

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-857 (SUB-NO. 2)

LANDOWNERS
– ADVERSE ABANDONMENT –
GREAT WESTERN RAILWAY OF COLORADO, LLC
IN WELD COUNTY, CO

PROTEST OF GREAT WESTERN RAILWAY OF COLORADO, LLC

ENTERED
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November 18, 2022
Part of
Public Record

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Great Western Railway
Of Colorado, LLC

Dated: November 18, 2022

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Pursuant to 49 C.F.R. § 1152.25(a)(1), Great Western Railway of Colorado, LLC ("GWRC") protests the application for adverse abandonment of GWRC's Welty Branch located between milepost 0.0, at Johnstown, Colorado, and milepost 6.2, at Welty, Colorado (the "Line" or "Welty Branch"), filed with the Surface Transportation Board ("Board") by the Landowners.

I. BACKGROUND

On October 15, 2021, the Landowners filed with the Board a Petition For Partial Waiver. Approximately 15 days later, the Landowners decided to comply with the Board's rules and serve a copy of The Petition on GWRC. The Petition was granted in part by decision served February 11, 2022 (the "February 11 Decision"). On July 22, 2022, the Landowners' Notice of Intent ("NOI") was filed with the Board. The NOI was served on July 21, 2022, and published on July 24 and 31, 2022, and on August 7, 2022. On August 1, 2022, the Landowners filed an Environmental and Historic Report ("Initial Report"). On August 18, 2022, the Landowners tendered for filing their Application. By decision served September 7, 2022, the Board found the Initial Report defective and held the proceeding in abeyance until 20 days after the Landowners

filed a revised Report (“September 7 Decision”). On September 13, 2022, the Landowners filed a revised Environmental and Historic Report (“Revised Report”), which was supplemented on September 15, 2022 (“September 15 Supplement”). On October 12, 2022, the Landowners filed with the Board a letter from the Colorado SHPO stating that the Welty Branch was eligible for listing on the National Register of Historic Place.

In the February 11 Decision, at 6, the Board ordered the Landowners “to prepare and submit both an environmental and historic report if they intend to file an application” and serve those reports on appropriate agencies. Rather than prepare their own reports, as ordered by the Board, the Landowners simply misappropriated GWRC’s Environmental and Historic Reports in Docket No. AB-857 (Sub-No. 3X). The Board correctly noted that the Landowners’ attempted use of GWRC’s reports resulted in “‘confusing and what appears to be conflicting information’ regarding potential salvage of the line and the prospect of interim trail use/rail banking of the right-of-way.” September 7 Decision at 1.

The Revised Report, like the Initial Report, is defective. Anyone seeking to file an abandonment application must certify that it has consulted with all appropriate agencies in preparing its environmental report and that those “consultations should be made far enough in advance to afford those agencies a reasonable opportunity to provide meaningful input.” 49 C.F.R. § 1105.7(c). The Landowners have failed to comply with this requirement. The Revised Report is dated September 13, 2022. The eight letters purportedly sent by the Landowners to various agencies are also dated September 13, 2022. Consequently, the Landowners have not provided any agency a meaningful opportunity to provide input to the environmental report. Moreover, the Landowners have not served copies of the Revised Report on all of agencies listed at 49 C.F.R. § 1105.7(b). The Landowners have also failed to comply with the requirements of

49 C.F.R. § 1105.7(d) since the Landowners failed to consult with any agency in preparing the Revised Report. Moreover, 49 C.F.R. § 1105.7 (e)(3)(i), (e)(3)(ii), (8), (9)(i), and (9)(ii) require a response in the environmental report to be based on consultation with various agencies. The Landowners cannot comply with these requirements because they have failed to make any consultations. In addition, the Landowners have failed to comply with the requirements of 49 C.F.R. § 1105.11, since no transmittal letters were prepared or forwarded to the appropriate agencies.

The Landowners once again make significant and erroneous use of GWRC's Environmental and Historic Reports. For example, the Landowners submitted to the U.S. Fish and Wildlife Service correspondence between GWRC and that agency set forth in GWRC's Environmental Report. GWRC's email to the Fish and Wildlife Service, which the Landowners forwarded to the Service, expressly states that the infrastructure of the Welty Branch will remain in place. The Landowners have therefore intentionally mislead the Service since the Landowners are insisting that the Welty Branch be salvaged. The Fish and Wildlife Service was concerned with any ground disturbance salvage operations will involve. The Landowners have not only failed to address the Fish and Wildlife's concerns but have mislead the Service into believing that no salvage operations will take place. Also, GWRC was planning on railbanking the line whereas the Landowners are insisting that the Board not permit railbanking. The Colorado State Historic Preservation Officer determined that GWRC's planned abandonment would have no adverse effect on historic properties provided that GWRC remain committed to railbanking the line. September 15 Supplement. Since the Landowners are opposed to railbanking, their proposed abandonment presumably will have an adverse effect on historic properties.

