



December 5, 2022

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:

The Landowners hereby respectfully submit the attached Reply to Great Western Railway of Colorado, LLC's Protest in opposition to the Landowners' Application for Adverse Abandonment in the above-referenced Board proceeding.

Sincerely,

A handwritten signature in blue ink that reads "Elizabeth McCulley".

Elizabeth Gepford McCulley

EGM/hrb

305738

ENTERED
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+ KC STL
mcculley@swm.legal

Certificate of Service

I hereby certify that on December 5, 2022, I served the foregoing document, Landowners' Reply to Protest of Great Western Railway of Colorado, LLC via electronic mail only upon the following counsel of record:

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A handwritten signature in blue ink, reading "Eliza 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 TO PROTEST OF
GREAT WESTERN RAILWAY OF COLORADO, LLC**

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**LANDOWNERS’ REPLY TO PROTEST OF
GREAT WESTERN RAILWAY OF COLORADO, LLC**

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 Protest against the Application on November 18, 2022. Pursuant to 49 C.F.R § 1152.25(c)(3), the Landowners file this Reply to GWRC’S Protest.

¹ GWRC’s Protest again questions the identity of the Landowners who filed the Application. *See* GWRC’s Protest, at 11. It is unclear from where GWRC’s confusion stems in this regard, as the 27 Landowners are clearly 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 again questions the sufficiency of the Landowners’ Environmental and Historic Report and accompanying service requirements. *See* GWRC’s Protest, at 4. 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).

I. GWRC HAS NOT DISPUTED ITS DECADES-LONG HISTORY OF NONUSE

GWRC disputes that a *de facto* abandonment of the Rail Line has taken place, yet it does not refute any of the facts that the Landowners put forth to demonstrate that abandonment. To reiterate, the following facts are undisputed:

- 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; and
- 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, no one has used the Line for 43 years, and there are no current shippers or definite shipping commitments.⁴

The only contrary evidence of use GWRC has offered is storage of railcars "on a number of occasions." See GWRC Protest, at 14. The Board has consistently rejected the notion that railcar storage alone is enough to warrant keeping a rail line within the Board's jurisdiction.⁵ Despite

⁴ See Landowners' Application, Appendix 6, the Declaration of Cindy Sauer, and Appendix 7, the Declaration of Fred Weis.

⁵ See *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 789-92 (D.C. Cir. 1994) (granting adverse abandonment application where rail line was only used for storage, loading, and switching of cars, despite the railroad's opposition and offered evidence of prospective shippers) ("*Chelsea Property Owners*"); *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

this, GWRC contends that its limited railcar storage constitutes “transportation” as defined in 49 U.S.C. § 10102(9)(A)-(B) and therefore supports the proposition that PC&N does not permit or require abandonment. *See* GWRC Protest, at 12-13.

Clearly, the storage of railcars that has occurred on the Rail Line was not “related to the **movement** of property by rail,” as the statute requires. *See* 49 U.S.C. § 10102(9)(A)-(B) (emphasis added). Instead, the storage at issue occurred while the railcars were at rest for lengthy periods, where GWRC acted as a bailee, and not as a “rail common carrier providing common carrier railroad transportation for compensation.” *See* 49 U.S.C. § 10102(5). Presumably, this is exactly why the Board has previously granted adverse abandonment applications despite a history of limited railcar storage.⁶ GWRC essentially argues that the Board interpreted its own statutes incorrectly in those prior cases but, instead, the Board correctly interpreted that *de minimis* railcar storage unrelated to property movement does not qualify as “transportation” under the statute. The Board should do the same here. Without railcar storage on which to rely on, there is no dispute as to any aspect of the 43-year period and counting of non-use, and that weighs heavily against GWRC in any analysis of present or future PC&N.⁷

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”).

⁶ By GWRC’s own admissions, the Rail Line has not been used for railcar storage for several years anyway.

⁷ As to PC&N, GWRC also contends that preservation of the Rail Line would benefit rural community and development (“RC&D”) “in general,” without any support whatsoever. *See* GWRC Protest, at 15. GWRC provides no evidence for this assertion whatsoever and, in fact, in contrast to the Rail Line’s decades-long period of complete non-use, abandonment would allow the Landowners and the Town of Johnstown to put the land to productive use, including allowing farm equipment to cross the right-of-way without incurring damage. Moreover, all the right-of-way west of Johnstown High School to Interstate 25, excluding GWRC’s small, vacant parcel, is targeted for commercial and residential development.

