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January 16, 2002

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423

Re: Docket No. 41230
GS Roofing Products Company, Inc., et al. v.
Arkansas Midland Railroad Company, et al.

Dear Mr. Williams:

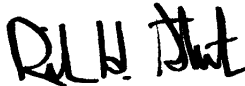
Enclosed for filing in the above-captioned proceeding are an original and ten copies of the Opening Statement of GS Roofing Products Company, Inc., dated January 16, 2002. In addition, please find the original and ten copies of GS Reopening Exhibit 1, which is filed under seal and enclosed herewith in a separate, sealed envelope.

Two extra copies of the statement and this letter are also enclosed. Please date-stamp these copies to show receipt of this filing and return them to our courier.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance in this matter.

Very truly yours,

BARNES & THORNBURG



Richard H. Streeter

RHS:lkj

Enclosures

cc: Thomas J. Litwiler, Esq. (via Federal Express)

DCDS01 RHS 55150v1

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ORIGINAL

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BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423



GS ROOFING PRODUCTS COMPANY, INC.,)
BEAZER WEST, INC. d/b/a GIFFORD-HILL)
& COMPANY, BEAN LUMBER COMPANY and)
CURT BEAN LUMBER COMPANY,)

Complainants,)

v.)

ARKANSAS MIDLAND RAILROAD and PINSLY)
RAILROAD COMPANY, INC.,)

Defendants.)

Docket No. 41230

JAN 16 2002
Public Record

OPENING STATEMENT

Comes now GS Roofing Products Company, Inc. ("GS Roofing"), by and through its counsel of record, and files its Opening Statement in response to the Decision of the Surface Transportation Board ("Board") served December 17, 2001. On August 20, 2001, the United States Court of Appeals for the Eighth Circuit issued its Decision in *GS Roofing Products Company, Inc. v. Surface Transportation Board*, 262 F.3d 767 (8th Cir. 2001). By its Decision, the Court of Appeals reversed and remanded the Board's conclusion that GS Roofing had "not carried [its] burden of proof concerning the amount of lost profits"¹ associated with an annual volume contract with Celotex Corporation whereby GS Roofing was to have shipped between 20,000 and 25,000 tons of roofing

¹ *GS Roofing Products Company, Inc. v. Arkansas Midland Railroad Company*, No. 41270, 2000 WL 705992 (I.C.C.), at *13 (May 5, 2000).

granules by rail to the Celotex manufacturing facility located in Houston, Texas during calendar year 1994.² As the Court held (262 F.3d at 778):

GS Roofing has carried its burden with relation to the Celotex contract. In short, there is nothing overly speculative or remote about GS Roofing's claim: the volume of granules under the contract is known, the price was established, and GS Roofing provided evidence of its production costs. The record also supports the shippers' contention that GS Roofing would have fulfilled its obligation under the contract in the absence of AMR's unlawful embargo.

Having concluded that GS Roofing is entitled to recover its lost profits, the Court remanded the proceeding to the Board to determine "the specific amount of damages due under the contract." *Id.* No party sought reconsideration or rehearing, or filed a petition seeking *certiorari* with the Supreme Court. Therefore, the Court's finding that "GS Roofing has carried its burden with relation to the Celotex contract" (*id.*) is binding on the Board and Arkansas Midland Railroad Company, Inc. ("AMR"). Moreover, the Board and AMR are precluded from challenging the volume of granules covered by the contract, the price at which the granules would have been sold, and that GS Roofing would have fulfilled its obligation under the contract.

The Board's December 17, 2001 Decision.

In reopening the proceeding, the Board has ordered the parties to address a variety of factors relating to the cost of production, transportation costs, and whether the profits were, in fact, lost or simply delayed for some period of time. In addition, the Board must determine the interest to which GS Roofing is entitled. Based on the Board's prior determination (2000 WL 555006, at *14), GS Roofing agrees that "[i]nterest [should] be based on the 91-day Treasury Bill Equivalent yield for the

² The Celotex facility that was the subject of the contract shall be referred to as "Celotex-Houston" to distinguish it from other facilities operated by Celotex that would not have been affected by the contract.

quarter . . . [and that] interest [should] be calculated pursuant to the procedures outlined at 49 CFR 1141.1(a)(2) and 1141.1(b)(2)." These calculations, which were prepared by Christena Nielsen, President of Nielsen Enterprises, show that the range of interest due from January 1994 through January 15, 2002, is between \$66,987 and \$83,734. See V.S. Nielsen at p. 3.

