



October 31, 2022

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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street S.W.
Washington, D.C. 70423-0001

**Re: Docket No. AB 857 (Sub-No. 2)
Colorado Landowners—Adverse Abandonment—
Great Western Railway of Colorado, LLC, in Weld County, CO**

Dear Ms. Brown:

Landowners hereby respectfully request leave to file the following Reply in support of its Adverse Abandonment Petition filed in the above-captioned proceeding. In order for the Board to make an informed decision, and in the interest of compiling a full record, Landowners wish to file the attached Reply, to correct numerous errors and misstatements asserted in GWRC's Reply to Landowners' Adverse Abandonment proceeding.

The Board's rules for proceedings initiated under the agency's individual petition for exemption procedures do not specifically provide for the filing of a Reply to a Reply. *See* 49 C.F.R. § 1104.13(c). However, for good cause and in the interest of a more complete record, the Board will accept a Reply to a Reply. *See City of Alexandria—Pet. For Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

Given GWRC's Reply, which contains misstatements and misleading arguments, a Reply filing is warranted and should be accepted. If the Board chooses to accept Landowners' proffered Reply, then Landowners Reply is attached as Exhibit A.

Sincerely,

A handwritten signature in blue ink that reads 'Elizabeth Gepford McCulley'.

Elizabeth Gepford McCulley

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Certificate of Service

I hereby certify that on October 31, 2022, I served the foregoing document, Certificate of Service Letter via electronic mail only upon the following counsel of record:

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A handwritten signature in blue ink, reading "Elizabeth McCullough", is written over a horizontal line.

BEFORE THE
SURFACE TRANSPORTATION BOARD

LANDOWNERS – ADVERSE	)	
ABANDONMENT – GREAT WESTERN	)	DOCKET NO. AB-857 (SUB-NO. 2)
RAILWAY OF COLORADO, LLC—IN	)	
WELD COUNTY, CO.	)	

LANDOWNERS' REPLY

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DATE FILED: October 31, 2022

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WELD COUNTY, CO.	)	

LANDOWNERS’ REPLY

The Landowners¹ filed their Application² under 49 U.S.C. § 10903 requesting that the Surface Transportation Board (“Board”) authorize adverse abandonment of 6.2 miles of rail line that extends from Milepost 0.0 at Johnstown, Colorado, to Milepost 6.2 near Welty, Colorado (the “Rail Line”).³ Great Western Railway of Colorado, LLC (“GWRC”) filed its Reply on October 14, 2022. Although the applicable rules do not specifically provide for the filing of a Reply by the Landowners to the Reply filed by GWRC, because GWRC’s Reply contains myriad errors and

¹ GWRC’s Reply infers that there is some confusion about the number of Landowners and their identity by stating that “the identity of the Landowners is unclear.” See GWRC’s Reply, at 2, fn. 1. There is no confusion whatsoever, however, because the 27 Landowners are listed in Appendix 1 to the Landowners’ Application.

² The Landowners’ Application was considered filed on October 5, 2022, which was 20 days after the Landowners’ filed the September 15, 2022 amendment to a September 13, 2022 revised Environmental and Historic Report. See *Colo. Landowners’—Adverse Aban.—Great W. Ry. of Colo., LLC, in Weld Cnty., Colo.*, AB-857 (Sub No. 2), Slip. Op. at 1 (STB served Sept. 7, 2022).

³ GWRC’s Reply also challenged the sufficiency of service of the Landowners’ Environmental and Historic Reports. See GWRC’s Reply, at 3. GWRC’s criticism is misplaced because the Landowners complied with the Board’s regulations and served the revised Environmental and Historic Report on all agencies listed at 49 C.F.R. 1105.7(d), which was confirmed in e-mail exchanges between the Landowners’ counsel and the Board, and an additional Certificate of Service was filed. Although GWRC’s criticisms have no merit, “to the extent that these objections need to be addressed, the Board will do so in a future decision in this docket.” See *Colo. Landowners—Adverse Aban.—Great W. Ry. of Colo., LLC, in Weld Cnty., Colo.*, AB-857 (Sub No. 2), Decision 51462, at 4, fn. 4 (STB served Oct. 25, 2022).

misstatements, and in the interest of compiling a more complete record, this Landowners' Reply is necessary, and the Board should accept it.