Pursuant to the September 7 Decision, the Application was considered filed on October 5, 2022. The Board's rules, however, require that the NOI be served not more than 30 days prior to the filing of the Application, be published within the 30-day period prior to the filing of the Application, and must be filed with the Board concurrently with service or when first published. See 49 C.F.R. § 1152.20 (b). The NOI does not comply with any of these time limits.¹ Also, the NOI is not in compliance with the revised notice of intent approved by the Board in the February 11 Decision.

Attached as Appendix 3 to the Application is a copy of the NOI as published in the Greeley Tribune. The published NOI is not even remotely close to the Notice of Intent approved by the Board in the February 11 Decision. Attached as Appendix 5 to the Application is a copy of the proposed Federal Register Notice. Again, the proposed Notice is not in compliance with the Notice authorized by the Board in the February 11 Decision. For example, the draft notice does not include language relating to trail use.

The Application also does not contain the affidavit required by 49 C.F.R. § 1152.24(b). The Application contains a Certificate of Service alleging that the Application was served on August 18, 2022, on 15 named individuals or agencies, including counsel for GWRC. To date, the undersigned counsel has not received a copy of the Application by email or first-class mail. This raises the question of how many other individuals or agencies were not properly served!

On October 14, 2022, GWRC filed a Reply to the various filings made to date by the Landowners ("GWRC Reply").

¹ Even if the Application were deemed filed on August 18, 2022, the Landowners would not have complied with the Board's time limits.

The Landowners filed a “timeline of service of documents” (“Timeline”) on October 20, 2022. As previously noted, the Application was never served on the undersigned counsel of GWRC, contrary to the representations in the Timeline.² Also, the Timeline confirms that the Revised Report was not served in full compliance with 49 C.F.R. § 1105.7(b).

On October 31, 2022, the Landowners tendered for filing a reply to the GWRC Reply (“Landowners’ Reply”). Recognizing that a reply to a reply is prohibited by 49 C.F.R. § 1104.13(c), the Landowners attempt to justify their reply by claiming that the GWRC Reply “contains myriad errors and misstatements”. The Landowners, however, fail to identify a single error or misstatement in the GWRC Reply. Accordingly, the Landowners’ Reply should not be accepted for filing.

If the Landowners are in search of errors and misstatements they need look no further than the Landowners’ Reply. For example, the Landowners falsely claim that the prospect of future shipping on the Welty Branch is only speculative due to a lack of commitment and a lack of access. They further claim that GWRC has made no showing of quantity or revenue. The two entities seeking to locate on the Welty Branch have projected traffic volumes they intend to ship over the Welty Branch: G4 Energy, LLC expects to transload up to one million tons of product over the Welty Branch and Rocky Mountain Transload, Inc., projects to move up to 50,000 tons of product over the Welty Branch. As purported landowners adjacent to a relatively short rail line, the Landowners should be aware of the fact that GWRC owns a sizable parcel of land adjacent to the Welty Branch near Interstate I-25 and that the parcel of land is directly accessed by a road. Accordingly, GWRC has made the requisite showing of anticipated traffic volumes

² It has come to GWRC’s attention that on August 18, 2022, the Landowners tendered for filing an addition document which was not served on the undersigned counsel and has not appeared on the Board’s website.

and direct truck access to the Welty Branch. The Landowners conveniently ignore the fact that GWRC is spending about \$1 million to rehabilitate the Welty Branch. Surely, a relatively small rail line operator, such as GWRC, would not make such a substantial investment unless it was convinced that the traffic projections were realistic and the revenues from that traffic justified the expenditures.³

It has become painfully obvious that the Landowners are unwilling or unable to complying with the Board's rules.

II. REQUIRED INFORMATION

Pursuant to the requirements of 49 C.F.R. § 1152.25(a)(1), GWRC submits the following information:

- (i) Protestant's name and address:

Great Western Railway of Colorado, LLC
252 Clayton Street, 4th Floor
Denver, Colorado 80206

- (ii) Nature of Company's business:

GWRC is a Class III carrier subject to the jurisdiction of the Board that owns the Welty Branch and connecting rail lines.