The Profits That Would Have Been Realized Under The Contract With Celotex Were Lost And Not Merely Delayed.

There is no evidence whatsoever that indicates that the profits from the new contract with Celotex were merely delayed and not lost. As explained in the accompanying Verified Statement of Butch Cowart, the books and records maintained by GS Roofing in the ordinary course of business do not indicate any sales during 1994 to Celotex-Houston. As Mr. Cowart has testified at ¶¶ 5-6 of his Verified Statement:

[T]he Board has noted that a question has been raised as to 'whether the profits were in fact lost or simply delayed for some period of time.' In order to respond to the foregoing matters, I have reviewed the year-end accounting data for 1994 for GS Roofing's Glenwood, Arkansas facility.

In response to the suggestion that profits may have been delayed for some period of time, rather than being lost, GS Roofing never sold any roofing granules as a result of the contract with Celotex-Houston. Any "delayed" sales presumably would have occurred during the period between June 1, 1994 and December 31, 1994. Based on my personal knowledge, as well as my review of the books and records maintained by GS Roofing during the ordinary course of business, GS Roofing did not sell any roofing granules to the Celotex facility in Houston, Texas during that period. My review of the books and records also showed me that GS Roofing had the current capacity to manufacture and sell an additional 25,000 tons of granules during 1994.

It is noted that GS Roofing previously submitted sworn testimony in September 1994 in order to respond to a similar argument raised by AMR's previous counsel. Mr. Cowart's testimony confirms and corroborates that earlier testimony as follows:

I will also confirm the accuracy of Mr. Smith's prior testimony whereby he responded to the argument that there is 'no proof that GS Roofing did not sell the same granules to some other purchaser at an even greater profit. AMR/Pinsly Statement of Facts and Argument at 51.' V.S. Smith, at ¶ 5, filed September 29, 1994. As Mr. Smith testified:

That assertion is baseless. In the first place, as reflected by the decline in rail shipments of which AMR/Pinsly is well aware, GS Roofing's Birds Mill facility is not operating to capacity. The Birds Mill facility has an operating capacity of 40 tons per hour. When multiplied by 365 days per year times 24 hours per day, its total capacity is 350,400 tons per year. The most that Birds Mill has ever produced in a year was approximately 172,400 tons. Hence, if the full 25,000 tons to be sold to Celotex Corporation were added to the best year in the plant's history, substantial capacity would still exist. Thus, even if the sales to Celotex Corporation had not been lost, the Birds Mill facility would have had excess capacity this year to handle additional shipments. Of course, because GS Roofing currently is not operating to capacity, and would not be operating to capacity even with the sales to Celotex Corporation, the sales that were made to customers other than Celotex Corporation would have been made in any event.

Although Mr. Smith's testimony was submitted in late September 1994, GS Roofing's 1994 year-end data corroborate the accuracy of his testimony. In 1994, GS Roofing produced a total of 141,332.4 tons of product. Furthermore, at no time during that year did the plant work to full capacity. Hence, it could have easily handled the full 25,000 tons that would have been sold to Celotex had it not been for the unlawful embargo which AMR placed on the Norman Branch line in December 1993. Furthermore, it could have done so without incurring any additional overhead or capital expenditures.

Given GS Roofing's excess, unused capacity, as well as the absence of any sales to Celotex-Houston, there is no question that the sales contemplated under the contract with Celotex-Houston were not made. Therefore, the Board must conclude that GS Roofing experienced lost profits from the sale of between 20,000 and 25,000 tons of roofing granules, pursuant to the contract with Celotex-Houston.

GS Roofing's Cost of Production.

In his Verified Statement, Mr. Smith testified that the cost of production was \$11.29 per ton. That testimony was based on the books and records maintained by GS Roofing in the ordinary course of business. That figure did not take into consideration the year-end figures for 1994.

As explained in the Verified Statement of Tom A. Gwynn, which is attached hereto, the actual cost of production using year-end expenses for 1994 was \$14.41 per ton, which includes a per-ton cost of \$2.064 for slate oil, which would have been added to the roofing granules prior to delivery to Celotex-Houston. *See also*, GS Reopening Ex. 1 (filed under seal).

Transportation Costs.

The transportation cost of \$21 per ton was based on an existing contract with Union Pacific ("UP") covering the movement of roofing granules from Birds Mill, Arkansas to Houston, Texas. *See* V.S. Cowart at ¶8. Although the contract rate was originally established for movements to another customer in Houston, UP agreed to honor the rate for the Celotex-Houston movements.

Interest.