I. GWRC HAS NOT DISPUTED EITHER THE PROCEDURAL HISTORY OR THE FACTUAL HISTORY

GWRC's Reply does not dispute, and in fact does not even address, the extensive factual history the Landowners presented in their Application for Adverse Abandonment. As a result, the facts are undisputed that a *de facto* abandonment occurred more than 40 years ago and that the present and future public convenience and necessity ("PC&N") permit adverse abandonment.⁴

The following undisputed facts establish the *de facto* abandonment:

- 1) The Rail Line was constructed in 1902 and 1903;
- 2) The Rail Line is stub-ended at milepost 6.2 where it literally comes to an end in the middle of nowhere;
- 3) The Rail Line was constructed to transport sugar beets from a sugar beet dump facility, located at milepost 6.2, to the railroad's main line facilities in Johnstown;
- 4) The sugar beet dump facility was closed in the 1970's and the closure of the sugar beet dump facility reduced the demand for railroad traffic to zero;
- 5) The Rail Line has not been used since 1979 for board-regulated rail traffic, in addition to the 43 years of non-use, the Rail Line has been in a constant condition of substantial disrepair, there was no train activity or even the storage of cars on the Rail Line from 1979 through 2008, there was no effort to actually solicit train traffic for decades, just like in *D&RGW* and *Modern Handcraft*, and the Rail Line has not been used by anyone for 43 years, and there are no current shippers or shipping commitments.⁵

⁴ See *Modern Handcraft, Inc.—Abandonment—in Jackson County, MO*, 1981 WL 22670, 363 I.C.C. 969 (1981) ("*Modern Handcraft*"); *Denver & Rio Grande Railway Historical Foundation—Adverse Abandonment in Mineral County, Co.*, 2008 WL 2154898 at *12 (2008) ("*D&RGW*"); *Chelsea Property Owners—Abandonment—Portion of Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY*, 8 I.C.C. 2d 773, 779 (1992), *aff'd*, *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994) ("*Chelsea Property Owners*").

⁵ See Landowners' Application, Appendix 6, the Declaration of Cindy Sauer, and Appendix 7, the Declaration of Fred Weis. See also discussion in Section II *infra*.

Similarly, GWRC does not dispute any aspect of the detailed procedural history. The undisputed procedural history is as follows:

- 1) GWRC filed a Notice of Exemption on April 16, 2008 and, after specifically admitting that there had been no rail traffic on the Rail Line for more than 20 years, and that the Rail Line was stub-ended and not even capable of handling overhead traffic, requested a proposed consummation date for abandonment of June 5, 2008;⁶
- 2) After Notice of the exemption was served and published in the Federal Register, the Board issued a Notice of Interim Trail Use or abandonment authorizing negotiations for interim trail use/railbanking of the Rail Line under the Board's regulations at 49 C.F.R. § 1152.29;
- 3) After the Board issued a NITU on July 28, 2008, the negotiations for trail use ceased and the Board's authorization for abandonment was again triggered on December 2, 2008, but GWRC then requested and received six yearly extensions to consummate abandonment;
- 4) On August 28, 2014, rather than consummate abandonment, GWRC filed a letter with the Board stating that it had decided to reactivate the Rail Line;
- 5) In a Decision served on February 11, 2022, the Landowners were granted exemptions from several statutory provisions and waivers of certain Board regulations that were unnecessary to the adverse abandonment application or that sought information not available to the Landowners;
- 6) During and after the time when the Landowners started the process of adverse abandonment by filing their petition for waivers and exemptions, GWRC started a renewed abandonment exemption process, first indicating that they were going to file a Notice of Exemption by February 15, 2022, and then stating that they would file a Notice of Exemption by June 1, 2022, and GWRC ultimately filed its Environment and Historic Report on April 6, 2022; and
- 7) GWRC never filed a new Notice of Exemption, even though the Rail Line is stub-ended and there has been no train traffic for 43 years, and the Landowners filed their Application for Adverse Abandonment on August 18, 2022.

⁶ See *Great Western Ry. of Colo., LLC—Aban. Exemption—in Weld Cnty. Colo.*, Docket No. AB 857 (Sub No. 1X).

Although GWRC does not dispute any aspect of the 43-year period of non-use,⁷ GWRC's Reply does raise the issue of possible shippers in the future. But, as discussed herein, the two potential shippers GWRC identified do not even own land adjacent to the Rail Line and make no commitment whatsoever for actual shipments, which means that the actual potential for future shippers is speculative at best, and GWRC's effort to defeat the Landowners' Application is a sham.

II. GWRC'S PROPOSED SHIPPERS ARE PURELY SPECULATIVE AND DO NOT REBUT THE LANDOWNERS' APPLICATION

GWRC identified two "potential" shippers to purportedly show that the Rail Line is imminently ready for significant freight traffic, yet GWRC's evidence is entirely self-serving and purely speculative. Board decisions clearly show that speculative freight traffic is not enough to justify keeping a rail line within the Board's jurisdiction.