- (iii) Summary of reasons why GWRC opposes the application for adverse abandonment:

GWRC opposes the abandonment because: (1) it is a viable railroad that is in the process of restoring rail service on the Welty Branch; (2) the Welty Branch has a connection to interstate commerce via a connecting rail line also owned by GWRC; (3) GWRC has been in discussions with two definite freight customers and one potential freight customer that intend to use the Welty Branch once it has been rehabilitated; (4) GWRC is currently rehabilitating the Welty Branch at a cost of about \$ 1 million; (5) restoring freight rail service on the Welty Branch is

³ What is most disconcerting about the Landowners' Reply is their statement that they have engaged in Ex Parte communications with the Board which are expressly prohibited and subject to penalties pursuant to 49 C.F.R. § 1102.2.

important to the local rural economy of Weld County; and (6) there is no public interest or legitimate private interest supporting the requested abandonment.

III. ARGUMENT

In addition to the numerous procedural flaws noted above and in the GWRC Reply, the Application is defective and the relief sought is inappropriate. The Application consists primarily of a few pages of background information, a short discussion of the legal standard, and nearly 100 pages of photographs of the Line.

The Landowners erroneously contend that the factual background set forth in the Application is undisputed. GWRC, however, disagrees in two major respects. First, GWRC disputes the false allegation that a *de facto* abandonment has taken place and that no serious efforts have been made to reinstitute rail service. In 2008, GWRC filed to abandon the Welty Branch not with the intent of consummating the abandonment but to railbank the Line until a future need for rail service develops. Not having been successful in locating a trail sponsor, in 2014 GWRC notified the Board that it would not consummate the abandonment of the Line. In December 2021, GWRC once again started the abandonment of the Line in Docket No. AB-857 (Sub-No. 3X). As pointed out in its Environmental Report, filed with the Board on April 6, 2022, GWRC was planning again to file for abandonment authority because certain “Landowners’ are apparently seeking to file an adverse abandonment and salvage the Line. Consequently, GWRC is seeking abandonment authority so the GWRC can railbank the Line and preserve the corridor for future rail service.” Accordingly, GWRC has taken all reasonable steps in preserving the Welty Branch for future freight operations.

As pointed out in the GWRC Reply, shortly after completing its Environmental and Historic Reports, GWRC was contacted by G4 Energy, LLC (“G4”) about opening a new rail

and transload facility on land adjacent to the Welty Branch. A copy of the Verified Statement of Guillermo Grossi-Roffi is attached for the Board's convenience. GWRC was also contacted by Rocky Mountain Transload, Inc. ("RMT") about opening a new transload facility adjacent to the Welty Branch at approximately milepost W5. The Verified Statement of Walter Sanders is also attached for the Board's convenience. GWRC has also been contacted recently by other firms seeking rail service on the Welty Branch.

Second, GWRC disputes the contention of the Landowners that "it is and will be close to impossible and cost prohibitive to ever reinstate rail service in the future...." Application at 15. Since being contacted by entities seeking rail service on the Welty Branch, management of GWRC has estimated that it would cost approximately \$1 million to repair the entire Line. While a substantial sum for a shortline railroad, it is not cost prohibitive given the significant interest in reinstituting rail services on the Welty Branch. Attached is the Verified Statement of Sergio Sabatini describing the rehabilitation activities that have taken place and are now being performed by GWRC on the Welty Branch. To date, all of the rail ties have been installed and the remaining rail replacement and ballast will be completed by the end of this year. Mr. Sabatini also describes the land owned by GWRC adjacent to the Welty Branch and I-25 that will be used for transload operations.

Third, the Application focuses exclusively on the past and present public convenience and necessity and totally ignores the *future* public convenience and necessity. The statutory standard governing any application to abandon a line of railroad is whether the present or *future* public convenience and necessity require or permit the proposed abandonment. 49 U.S.C. § 10903(e). The Board implements this standard by balancing the potential harm to affected

shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. In adverse abandonment cases, where the owning railroad opposes the abandonment, the noncarrier applicant has the burden of establishing that the present and future public convenience and necessity require or permit the abandonment. *See Chelsea Property Owners – Aban. – The Consol. R. Corp.*, 8 I.C.C.2d 773, 778 (1992) (Chelsea), *aff’d sub nom. Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994).

The function of the Board’s exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary cessation or obstruction of existing rail service. *See Modern Handcraft, Inc. --Abandonment*, 363 I.C.C. 969, 972 (1981) (“*Modern Handcraft*”). The Board has a statutory duty to preserve and promote continued rail service where the railroad has expressed and demonstrated a desire to perform operations and has taken reasonable steps to acquire traffic. *See Chelsea*, 8 I.C.C.2d at 779.

The record in this proceeding does not support the Landowners’ contention that the public convenience and necessity require or permit abandonment. The Landowners erroneously contend that the Line has not been used for regulated rail transportation for approximately 43 years and that there is no reasonable prospect for such use in the foreseeable future.