II. GWRC'S PROPOSED SHIPPERS ARE PURELY SPECULATIVE AND DO NOT REBUT THE LANDOWNERS' APPLICATION OR NEGATE THE PC&N STANDARD

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.⁸ 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 Denver & Rio Grande Railway Historical Foundation—Adverse Abandonment in Mineral County, Co.*, 2008 WL 2154898 at *5-8 (2008) (“*D&RGW*”). The Board pointed 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. Here, not only were there no shippers

⁸ Additionally, GWRC alleges that rehabilitation of the Rail Line is “nearly completed.” *See* GWRC Protest, at 15. However, its own witness contradicts this through his statement that GWRC has installed only a limited number of ties. *See* GWRC Protest, Verified Statement of Sergio Sabatini, Ex. A-6. The Protest contains precious little detail about the actual work performed, and crosstie installation could easily have been in furtherance of the Governmental Projects identified in Page 2 of the Sabatini Statement, rather than on true rehabilitation efforts to restore freight service.

for 35 years from 1979 to 2014, there have been no shippers for an additional 8 years after GWRC purportedly “reactivated” service in 2014.

Even more on point is *Stewartstown Railroad Co. – Adverse Abandonment – In York Cnty., Penn.*, a decision that GWRC actually cited in its Protest. *See* GWRC’s Protest, at 10. 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, which is 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&N require or permit the 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, only clear, definite evidence of freight traffic resumption can prevent abandonment, and that is certainly not present here.

GWRC contends that *D&RGW* and *Stewartstown* are easily distinguishable, but its only argument in support is that those are decisions in which the Board found no reasonable prospect for future rail service. However, as the Landowners have shown, that is clearly also the case here, and GRWC’s attempts at offering evidence of speculative potential shippers in the future do

nothing to change that. The facts of this case clearly demonstrate that, after 43 years of no shippers, GWRC has no credibility whatsoever to argue that the Landowners have not met the PC&N standard.

GWRC identified two shippers—G4 Energy, LLC (“G4”) and Rocky Mountain Transload, Inc. (“RMT”)—as having interest in freight operations on the Rail Line. 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. Even further, the Verified Statements themselves belie GWRC’s optimistic view of prospective freight traffic, as the Statements reveal that the shippers merely expect the proposed site “could” receive the tonnage. *See* GWRC Protest, Ex. A, at 2-5.

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. In addition to the Verified Statements, GWRC holds up the Letter of Intent (“LOI”) with G4 as additional evidence of shipping prospects. However, the LOI is not executed, it is by its own terms “non-binding,” and it expired of its own terms on November 28, 2022. *See* GWRC Protest, Ex. 1. Unless G4 actually executed the LOI on or before November 28, its evidentiary value is worthless, and even if G4 did execute the LOI, its terms are just as non-committal, and therefore speculative, as GWRC’s other “evidence” of potential shippers. It is also unclear how the immediately adjacent Interstate 25 does not provide all the necessary freight service either G4, RMT, or any other potential shipper would need, as it historically presumably has since 1979 when the sugar beet dump facility closed down.

In this case, 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. *See Modern Handcraft, Inc. – Abandonment – in Jackson County, MO*, 1981 WL 22670, 363 I.C.C.

969 (1981); *Chelsea Property Owners*, 1992 WL 22671 at *1-*4; *CSX Corp.*, 2002 WL 127074 at *4. The Rail Line has had 43-years-and-counting of zero freight traffic, and GWRC's evidence that the identified shippers might use the Rail Line at some indeterminate point in the future is wholly inadequate to make the requisite showing because there is no overriding federal interest in interstate commerce. The Board should conclude that the PC&N test has been satisfied and should permit the adverse abandonment of this Rail Line.

