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December 20, 2021

By e-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-857 (Sub-No. 2X), *Colorado Landowners -- Adverse Abandonment -- Great Western Railway of Colorado, LLC in Weld County, Colorado*

Dear Ms. Brown:

The Colorado Landowners respectfully request leave to file brief rebuttal directed to the reply filed by Great Western Railway of Colorado (GWRC) on November 30, 2021. The rebuttal should be accepted for filing in the interest of compiling a complete record on which to base a decision.

First, GWRC's Reply should be rejected because it does not satisfy the essential requirements of standing, i.e. (1) injury-in-fact; (2) causation; and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). GWRC fails to explain how the procedural matters raised by the Petition implicate any legitimate interests of GWRC. Consequently, GWRC lacks standing to oppose the procedural relief sought by the Landowners. *See Brotherhood of Signalmen v. STB*, 638 F.3d 807 (DC Cir. 2011).

Second, GWRC's statements concerning the "storage" of cars in the context of the proposed Notice of Intent are factually inaccurate and legally premature because they relate if at all, to the ultimate merits of adverse abandonment and have no relevance to the Landowners' Petition for Partial Waiver of Abandonment Regulations and for Exemption from Statutory Requirements. When railcars are taken out of common carrier service for extended periods of time, storage of those cars is not the kind of "storage" over which the Board has jurisdiction under 49 U.S.C. § 10102(9)(B). The Board has jurisdiction over storage that is incidental to the performance of common carrier service, such as traditional storage-in-transit. Storage of cars in the case at hand is extended storage that is not incidental to the provision of common carrier service. Carriers act as bailees of cars temporarily taken out of common carrier service for extended periods, not as carriers for the provision of common carrier service.

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Third, GWRC's reply pertaining to the Offer of Financial Assistance regulations ("OFA") adds nothing to the matters actually at issue. The Landowners' Federal Register Notice does not address OFA and Railbanking provisions because those provisions are not to be imposed in adverse abandonment cases, at least over the objection of the applicant for abandonment. The federal interest in a rail line ceases when the Board grants an application for adverse abandonment. An OFA or Railbanking would be fundamentally inconsistent with that relief because it would reintroduce federal jurisdiction over the rail line authorized for abandonment. Consequently, OFAs and railbanking cannot be imposed as a condition to an authorized adverse abandonment, at least if the applicant for adverse abandonment opposes continued rail service pursuant to an OFA, or railbanking and trail use.

Fourth, the Landowners continue to believe that a Draft Environmental and Historic Report (DEHR) is not required in the case at hand because GWRC filed a DEHR several years ago when it sought abandonment of the Line. Nothing has changed in the interim. GWRC was not performing transportation subject to Board jurisdiction at that time, and neither is it performing such transportation at present. A DEHR is unwarranted here because it is highly unlikely that environmental and historic conditions have changed in view of the absence of active rail operations in both instances, and because there is no likelihood of rail operations in the foreseeable future.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated that Board should take the foregoing into account in ruling on the Landowners' Petition for Partial Waiver of Abandonment Regulations and for Exemption from Statutory Requirements, filed on October 15, 2021.

Respectfully submitted,

/s/ Thomas F. McFarland
Thomas F. McFarland
One of the Attorneys
for Colorado Landowners

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cc: All parties of record