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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 responds to the filing by the Colorado Landowners (“Landowners”) dated April 30, 2025. GWRC opposes the April 30th filing to the extent it threatens the filing of a Writ of Mandamus against the Board.

Mandamus is an extraordinary remedy which should only be used in exceptional circumstances. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). As noted by Professor Kenneth Culp, an “imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies” sought by a Writ of Mandamus. 3 Davis, Admin. Law Treatise 388 (1958). The power of courts to compel official action by mandatory order is limited to the enforcement of nondiscretionary, plainly defined, and purely ministerial duties. *Wilbur v. United States*, 281 U.S. 206, 218 (1930).

The Landowners essentially argue that the Board’s regulations at 49 C.F.R. Section 1152.26(a) mandate that a final decision in an abandonment proceeding must be issued within 110 days after the abandonment application is filed with the Board. The schedule set forth in Section 1152.26(a) was not prescribed or mandated by Congress, but was adopted at the discretion of the Board. *See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903*, 1 S.T.B. 894, 896-897 (1997). Consequently, the failure of the Board to meet that deadline is a discretionary action and not appropriate for a Writ of Mandamus.

Even if the abandonment schedule set forth in Section 1152.26(a) were mandated by Congress and nondiscretionary, failure by the Board to fully comply would not be appropriate for a Mandamus action since the delay in issuing a final decision in this proceeding is largely the fault of the Landowners. The Landowners have, to date, made 15 filings in this proceeding, well in excess of the number of filings made in an abandonment proceeding. Moreover, many of these filings were defective and failed to comply with the Board's rules. For example, it has been more than two-and-a-half years since Application was filed and, to date, the Landowners have failed to serve a copy on counsel for GWRC. In preparing their purported second Environmental Report, the Landowners submitted false information to the U.S. Fish and Wildlife Service. The Landowners have repeatedly failed to serve all parties of record and committed countless other violations of the Board's rules. As GWRC has previously pointed out, the Landowners are chronic violators of the Board's rules.

Moreover, Section 1152.26(a) has never applied to adverse abandonment proceedings, such as this ill-conceived proceeding. Section 1152.26 became effective on January 23, 1997. As of January 1, 1996, the Board no longer had statutory authority to grant abandonments filed by third parties. As of that date, 49 U.S.C. 10903(a)(1), was amended to provide that:

"A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to--

- (A) abandon any part of its railroad lines; or
- (B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter."

Consequently, only a "rail carrier" may file to abandon "its railroad lines." There are no corresponding provisions in Chapter 109 governing abandonment applications filed by third parties. Thus, only GWRC may file to abandon all or portions of its railroad tracks. *See City of South Bend v. STB*, 566 F.3d 1166 (D.C. Cir. 2009).

In enacting the ICC Termination Act of 1995, Congress specifically excluded adverse abandonments from the ambit of the Board's jurisdiction which is entirely consistent with the Congressional mandate that the Board "preserve and promote continued rail service." *N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004).

During the past two years, GWRC has spent about \$1.5 million to rehabilitate the Welty Branch. GWRC would not have made such a substantial investment unless it was convinced that there is a realistic opportunity in the foreseeable future of rail traffic moving over the Welty Branch. Moreover, as previously noted by GWRC, the Welty Branch has been used over the years to store railcars. "Transportation" subject to the Board's regulation specifically

includes a railcar [49 U.S.C. 10102(9)(A)] and services related to a railcar includes “storage” of a railcar. [49 U.S.C. 10102 (9)(B)].

Accordingly, the Board should reject the Landowners Application on grounds that the Board does not have jurisdiction over adverse abandonments or, alternatively, deny the application on grounds that the public convenience and necessity does not require or permit the abandonment of the Welty Branch.

Sincerely,

/s/ Karl Morell

Karl Morell

Attorney for:

Great Western Railway of Colorado, LLC

cc: All parties of record via electronic mail.