In *D&RGW*, as to a rail line in non-operational condition that had not seen freight operations for decades, the Board granted an application for adverse abandonment over the railroad's objections and evidence of potential shippers. *See D&RGW*, at *5-8. The Board pointed

⁷ GWRC bases its only counter evidence as to use of the Rail Line on the storage of rail cars "on a number of occasions." *See* GWRC's Reply, at 8-9. Setting aside that description's vagueness and inherent confirmation that GWRC's rail car storage was *de minimis*, rail car storage alone is not enough to warrant keeping a rail line within the Board's jurisdiction, and therefore the Board should not consider it as a factor against granting the Landowners' Application. *See Chelsea Property Owners*, 8 I.C.C. at 789-92 (granting adverse abandonment application where rail line was only used for storage, loading, and switching of cars, despite railroad's opposition and offered evidence of prospective shippers); *Tri-Cnty. Metro. Transp. Dist. of Or.—Abandonment—A Line of Burlington N. R.R. Co. in Wash., Cnty., Or.*, Docket No. AB-6 (Sub-No. 348), 1993 WL 176653, at *1-2 (STB served May 26, 1993) (finding PC&N supported grant of abandonment authority where a stub-ended rail segment was used only for limited car storage for preceding eight years); *The City of Chi., Ill.—Adverse Abandonment—Chi. Terminal R.R. in Chi., Ill.*, Docket No. AB 1036, 2010 WL 2405015, at *1-4 (STB served June 16, 2010) (granting adverse abandonment application over railroad opposition, including that the line had future traffic potential and was needed for empty rail car storage, in part because no rail traffic was "currently originated, terminated, or bridged over the segments").

out that the railroad had more than seven years after it acquired the line to seek out potential shippers and rehabilitate the line, yet failed to do so and “provided no evidence that freight traffic would actually materialize, or that there would be enough of this traffic to justify keeping this line in the interstate rail system.” *See id.* at *8-9. Just like with the Rail Line at issue here, freight service on the line in *D&RGW* stopped decades before the adverse abandonment application because the industry that justified the line’s use dried up—in that case, mining operations. *See id.* at *1.

Even more on point is *Stewartstown Railroad Co. – Adverse Abandonment – In York Cnty., Penn.*, a decision that GWRC actually cited in its Reply. *See* GWRC’s Reply, at 9. In *Stewartstown*, the Board again granted an application for adverse abandonment over a railroad’s objections and evidence of “potential” shippers, this time as to a line that had been out of freight service for two decades. *See Stewartstown Railroad Co.—Adverse Abandonment—In York Cnty., Penn.*, STB Docket No. AB 1071, Slip Op. at *4-7 (STB served Nov. 16, 2012) (“*Stewartstown*”). Unlike in *D&RGW*, and like the Rail Line here, the potential shippers in *Stewartstown* filed letters in opposition to adverse abandonment and asserted ongoing negotiations and interest in freight service as evidence. *See id.*

The Board dismissed the first potential shipper in *Stewartstown* as speculative because the shipper had not made a **“definite commitment to ship”** and instead had only “preliminary discussions” with the railroad, just like the facts here. *See id.* at *4-5 (emphasis added). The Board rejected the first potential shipper even though the shipper’s facility was adjacent to the line, contrary to the facts here, the shipper stated it anticipated a need for rail service within the next two years, and the railroad indicated it had begun negotiations for future freight service. *Id.* The Board then dismissed the second potential shipper because the shipper **“[did] not indicate a**

present need for, or a present commitment to, rail service” and the line’s availability as an “option” for rail deliveries “does not demonstrate that freight traffic will actually materialize in the future.” *See id.* at *5 (emphasis added). Finally, the Board dismissed the third potential shipper as **“too speculative”** because it made **“no definite commitment to ship”** over the rail line, even though the shipper stated a desire to establish operations along the line “within the next few years.” *See id.* at *6 (emphasis added).

After finding that each proposed shipper’s prospects at restoring freight either speculative or unrealistic, the Board laid out the appropriate standard in *Stewartstown*:

In adverse abandonment proceedings, the burden lies with the applicant to show that the carrier has no likelihood of success in preserving the line for rail service. When the applicant makes such a showing, **the burden of production then shifts to the carrier to show that there is a realistic potential for rail service.**

See id. at *7 (emphasis added). Accordingly, the Board found the applicant showed there was “little, if any, realistic or credible potential for future rail service,” and that the railroad did not persuasively rebut the showing. *See id.*

D&RGW and *Stewartstown* show a throughline as to how the Board weighs prospective shippers in the context of an adverse abandonment application—where the rail line at issue has had no freight service for decades, only definite commitments from shippers to provide freight service will justify keeping the line within the Board’s authority and jurisdiction. This ties into § 10903(d)’s broader standard for adverse abandonments that no line of railroad may be abandoned and no rail service discontinued unless the Board finds that the PC&N⁸ require or permit the