The lack of current freight operations, however, is not sufficient grounds for granting an adverse abandonment. Under the public convenience and necessity standard, the Board must also consider the potential for future freight rail operations. *See Docket No. AB 1071, Stewartstown Railroad Company – Adverse Abandonment – In York County, PA* (not printed), served November 16, 2012, at 5 (“*Stewartstown*”). And as noted above and in the GWRC Reply, there is significant interest in future freight rail operations.

The Board's predecessor, the Interstate Commerce Commission ("ICC"), pointed out that any person may initiate an adverse abandonment, provided that the entity establishes a proper interest in the proceeding. *Chelsea, supra*, at 778. The Landowners argue that their interest in the right-of-way is not in dispute because, in a takings case pending before the Court of Federal Claims, the Department of Justice has stipulated that GWRC has only an easement in the right-of-way. The problems with the Landowners' argument are several: Who are the Landowners in the Claims Court proceeding as opposed to the Landowners in this proceeding; this proceeding is not the same as the one in the Claims Court; and GWRC has not conceded that the Landowners in this proceeding have a proper interest in initiating an adverse abandonment case before the Board. In other words, the Landowners have failed to demonstrate that they have a proper interest in this proceeding.

In any event, the Board has consistently denied adverse abandonment applications where, as here, there was a potential for continued operations and the carrier has taken reasonable steps to attract traffic. *Chelsea, supra*, at 778; *Western Stock Show Assn. – Aban. Exemption – In Denver, CO*, 1 S.T.B. 113, 131 (1996); STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT*, (not printed), served March 8, 2002. GWRC has been actively seeking new business for the Welty Branch and the Verified Statements of Messrs. Grossi-Roffi and Sanders present evidence of new shippers and new uses for the Line. As is demonstrated in Exhibit 1, GWRC and G4 are currently negotiating a Letter of Intent which will result in new traffic moving over the Welty Branch shortly after the repairs are completed.

The adverse abandonment applications granted by the ICC are readily distinguishable from this proceeding. In *Fore River RR. Corp. – Discon. Exempt. – Norfolk County, MA*, 8

I.C.C.2d 307 (1992), the ICC granted discontinuance authority because the lessee had shown a consistent pattern of failing to meet its obligations to its shippers, employees and lessor. In *Modern Handcraft*, the ICC granted an adverse abandonment because the carrier had made no serious effort to solicit traffic or reinstitute rail service. In *Chelsea*, the adverse abandonment was granted because the ICC found that there was no possibility of restoring rail service. In STB Docket No. AB-1014, *Denver & Rio Grande Railway Historical Foundation – Adverse Abandonment --- In Mineral County, CO* (not printed), served May 23, 2008, at 16 (“*Denver & Ri Grande*”), the Board found that “there is no realistic potential for freight rail service....”

The management of GWRC has retained the Welty Branch, and foregone the opportunity costs of salvaging the Line, because it has been convinced that the area surrounding the Line would experience industrial development requiring rail service. While it has taken longer than expected, management’s expectations are finally coming to fruition as demonstrated in the attached Verified Statements and the fact that other entities have expressed an interest in rail service on the Welty Branch.

In contending in the Application that no overriding federal interest exists in preserving the Welty Branch, the Landowners totally ignore the statutory standard of whether the *future* public convenience and necessity requires or permits the proposed abandonment. The Landowners should not be surprised that GWRC is in discussions with firms seeking rail service on the Welty Branch. Counsel for GWRC informed two of the Landowners’ attorneys on separate occasions that GWRC was withholding the filing of its abandonment Notice because GWRC was in active negotiations with prospective customers. Rather than await the outcome of these negotiations, the Landowners decided to file their meritless Application even though one of the Landowners’ attorneys apparently agrees with GWRC’s position in this proceeding. In a

Reply filed with the Board on November 4, 2004, in STB Docket No. AB-882, *Minnesota Commercial Railway Company – Adverse Discontinuance – In Ramsey County, MS*, at 5, Mr.

Thomas McFarland stated that an “adverse abandonment has consistently been denied where the rail carrier operating the line has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.”

In 1988, the ICC noted that:

“the railroad has expressed its confidence in the availability of future traffic and has submitted evidence to support that confidence. It has also chosen to forego any opportunity costs that it may incur in continuing to operate the line. We are reluctant to substitute our judgment for that of the railroad on these issues. More importantly, there is nothing in the rail transportation policy that directs the Commission to force an abandonment because the line may be presently unprofitable. *** A railroad may have good business reasons for continuing an unprofitable service, *i.e.*, it may anticipate increasing traffic and future profits.

Finance Docket No. 31303, *Wisconsin Dept. Of Transp. – Aband. Exempt.* (not printed), served December 5, 1988.