Based on the Board's prior determination (2000 WL 555006, at *14) that "[i]nterest will be based on the 91-day Treasury Bill Equivalent yield for the quarter ... [and that] interest shall be calculated pursuant to the procedures outlined at 49 CFR 1141.1(a)(2) and 1141.1(b)(2)," GS

Roofing calculates that it is owed between \$66,987 and \$83,734 of interest, in addition to the lost profits that it has demonstrated of between \$151,800 and \$189,750. The interest computations assumed a regular flow of product starting January 1, 1994, with interest being calculated from January 31, 1994 for the lost profit that was lost for that month. Beginning December 31, 1994, interest was calculated on the entire amount of lost profit. *See* V.S. Nielsen.

Under the Circumstances of this Case, Fixed Overhead Costs, as Opposed to Variable Costs, Are Not Properly Deducted in Calculating Lost Profits.

In its Petition seeking the establishment of a procedural schedule, AMR suggests that the Board should consider overhead costs in computing lost profits. Although that position finds some support in a limited number of older legal cases,³ more recent cases, as well as the Uniform Commercial Code, have rejected that position.

As noted in the Annotation, Overhead Expense As Recoverable Element of Damages, 3 A.L.R. 3d 689, n.19 (1965)(*available in WL*), § 2-708(2) of the Uniform Commercial Code provides that in the event of a buyer's breach of contract, one measure of damages which may be available to the seller is the amount of his lost profits including reasonable overhead. As explained (*id. available in WL* at page 13):

[I]n the Uniform Commercial Code there has been provided an express reference to the matter of overhead expenses. Section 2-708 (2) of the Code states that if there has been a breach of contract by the buyer and another measure of damages is inadequate to put the seller in as good a position as performance would have done, 'the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together

³ *See, e.g., Worrell & Williams v. Kinnear Mfg. Co.*, 103 Va. 719, 49 S.E. 988 (1905); *A. Lenobel, Inc. v. Senif*, 252 App. Div. 533, 300 N.Y.S. 226, *resettled* 253 App. Div. 813, 1 N.Y.S.2d 1022 (1937); *Willhelm Lubrication Co. v. Bratrud*, 197 Minn. 626, 268 N.W. 634, 106 A.L.R. 1279 (1936).

with any incidental damages provided in this Article (Section 2-710) . . . ' (In § 2-710 it is provided that incidental damages to an aggrieved seller include any commercially reasonable charges, expenses, or commissions incurred in various specified ways 'or otherwise resulting from the breach.') By expressly including overhead expenses as part of the seller's lost profits, the Code brings about a result that is contrary to some cases which were decided under earlier, more general, statutory provisions, and which held that overhead expenses had to be deducted as costs instead of being included as part of the lost profits which were recoverable by the seller.

The foregoing line of reasoning was followed in *Vitex Manufacturing Corporation, Ltd. v. Caribtex Corporation*, 377 F.2d 795, 799 (3d Cir. 1967), wherein the Third Circuit noted that:

[T]he Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions. Indeed, it may overrule some of the cases denying recovery for overhead. E.g., *Wilhelm Lubrication Co. v. Bratrud*, 197 Minn. 626, 632, 268 N.W. 634, 636, 106 A.L.R. 1279 (1936).

As explained in Robert L. Dunn, *Recovery of Damages for Lost Profits*, Vol. 2, § 6.5 at 366 (Lawpress 1992, 4th edition)(emphasis in original):

The weight of authority holds that fixed overhead expenses need *not* be deducted from gross income to arrive at the net profit properly recoverable. Most cases that have considered the argument that fixed overhead must be allocated and deducted have rejected it.

See also, *Vanwyk Textile Systems, B.V. v. Zimmer Machinery America, Inc.*, 994 F. Supp. 350, 383 (W.D.N.C. 1997).

As Dunn also explains (p. 367), quoting from the holding in *Oakland California Towel Co. v. Sivils*, 52 Cal. App. 2d 517, 126 P.2d 651 (Cal. Ct. App. 1942):

[T]he true rule seems to be that the prospective profit should be diminished by charges comprising an essential element in the cost to manufacture . . . Essential elements in such costs do not include remote costs, overhead or otherwise, but are confined to expenditures

that would necessarily have been made in the performance of the contract. The only matter of concern is the detriment suffered or benefit lost as a result of the breach. If the fixed expenses neither increase nor decrease as a consequence of the nonperformance of the contract, there would be no loss or benefit arising from that factor.