III. RAILBANKING IS BOTH UNWARRANTED AND INCONSISTENT

As an alternative, GWRC advocates for railbanking of the Rail Line for interim trail use over the Landowners' objection. However, in GWRC's authority, *Rail Abandonments – of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986), the Board did **not** find that a trail use condition can or should be imposed in an adverse abandonment proceeding over adjacent landowners' opposition, as GWRC asserts. Instead, this is a case of first impression on that point, as “[t]he Board has not yet had occasion to decide whether the issuance of a certificate of interim trail use in an adverse abandonment would be consistent with the grant of such an application.” *See Norfolk Southern Ry. Co. – Adverse Abandonment – in St. Joseph County, IN*, 2006 WL 3401094, at *6 (STB Docket No. AB-290, Sub-No. 286) (“*Norfolk Southern*”). That is exactly why the Board continues to require adverse abandonment applicants to “address whether the issuance of a certification of interim trail use ... would be consistent with the grant of an adverse abandonment application.” *See, e.g., New York State Dept. of Environmental Conservation – Adverse Abandonment – Saratoga and North Creek Railway in the Town of Johnsbury, NY*, 2019 WL 4127257, at *2 (STB Docket No. AB-1261).

In this case, the Board should find that railbanking the Rail Line would be inconsistent with the grant of the Landowners' Application. The reasoning is essentially the same as in *Norfolk*

Southern, in which the Board issued exemptions from the Offer of Financial Assistance provisions of 49 U.S.C. § 10904 and the Public Use provisions of 49 U.S.C. § 10905. The Board stated its reasoning as follows:

The petition for exemption from 49 U.S.C. § 10904 . . . will be granted. In a third-party abandonment proceeding, the Board withdraws its primary jurisdiction to permit state, local, or other federal law to apply where there is no overriding federal interest in interstate commerce. Absent exemption, section 10904 could provide a vehicle for someone to invoke agency processes that the Board has determined are not necessary or appropriate. If the Board ultimately finds that the PC&N require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, **it would be fundamentally inconsistent to provide for further Board regulation under section 10904 and thereby negate the Board's decision.**

We merely find . . . that under the circumstances presented here, a grant of an adverse abandonment . . . would be frustrated if section 10904 could be invoked in an effort to continue active rail service.

We will grant an exemption from the public use provisions of 49 U.S.C. § 10905 . . . **Should we decide to withdraw our primary jurisdiction over the Lines, we should not then allow our jurisdiction to be invoked to impose a public use provision.**

See Norfolk Southern, 2006 WL 3401094, at *5-6 (emphasis added).

Here, if the Board finds that PC&N permits withdrawal of the Board's regulatory authority, it should likewise grant an exemption from Public Use provisions, including railbanking. It would be cruelly ironic if the Board were to grant withdrawal of federal jurisdiction, enabling the Landowners to free their land from GWRC's railroad easement, only to have the Board then reassert federal jurisdiction to permit unwanted trail use even more intrusive than the dormant railroad easement. In this case, the Board should waive application of trail use regulations as

equally inconsistent with adverse abandonment as OFA and Public Use provisions, at least where the Applicant for adverse abandonment does not agree to the trail use provisions.

Further, and fundamentally, GWRC's support of railbanking is wholly inconsistent with its position that shippers are lined up to use the Rail Line and resumption of freight service is imminent. GWRC's entire argument against the Landowners' Application is that it is actively rehabilitating the Rail Line for rail service and indeed has shippers committed to using the Rail Line. If that is true, railbanking is completely unnecessary to preserve the Rail Line for rail service.⁹ Really, GWRC seeks to prevent the Landowners from asserting their rights in the corridor, whether that is through feigned resumption of rail service or a sham railbanking. The Board should reject GWRC's plea to use the Trails Act and railbanking as an alternative method to continue to use the Board's jurisdiction as a shield against the Landowners' rights.

IV. CONCLUSION

GWRC's evidence and argument does nothing to change the fact that GWRC has not used the Rail Line for any valid rail transportation use for more than four decades. In their Application, the Landowners satisfied their burden to show that PC&N permits abandonment. GWRC attempts to provide contrary rebuttal evidence in the form of "potential shippers," but these shippers are highly speculative, especially considering GWRC's lengthy non-use. GWRC abandoned this Rail Line many years ago, and the Board should grant the Landowners' Application and lift its jurisdiction to reflect that reality.

Respectfully submitted,

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⁹ Obviously, given the relevant history since 2008, GWRC has zero credibility on this issue too.

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