In STB Docket No. AB-124 (Sub-No.2), *Waterloo Railway Company -- Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company* (not printed), served May 3, 2004, at 6, the Board observed:

Because of the strong statutory and Board policies favoring the preservation of rail-to-rail competition and the provision of adequate service for shippers, the Board will not deprive [the shipper] of the availability of rail service options that it already has absent a very strong showing that such action is in the public interest. In particular, the [trustee] has the burden of proving that the benefit of the existing competitive service option available to the [shipper] from [the carrier] is outweighed by other harms.

The Landowners erroneously contend that the Line has not been used for regulated rail transportation for approximately 43 years and that there is no reasonable prospect for such use in the foreseeable future. The attached Verified Statements, Exhibit 1, the GWRC Reply and this

Protest, thoroughly refute the Landowners' contention. As to the past use of the Line, the Landowners expressly acknowledge that the Line has been used on a number of occasions for the storage of railcars. In their unlawfully filed Reply, the Landowners cite to three Board proceedings where an adverse abandonment application was granted even though the rail line had been used for railcar storage. Essentially, the Landowners maintain that the Board does not consider railcar storage to constitute "transportation" subject to Board regulation. The statute governing Board regulation, however, specifically defines "transportation" to include a railcar [49 U.S.C. § 10102(9)(A)] and services related to a rail car, to including "storage" of a rail car. [49 U.S.C. § 10102(9)(B)]. In GWRC's view, the statute trumps any Board decisions which may be inconsistent with the statute. Under the Board's governing statute the storage of empty rail cars constitutes an essential transportation service. Consequently, contrary to the Landowners' contention, GWRC has been performing Board regulated rail transportation in recent years.

In their unlawful Reply, the Landowners attempt to refute GWRC's contention that the future public convenience and necessity does not require or permit the proposed abandonment. They cite two proceedings, *Denver & Rio Grande* and *Stewartstown*, which are readily distinguishable from this case. In *Denver & Rio Grande*, the City of Creede, CO sought to abandon a 1-mile section of track traversing the downtown streets of the City. In granting the adverse abandonment, the Board found that none of the potential shippers identified by the railroad had demonstrated a realistic interest in shipping over the line in the near future and that, since these potential shippers were not located on the line and the railroad did not own any property adjacent to the line, any future transload operations would need to take place on the railroad outside of the city limits. The Board went on to conclude that the likelihood for freight rail traffic on this 1-mile segment was almost non-existent.

Similarly, in *Stewartstown* the Board concluded that there was little likelihood of future need for rail service over the line. One purported future customer had only had “preliminary discussions” with the railroad, another merely sought use of the line as an “option for future rail deliveries”, and a third failed to demonstrate when it would actually locate on the line. Accordingly, the Board determined that there was no realistic potential for rail service. More importantly, the Board concluded that the railroad was unlikely to be able to restore service on the line and the railroad had no outlet to the interstate rail system.

As previously noted, two shippers oppose the proposed abandonment in this proceeding and they have demonstrated a present need for rail service, or service that would commence as soon as the Line is rehabilitated. GWRC and one of those shippers are currently negotiating a letter of intent that will provide for volume commitments. The rehabilitation of the Line is nearly completed at a cost of about \$ 1 million. GWRC owns over five acres of land adjacent to the Line which is accessed by a road and which will be used for transload operations. See Exhibit 1 and Verified Statement of Sabatini. Accordingly, the Landowners’ reliance on *Denver & Rio Grande* and *Stewartstown* is misplaced.

Under 49 U.S.C. § 10903(d), the Board must consider whether the abandonment of the Welty Branch would have a serious, adverse effect on rural and community development. The Landowners have failed specifically to address the effect of the requested abandonment on rural and community development. GWRC maintains that preservation of needed rail service over the Welty Branch will benefit rural and community development and interstate commerce in general.

The Board is required to consider the environmental and energy impacts of the proposed abandonment. The Landowners have the burden of submitting information

regarding the environmental impacts of the proposed abandonment and otherwise complying with the Board's environmental regulations. As explained above, the Landowners have made a mockery of the Board's rules and have woefully failed to meet their obligations in this regard.

IV. RAIL BANKING

The Town of Johnstown has indicated that it intends to file a request to railbank the Line. GWRC would support such a request. If Johnstown fails to make such a request and it becomes necessary, GWRC will file for an interim trail use/rail banking condition.

The National Trails Systems 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 filings under 49 U.S.C. 10903, including adverse abandonment applications. *See Rail Abandonments – Use of Rights-Of-Way As Trails*, 2 I.C.C.2d 591, 600 (1986).

