitution each contain a Due Process Clause. The Due Process Clause acts as a safeguard from arbitrary denial of life, liberty, or property by the government outside the sanction of law. The United States Supreme Court interprets the clauses more broadly, concluding that these clauses provide: procedural due process (in civil and criminal proceedings), substantive due process , and a prohibition against vague laws.

The STB's predecessor, the ICC, promulgated the original regulations for implementing the Rails to Trails Act, 16 U.S.C. § 1247(d), as 49 C.F.R. § 1152.29 et. seq., in 1986; see *Rail Abandonments-Use of Rights-of Way as Trails*, 2 ICC 2d 591, (1986). Thereafter to date, these regulations have been changed somewhat, but are essentially the same. NARPO has participated

in the original and later rulemakings for 49 C.F.R. § 1152.29. On three previous occasions, NARPO has petitioned the ICC and now the STB to give greater protections for the property owners who own the reversionary rights to the railroad rights of way. More than 85% of railroad rights of way were acquired by the originating railroads through some form of easements and or condemnation (eminent domain). Almost all courts have interpreted these easements to be reversionary upon abandonment for railroad purposes. The U.S. Supreme Court has ruled that the reversionary rights to railroad right of way easements are property to the abutting property owners, see *Preseault v ICC*, 494 US 1 (1986) and *Brandt v US*, 572 US 93 (2014). And because 16 U.S.C. § 1247(d), the rails to trails act, creates a “taking” of property, the property owner affected can get just compensation through the U.S. Court of Claims.

Numerous U.S. Court of Claims cases that have emanated from the *Preseault* decision have also found the abutting property owners have a monetary claim for the “taking” of their reversionary rights and have awarded just compensation to the affected property owners. Here lies the problem with how the STB administers and writes the regulations implementing 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. As NARPO represents property owners in 49 states, NARPO has seen the failure of the ICC and now the STB to make abutting property owners aware that their property (reversionary rights to railroad rights of way) has been “taken” by the U.S. Government for interim trail use. The property owner's plight was worsened in 2004 when the Federal Circuit Court of Appeals in *William Caldwell v. U. S.*, 391 F.3d 1226, ruled that the 6-year statute of limitations for filing a “takings” claim in the US Court of Claims starts on the day the STB issues a decision granting a trails group a Notice of Interim Trail Use (NITU).

In previous rulemakings on the issue of abutting property owner notification of interim trail use of their property, the ICC and STB have said that Federal Register notice is sufficient notice to property owners who own land abutting a railroad. In the real world, a rural landowner does not read the Federal Register. Adding to the property owners' notification problem is the fact that nothing is apparent on the railroad right of way to indicate that there is a proposed abandonment and NITU. Railroads using the class exemption for abandonment of rail lines out of service for two years or more provide nothing observable to warn the landowners of a pending abandonment or NITU.

In NARPO's request for this rulemaking, we listed a few of the abandonments that have gone on for over 10 to 20 years before any trail use agreement or other action has been taken to implement or even propose to implement an interim trail. Meanwhile, the six year statute of limitations is expiring for the abutting property owners to file a "takings" case before the U.S. Court of Claims. That combination denies landowners due process of law.

In summary on issue 2, since the last STB rulemaking in 49 C.F.R. § 1152.29, the *Caldwell* case changes the complexion of notification to the abutting property owners. The STB should require the abandoning railroad and/or the proposed trail entity to provide abutting property owners with mail notification of the pending interim trail use of their property.

**ISSUE 3 - Filing Fee for NITU Extensions are payable by Public
and non-public entities**

The federal law that regulates and administers fees of government agencies, 31 U.S.C. 9701, does not provide or even imply that government agencies are entitled to a fee waiver, see Appendix "A". Fee waivers are at the reasonable discretion of the STB. The Board will see that 90% of the 100 or so extension requests each of the past few years were fee-waived. This means

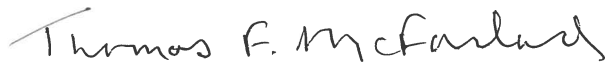
that STB time spent on fee waived extensions has to be made up by the non-fee waived entities in the way of higher fees.

In summary for issue 3 - In that there is no justification for these fee waivers and the statute doesn't require fee waivers, the STB should amend their fee rules to provide that all entities pay fees for extension of NITUs.

Respectfully submitted,

NATIONAL ASSOCIATION OF
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Appendix “A”

31 U.S. Code § 9701 - Fees and charges for Government services and things of value

(a)

It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1)

fair; and

(2) based on—

(A)

the costs to the Government;

(B)

the value of the service or thing to the recipient;

(C)

public policy or interest served; and

(D)

other relevant facts.

(c) This section does not affect a law of the United States—

(1)

prohibiting the determination and collection of charges and the disposition of those charges; and

(2)

prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.