Whether a particular charge is an essential element and therefore to be considered, or whether it is not affected as a consequence of the nonperformance of the contract, is a question of fact. The evidence amply supports the findings that the charges here challenged were fixed charges in no way affected by the nonperformance and were therefore not deductible from the amount of damages otherwise established.

See also, 22 Am. Jur. 2d *Damages* § 645 (1988) ("it has been held in numerous cases that overhead expenses should not be deducted from profits, because they are not affected by the performance or nonperformance of the particular contract").

As explained in *Sure-Trip, Inc. v. Westinghouse Engineering*, 47 F.3d 526, 531 (2d Cir. 1995)(internal citations omitted):

Where plaintiff is seeking to recover lost profits, such damages are equal to the revenue that would have been derived, less additional costs that would have been incurred, in performing the contract . . . Fixed overhead costs, as opposed to variable costs, are not properly deducted in calculating plaintiff's lost profits . . . Fixed costs represent the total dollar expense that occurs regardless of output.

In contrast, variable expenses, defined as those additional costs necessarily incurred in performing the contract, must be deducted from plaintiff's recovery so plaintiff is not put in a better position than it would have been had defendant performed. Thus, [the plaintiff's] alleged lost revenue had to be offset by any additional costs it would necessarily have expended in performing the contract to arrive at its lost profits.

A similar result was reached by the Third Circuit in *Vitex Manufacturing Corporation, Ltd. v. Caribtex Corporation*, *supra*, 377 F.2d at 798. As reasoned therein (*id.* internal citations omitted):

Although there is authority to the contrary, we feel that the better view is that normally, in a claim for lost profits, overhead should be treated as a part of gross profits and recoverable as damages, and should not be considered as part of the seller's costs. A number of cases hold that since overhead expenses are not affected by the performance of the particular contract, there should be no need to deduct them in computing lost profits . . . The theory of these cases is that the seller is entitled to recover losses incurred and gains prevented in excess of savings made possible . . . since overhead is fixed and nonperformance of the contract produced no overhead cost savings, no deduction from profits should result.

A similar conclusion was reached in *Buono Sales, Inc. v. Chrysler Motors Corporation*, 449 F.2d 715, 719-20 (3d Cir. 1971) ("where the plaintiff's overhead or fixed expenses are not affected by the defendant's breach, no deduction should be made in calculating the profits which the plaintiff would have made had it not been for the breach").

See also, Peter Kiewit Sons' Company v. Summit Construction Company, 422 F.2d 242, 264 (8th Cir. 1969). After noting the "sharp division in the cases on whether overhead expense must be included as a cost of completion" and recognizing that "requiring inclusion would, of course, have the consequence of reducing the recovery for lost profits by the amount of the overhead expense," the Eighth Circuit affirmed the trial court's holding which permitted the plaintiff to eliminate general overhead expense in determining its cost of completion of a breached contract.

In this case, the lost profits were incurred in Arkansas. It is noted that the Arkansas Supreme Court adopted the majority rule in *Interstate Oil and Supply Company v. Troutman Oil Company*, 334 Ark. 1, 6, 972 S.W.2d 941 (1998). As the Court reasoned (*id.* at 944):

The rationale behind this rule is that overhead continues whether or not the contract in question has been breached . . . If overhead is deducted, thereby reducing recoverable damages, the effect is to reduce the profitability of other contracts by forcing them to bear a

disproportionate share of fixed costs . . . Conversely, all applicable variable expenses should be deducted when arriving at lost profits.

As Mr. Gwynn has testified,⁴ GS Roofing's fixed costs would not have increased or decreased had it fulfilled its contractual obligation to provide roofing granules to Celotex-Houston. Therefore, under the unique circumstances of this case and consistent with the majority rule, overhead costs should not be deducted in calculating GS Roofing's lost profits. In order to put GS Roofing in as good a position as if the contract had been fully performed, only the variable costs incurred in producing the additional roofing granules, as well as transportation costs, should be deducted from the sales price of \$43.00 per ton.

Conclusion

For all the above-stated reasons, the Board should find that GS Roofing incurred lost profits ranging between \$218,787 and \$273,484. Given the protracted nature of this proceeding, the Board is requested to handle this matter in an expedited fashion.

Respectfully submitted,



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Dated: January 16, 2002

⁴ V.S. Gwynn at ¶12.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of January, 2002, served a true copy of the foregoing Opening Statement filed on behalf of GS Roofing Products Company, Inc. by FedEx on the following:

Thomas J. Litwiler, Esq.
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721

A handwritten signature in black ink, appearing to read "Richard H. Streeter", written over a horizontal line.

Richard H. Streeter