V. CONCLUSION

As demonstrated above, the Landowners have failed to demonstrate that the present or future public convenience and necessity require or permit the proposed abandonment. Consequently, the Application should be denied. GWRC respectfully

urges the Board to deny the Application as expeditiously as possible. GWRC was reluctant to incur the \$1 million expense of repairing the Line while an application for adverse abandonment is pending before the Board. Nevertheless, because of the substantial interest that has been expressed in rail service over the Welty Branch and given the growth of northern Colorado and the resultant need for rail service in the area, GWRC decided to rehabilitate the Welty Branch which will be completed in the very near future.

Respectfully submitted,

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

Karl Morell
Karl Morell & Associates
440 1st Street N.W., Suite 440
Washington, D.C. 20001
(202) 638-3307

Attorney for:
Great Western Railway
Of Colorado, LLC

Dated: November 18, 2022

cc: All parties of record

EXHIBIT 1

GREAT WESTERN RAILWAY OF COLORADO, LLC
252 Clayton Avenue
Denver, Colorado 80206

Letter of Intent to Lease Approximately 5.180 Acres and Track near Buda, CO

November 10, 2022

G4 Energy, LLC
610 S Lipan Street
Denver, CO 80223
Attention: Guillermo Rossi

Re: Buda, CO – Lease Proposal

Dear Guillermo:

Great Western Railway of Colorado, LLC and its affiliates or assignees (collectively, “Landlord”) would like to present G4 Energy, LLC (“Tenant”) with this non-binding letter of intent (the “Letter”) for the lease of land and certain rail infrastructure located near Buda, CO in Weld County, Colorado. Below are the general terms and conditions by which Landlord is willing to enter into a definitive lease agreement with Tenant (“Lease”).

- Premises:** Approximately 225,641 square feet (5.18 acres) of land, referred to as Assessor Parcel Number 106111000002, located in the Town of Buda, County of Weld, State of Colorado. Lease Rate shall exclude 2,000 square feet of Property, which is reserved for a future billboard and is further depicted on Exhibit “A”.
- Lease Term;**
Commencement Date: The term of the Lease (the “Term”) shall be 15 years from the date of mutual execution of the Lease (the “Commencement Date”).
- Basic Rent:** \$30.00 per linear foot of railroad track and \$0.50 per square foot NNN of land annually (“Basic Rent”), with annual increases of 4% above the prior year’s Basic Rent. Basic Rent shall commence on the Commencement Date with the first month’s Basic Rent being due upon signing of the Lease. Subsequent Basic Rent, as well as Additional Rent (as defined below), shall be due on the first of each month beginning thereafter. If the Commencement Date is not the first day of a month, Basic Rent - Track for the first month will be prorated accordingly.

Premises As-Is:	Tenant will accept the Premises and Equipment in its “as is” “where is” and “with all faults” condition, without any covenant, warranty or representation as to legal condition, physical condition, title, access, zoning, operation, conditions of approval or suitability for a particular purpose of any other matter whatsoever.
Truck Route:	Tenant will cause all trucks over 10,000 pounds of gross vehicle weight accessing the Premises to use the truck route(s) designated by Landlord from time to time.
Renewal Option:	Tenant shall have three renewal options, each for a period of five years. Notice of the election to exercise such rights must be given no more than 12 months, and no less than nine months, prior to the expiration of the then-applicable Term. Basic Rent during each renewal term will be at the greater of the current market rates or 110% of the current Basic Rent rate.
Expenses:	In addition to Basic Rent, Tenant shall be obligated to pay (or reimburse Landlord for) all expenses related to the ownership, lease and operation of the Premises (collectively referred to as “Additional Rent”), including, without limitation, utilities, real estate taxes and insurance (commonly referred to as a “Triple Net (NNN) Lease”).
Maintenance and Repairs:	Tenant will be responsible, at its cost, for maintaining and repairing the Premises, inclusive of land and track, during the Term.
Use:	The Premises shall be exclusively used for the sole purposes of a laydown and transload facility of various fuels and other commodities and for no other purpose whatsoever without the prior written consent of Landlord, which consent may be withheld in Landlord’s sole and absolute discretion. Tenant shall control all noxious odor emissions from the Premises in concurrence of all local, state, and federal laws and regulations.
Assignment:	Tenant may assign the Lease or sublet a portion of the Premises to an affiliate of Tenant, as long as Tenant remains liable under the Lease and such assignee or subtenant remains an affiliate of Tenant throughout the Term. Assignment of the Lease or subletting any portion of the Premises to an unaffiliated party will require Landlord’s prior written consent, which consent may be conditioned or withheld in Landlord’s sole discretion.
Lease Agreement:	Within 30 business days after acceptance of this proposal, Landlord shall deliver to Tenant a Lease incorporating the terms outlined herein. Landlord and Tenant agree to work in good faith toward completion and execution of a mutually satisfactory and binding Lease.
Access:	Access to the site will be from NE Frontage Road of Interstate-25.

