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December 28, 2021

E-Filed

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

Re: Docket No. AB 857 (Sub-No. 2X), Colorado Landowners -- Adverse Abandonment --
Great Western Railway of Colorado, L.L.C. in Weld County, Colorado

Dear Ms. Brown:

Great Western Railway of Colorado, L.L.C. ("GWRC") hereby replies in opposition to the filing made by the Colorado Landowners ("Landowners") on December 20, 2021, with the Board. The filing, labeled a "rebuttal", is simply a reply to GWRC's reply and, therefore, prohibited by 49 C.F.R. 1104.13(c). *St. Louis Southwestern Ry. Co. Compensation – Trackage Rights*, 4 I.C.C. 2d 668, 673 (1987). In addition to being prohibited by the Board's rules, the Landowners' reply is sorely misguided as set forth below.

First, the Landowners' contention that GWRC lacks standing to file its reply is based on a fundamental misunderstanding of the doctrine of standing. The doctrine of standing is an essential part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under well-established law, a party seeking to invoke federal court jurisdiction (i.e., the plaintiff and not the defendant) must demonstrate three things: (1) injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); and *Clements v. Fashing*, 457 U.S. 957 (1982). Surely, the Landowners are not suggesting that GWRC is the plaintiff and they are the defendants in this proceeding. GWRC is not seeking to seize any of the plaintiffs' property. Rather, it is the Landowners who are attempting to expropriate GWRC's Welty Branch.

Before filing their adverse abandonment application, the Landowners should seriously consider whether they have standing to do so. The Welty Branch was constructed in 1902 and 1903, well before the Landowners acquired any adjacent property. When the Landowners

acquired their purported adjacent lands, they were aware of the location of the Welty Branch. At the time of its construction and for decades thereafter, the Welty Branch promoted the establishment of Johnstown and significantly enhanced the value of the lands in the surrounding communities. Today, the area surrounding the Branch is a prime location for industrial development provided that rail access via the Welty Branch remains in place. The Landowners cannot plausibly demonstrate any “injury in fact”. The Welty Branch enhanced the value of the surrounding area when it was constructed and continues to do so today. Also, there is no causal relationship between the retention of the Welty Branch and any speculative reduction in the value of the adjacent lands. Any diminution in the value of the Landowners’ adjacent lands would only result from the forced abandonment of the Welty Branch and, thus, constitute a self-inflicted wound. Because a forced abandonment would reduce, and not enhance, the value of the adjacent lands, there is no injury to be redressed by a ruling favorable to the Landowners.

Second, the Landowners mischaracterize GWRC’s objection to their proposed Notice of Intent where they claim that GWRC has not used the Welty Branch for railroad purposes. GWRC simply noted that it intends to demonstrate that it has in the past and intends in the foreseeable future to provide transportation services as defined at 49 U.S.C. Section 10102(9)(B), including the storage of rail cars. GWRC’s reference to “storage” was not limited to the long-term storage of empty rail cars but included the storage of loaded rail cars and storage of cars incidental to the performance of common or contract carrier service. Interestingly, the Landowners concede that the storage of loaded rail cars and storage of cars incidental to the transportation of property constitute transportation services which would preclude any successful adverse abandonment. Moreover, GWRC intends also to demonstrate that the storage of empty rail cars, particularly during downturns in rail operations, is an essential transportation service.

Third, the Landowners erroneously contend that the Offer of Financial Assistance (“OFA”) regulations and Railbanking provisions are not to be imposed in adverse abandonment proceedings. The Board generally waives informational requirements that are not available to the applicant in an adverse abandonment proceeding. That rationale, however, does not apply to OFA regulations and Railbanking provisions. The Landowners can just as easily comply with those requirements as could GWRC in a non-adverse abandonment proceedings. The Board has a statutory duty to preserve and promote continued rail service where, as here, the carrier desires to continue operations and has taken reasonable steps to acquire traffic. The filing of a legitimate OFA would perpetuate continued rail service which should be promoted and not foreclosed as the Landowners suggest. Also, the National Trails System Act, 16 U.S.C. 1247(d), “is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails.” *Preseault v. ICC*, 494 U.S. 1, 5 (1990). Under the Trails Act, the Board must “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor offers to assume certain statutory obligations. See 16 U.S.C. 1247(d). Interim trail use necessarily conflicts with any reversionary rights of adjacent land owners which, of course, is the very purpose of the Trails Act. Moreover, the Trails Act applies to all abandonment applications filed under Sections 10903 and 10904, including adverse abandonment applications. See *Rail Abandonments – Use of Rights-Of-Way As Trails*, 2 I.C.C. 2d 591, 600 (1986).

Fourth, the Landowners once again seek waiver of the environmental and historic filing requirements. As GWRC previously noted, the identical request was previously denied in Docket No. AB 1065 (Sub-No. 3), *Landowners – Adverse Abandonment – Indiana Southwestern Railway Co. in Posey & Vanderburgh Counties, Ind.* (not printed), served April 7, 2021. GWRC's environmental and historic reports ("EHRs") were prepared and filed with the Board in 2008, or nearly 14 years ago. The Board generally does not consider, as current, EHRs that were prepared more than one year ago. In any event, the Landowners have failed to demonstrate that the 2008 reports are still current.

As set forth above, the Plaintiff's reply is improper and should be given no consideration and the Petition For Partial Waiver should be denied.

If you have any questions, please call me.

Sincerely,

A handwritten signature in cursive script that reads "Karl Morell".

Karl Morell

cc: All parties of record