⁸ The Board must consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. *See N.Y. Cross Harbor R.R. v. S.T.B.*, 374 F.3d 1177 (D.C. Cir. 2004). The Board does not allow federal jurisdiction to be used to shield a line from the legitimate process of state law where no overriding federal interests exist. Although the Board must protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service, the Rail Line has no rail service to obstruct or disrupt. The Board must also consider whether the abandonment of the Rail Line would have

abandonment or discontinuance. *See* 49 U.S.C. § 10903(d). Where applicants for adverse abandonment establish PC&N, as the Landowners have done in their Application,⁹ only clear, definite evidence of freight traffic resumption can prevent abandonment, and that is certainly not present here.

GWRC identified two shippers—G4 Energy, LLC (“G4”) and Rocky Mountain Transload, Inc. (“RMT”)—as having interest in freight operations on the Rail Line.¹⁰ However, there is no real evidence that either shipper has committed to use the Rail Line or are even likely to commit in a reasonable time frame or commit at all. Indeed, it appears GWRC itself prepared the “Verified Statements,” as each statement contains virtually identical language that tracks exactly with GWRC’s assertions in the body of its Reply. *See* GWRC’s Reply, at 6–7; Verified Statement of Guillermo Grossi-Roffi; Verified Statement of Walter Sanders. Even further, the Verified Statements themselves belie GWRC’s optimistic view of prospective freight traffic. While GWRC asserts G4 “expects to transload” and RMT “expects to ship” their respective tonnage on the Rail Line, the Statements reveal that the shippers merely expect the proposed site “*could*” receive the tonnage. *See id.*

Moreover, and importantly, it is unclear as to how G4 and/or RMT would access the line for freight. Neither entity owns land adjacent to the Welty Line, and there are no obvious points of access, as residential and agricultural parcels dominate the adjacent land. Indeed, in

a serious, adverse effect on rural and community development and, here, abandonment of the Rail Line will finally allow the Landowners to put the land to productive use.

⁹ *See* Landowners’ Application, at 6-16.

¹⁰ GWRC also presents evidence of future freight in the form of “other firms seeking rail service,” but this evidence is hardly worthy of discussion. GWRC identifies no specific entities and itself admits these discussions are in a “preliminary stage,” which renders the entire statement highly speculative pursuant to *Stewartstown*, and there is no evidence any “supplemental information” GWRC may provide would add anything more concrete than the speculative prospects from G4 and RMT. *See* GWRC’s Reply, at 7.

Stewartstown, similar facts further supported the Board’s decision to dismiss certain potential shippers. *See Stewartstown*, at *7 (finding shippers had “no need for freight service on the Line because these companies have no facilities on the Line”); *see also R. J. Corman R.R. Prop., LLC—Abandonment Exemption—in Scott, Campbell, and Anderson Cntys., Tenn.*, Docket No. AB 1296X, 2021 WL 1740860, at *5-6, fns. 10, 12 (noting a proposed shipper without land or a facility adjacent to the rail line did not qualify as “specific evidence” necessary to demonstrate a need for continued rail service).

Undeniably, neither G4 nor RMT has provided the required definite commitment to freight service to rebut the Landowners’ showing that PC&N permit the proposed abandonment. The prospect of future shipping on the Rail Line is not only speculative due to a lack of commitment and a lack of access but, even if future shipping was an actual possibility, GWRC has made no showing that relates to quantity or revenue. As a result, any possible need for future rail service is outweighed by the Landowners interests and the Board should not allow continuing federal jurisdiction to be used to shield the Rail Line from the legitimate process of state law when no overriding federal interest exists. The Rail Line has had 43-years-and-counting of zero freight traffic, and GWRC’s evidence that the identified shippers might use the Line at some indeterminate point in the future is wholly inadequate to make the requisite showing.

III. CONCLUSION

The Landowners’ Reply is warranted due to GWRC’s introduction of misguided evidence and arguments that merit the Landowners’ response. None of GWRC’s evidence or argument addresses the Rail Line’s relevant procedural and factual history, and therefore GWRC’s four-decades-plus of non-use indisputably satisfies the Landowners’ burden to demonstrate that PC&N permits abandonment. GWRC’s Reply attempts to counter the Landowners’ demonstration

through the introduction of two potential shippers, yet the proffered evidence that supports these shippers' viability is both non-existent and highly speculative. GWRC abandoned freight service many years ago, and restoration of freight service is demonstrably unrealistic, and therefore the Board should grant the Landowners' Application.

Respectfully submitted,

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