- Volume Commitment:** Tenant agrees to enter into Landlord's standard rail switching agreement which will reflect a commitment to ship no less than four hundred (400) railcars per year through the facility ("Minimum Commitment"). If in any year during the Term Tenant fails to ship Minimum Commitment, Tenant shall pay to Landlord six hundred seventy-five dollars (\$675.00) for each railcar below the Minimum Commitment.
- Early Termination:** If tenant fails to meet their annual four hundred (400) railcars per year through the facility, Landlord has the option to terminate the lease at their sole discretion.
- Removal of Equipment:** Upon the expiration or earlier termination of the Lease, Tenant shall be responsible, at its sole cost and expense, for the prompt removal of all Equipment and fixtures on the Premises unless otherwise instructed by Landlord. In the event Tenant fails to surrender the Premises with all such items removed in accordance with the Lease, the remaining Equipment and fixtures shall be deemed abandoned and ownership will automatically revert to Landlord.
- Confidentiality:** Neither party shall disclose the terms and conditions of this Letter to any other party without the mutual written consent of the other, except to those parties acting in a fiduciary capacity (i.e., legal representatives, financial institutions, authorized agents, etc.) who shall hold such information pursuant to the terms of this paragraph. This paragraph is binding on Landlord and Tenant, regardless of whether a final Lease is executed.
- Brokers:** Landlord and Tenant each represents that it has not authorized any broker or finder to act on its behalf in connection with the purchase and sale contemplated hereby. Each party will indemnify the other against all losses arising out of such party's actual or alleged agreements, arrangements, understandings or dealings with any broker or finder in connection with the purchase and sale contemplated hereby.
- Non-Binding Nature:** Landlord and Tenant acknowledge that this Letter, although entered into in good faith by both parties, does not constitute a binding agreement between them with respect to the lease of the Premises, save and except for the Exclusivity Provision and Confidentiality Provision of this Letter. A binding agreement will not exist until approval is granted by Landlord's investment committee and the Lease is executed and delivered by both Landlord and Tenant, and neither the expenditure of funds nor the undertaking of actions in furtherance of the transaction contemplated by this Letter will be considered partial performance or constitute a binding agreement, nor will it be the basis for any reliance upon the terms of this Letter by any party. The parties agree that there will be no recourse by either of them against the other if they do not agree on the terms and conditions of the Lease. Either party may terminate negotiations under this Letter at any time and for any reason whatsoever. Each of Landlord and Tenant will bear their own costs (including legal costs) in connection with the negotiation of the Lease.

GWR Rail Service: Landlord will provide rail service up to five days per week, Monday thru Friday, based on railcar volumes.

Line Haul Rate: Landlord's line haul rate (or freight rate) with BNSF & UP, interchanging carriers, is listed in the GWR Rate Tariff 8001-series. GWR is currently a switch carrier with BNSF in Loveland, CO and an Interline Settlement Carrier with UP in Greeley, CO.

Rate Tariff: Please reference GWR Rate Tariff 8001-series for any potential miscellaneous accessorial charges not listed in this letter.

If you are in agreement with the terms and conditions of this Letter, please execute a copy in the place provided below and return a copy of the same to Landlord via hand delivery or overnight delivery, or by e-mail to crichter@omnitrax.com not later than November 28, 2022, after which this proposal will become null and void.

We look forward to working with you on this transaction.

Sincerely,

Chris Richter
Director, Growth & Development
Great Western Railway of Colorado, LLC

ACCEPTANCE:

G4 ENERGY, LLC

By: _____

Name: _____

Title: _____

Date: _____

Exhibit A
Depiction of Premises (Outlined in Blue)





August 24, 2022

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings Surface
Transportation Board 395 E
street, S.W.
Washington, DC 20423

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

Dear Ms. Brown:

G4 Energy, LLC ("Company") is submitting this verified statement in opposition to the Adverse Abandonment Application filed with the Board by the 27 Colorado Landowners ("Landowners").

G4 Energy is currently in active discussions with the Great Western Railway of Colorado ("GWRC") about opening a new rail and transloading facility on land adjacent to its Welty Branch at approximately milepost W5. This acreage is ideally suited for a rail and transloading facility because it is located very near Interstate 1-25 and adjacent to GWRC's Welty Branch. Also, GWRC has direct access to interchanges with both Union Pacific Railway and BNSF Railway. G4 Energy expects the site could receive and transload up to one million tons of product annually via the Welty Branch.

Accordingly, G4 Energy strongly encourages the Board to expeditiously deny the Landowners' Application.

G4 Energy, LLC

A blue ink signature of Guillermo Grossi-Roffi, written in a cursive style, positioned over the company name.

Guillermo Grossi-Roffi | President/CEO

VERIFICATION

STATE: Colorado

COUNTY OF Denver

I, Guillermo Grossi-Roffi, President/CEO for G4 Energy, penalty of perjury that I am familiar with the facts that they are true and correct to the best of my qualified and authorized to file this Verified Statement.

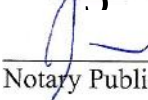
Executed on this 26 day of August, 2022.

G4 Energy, LLC


Guillermo Grossi-Roffi | President/CEO

Subscribed and sworn to before me

The ~~2nd~~ day of August,


Notary Public

JULIE WEIMAN NOTARY PUBLIC STATE OF COLORADO
NOTARY ID 20024006296 MY COMMISSION EXPIRES 04/12/2026



October 3, 2022

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

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

Dear Ms. Brown:

Rocky Mountain Transload, INC. (RMT) is submitting this verified statement in opposition to the Adverse Abandonment Application filed with the Board by the 27 Colorado Landowners ("Landowners").

RMT is based in Colorado and provides rail transload and trucking services throughout Colorado and the Rocky Mountain region. RMT also operates a logistics division and provides service and maintenance to the trucking industry.

Rocky Mountain Transload INC. is currently in discussion with the Great Western Railway of Colorado ("GWRC") about opening a new transload facility on land adjacent to its Welty Branch at approximately milepost W5. This acreage is ideally suited for a transload site because it is located very near Interstate 1-25 and adjacent to GWRC's Welty Branch. Also, GWRC has direct access to interchanges with both Union Pacific Railway and BNSF Railway. Rocky Mountain Transload, INC. expects the site could receive or ship up to 50,000 tons of product annually via the Welty Branch.

Accordingly, Rocky Mountain Transload, INC. strongly encourages the Board to expeditiously deny the Landowners' Application.

VERIFICATION

STATE Colorado

) SS

COUNTY OF ADAMS)

I, Walter Sanders, President for Rocky Mountain Transload INC hereby verify under penalty of perjury that I am familiar with the facts in the foregoing Verified Statement and that they true and correct to the best of my knowledge and believe. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on this 3 day of October, 2022.



(Name)

Subscribed and sworn to before me

The 3RD day of OCTOBER



, 2022.

Notary Public

MARGARET DURAN

MARGARET DURAN

Notary Public

State of Colorado

Notary ID # 20084006441

My Commission Expires 02-24-2024

**VERIFIED STATEMENT
OF
SERGIO SABATINI**

My name is Sergio Sabatini. I am employed by OmniTRAX, Inc. ("OmniTRAX") in the capacity of President and Chief Operating Officer. My office is in Denver, Colorado. I have been employed by OmniTRAX since September 2013, and have occupied my present position since January 2021. I have been in the rail industry since 1997.

I am familiar with the Great Western Railway of Colorado (the "GWR"), and specifically the Welty Line branch of the same which runs from MP 0.0 to MP 6.2 (the "Welty Line"). In the course of my duties I have been tasked with leading a rehabilitation of the Welty Line based upon recent interest from multiple parties to store and/or transload on the Welty Line or land adjacent thereto.

The following work has already been performed:

- Replacement of 4,000 crossties

The following work is contracted or in process to be completed prior to December 25, 2022:

- Installation of 4,500 tons of ballast, surfacing 31,680 track feet and associated drainage repairs along the line, replacement of 184 track feet of grade crossing, repairs to 1 turnout, and replacement of approximately 4,840 linear feet of rail.

GWR is continuing its work with the Colorado Department of Transportation ("CDOT") on the following projects affecting the Welty Line:

- The federally funded widening of the I-25 bridge over the Welty Line as part of the I-25 Express Lanes Segments 5 & 6 Package 4 (NHPP 0253-283 (24128)) to ensure continued GWR use of the Welty Line.
- The CDOT managed replacement of the crossing surface and installation of crossing signals at Highway 60 (S. 1st Street).

The work being performed is sufficient to permit transportation of loaded railcars across the entirety of the Welty Line, including to GWR owned land adjacent to the Welty Line known as the “Buda Site.” GWR is engaged with several customers likely to locate rail-centric facilities on the Buda Site which require freight rail accessibility.

Verification

I, Sergio Sabatini, verify under penalty of perjury that I am President and Chief Operating Officer for OmniTRAX, Inc., that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on November 15, 2022



Sergio Sabatini

On this 15 day of November ²⁰²²~~201~~, before me personally appeared Sergio Sabatini, to me personally known, who, being by me sworn, says that he has executed the foregoing Bill of Sale on behalf of OmniTRAX, Inc. as its authorized President and Chief Operating Officer.

Notary Public

KARIN R. WEST
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20004020889
MY COMMISSION EXPIRES 11/8/2023

A-8