

June 19, 2006

ORIGINAL

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VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20423

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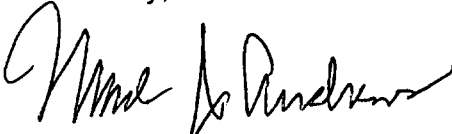
RE: Finance Docket No. 34865
Arkansas Midland Railroad Company, Inc. -- Petition for Declaratory Order --
Caddo Valley Railroad Company

Dear Secretary Williams:

Enclosed for filing in this proceeding are an original and ten (10) copies of opening comments on behalf of my clients CertainTeed Corporation and its subsidiary GS Roofing Products Company, Inc. These comments are being submitted pursuant to the Board's decision served May 12, 2006 in the above docket. An extra copy of this transmittal letter and the enclosed response are attached for the convenience of your office in acknowledging receipt of this filing. We ask your staff to return those receipt copies to our delivery person.

Please feel free to contact me with any questions about this filing. Thank you.

Sincerely,



Mark J. Andrews
Enclosures

cc: Carol M. Gray, Esq. (via electronic mail)
Parties on Certificate of Service
(via first class and electronic mail as indicated)

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34865
ARKANSAS MIDLAND RAILROAD COMPANY, INC.
--PETITION FOR DECLARATORY ORDER--
CADDO VALLEY RAILROAD COMPANY



OPENING COMMENTS BY CERTAINTEED CORPORATION
AND ITS SUBSIDIARY, GS ROOFING PRODUCTS COMPANY, INC.

Introduction and Summary

In response to the Board's decision served in the above docket on May 12, 2006, these comments are filed by GS Roofing Products Company, Inc. and its parent company CertainTeed Corporation (collectively, "GS"). The Board's decision opened this proceeding to consider a Petition for Declaratory Order filed by Arkansas Midland Railroad Company, Inc. ("AKMD"). That carrier had been directed to sell the Norman Branch line in southwestern Arkansas pursuant to the feeder line program codified at 49 U.S.C. § 10907, and accordingly had deeded the line in 2000 to the Caddo Valley Railroad Company ("CVR"). AKMD's April 2006 petition asked the Board to declare that a proposed sale of CVR's stock to Pioneer Railcorp ("Pioneer") would give AKMD a right of first refusal to re-acquire the Norman Branch pursuant to 49 U.S.C. § 10907(h). In response, the Board's Decision (at p. 3) invited comments "regarding when, if ever, a stock sale triggers section 10907(h)."

The cited statutory provision applies by its terms only to the purchasing carrier which acquires a line of railroad in a directed sale under the feeder line program. If a sale or abandonment of that "line" is proposed by that "carrier," then and only then does section 10907(h) require it to grant a conditional "right of first refusal" to the former

owner. In construing that provision, the Board should bear in mind that the beneficiary of the first-refusal right is the very carrier whose abandonment threats or “inadequate” service “for the majority of shippers” on the line triggered the directed sale in the first place; see 49 U.S.C. §§ 10907(b)(1)(A), (c)(1)(A)-(B).

GS – as the second largest shipper on the Norman Branch – urges the Board to reject AKMD’s ill-disguised and ill-founded efforts to regain its grip on a line it grievously mismanaged in the past.¹ Given the service-preservation objectives of the feeder program and given the narrow scope of the first-refusal right created by the statutory text, GS submits that the answer to the Board’s legal question is clear. Simply put, there is **never** a good reason – whether in legal or policy terms – for the first-refusal right to be expanded into the realm of carrier stock acquisitions when its plain language is confined to asset transactions (line sales or line abandonments).

From a legal standpoint, a fundamental regulatory distinction between carrier acquisitions and line sales has long been deeply embedded in the structure of the ICC Termination Act and predecessor statutes. That much was demonstrated by the submissions of GS and several other parties in response to the petition that instigated this proceeding,² and those arguments need not be reiterated here. Instead, the remainder of these comments – after responding to the Board’s implicit request for clarification of who currently owns CVR³ – will provide further reasons why expansion of the first-refusal right as proposed by AKMD would be bad policy even if permitted by the statutory text.

¹ The history of that mismanagement is summarized at pages 2 and 4 of GS’s initial Response filed in this docket on April 19, 2001.

² See Response of GS filed April 19, 2006, at pp. 4-5; Statement in Opposition of Pioneer Railcorp filed the same date, at pp. 1-2; Response of Caddo Valley Railroad Company and its shareholders filed April 18, 2006, at pp. 6-8.

³ See Decision at p.2 n.1.

**GS Has No Financial Axe to Grind with Regard to Ownership of CVR;
Its Only Interest Is in Preserving and Improving Service on the Norman Branch**

In order to clarify the record with regard to current ownership of CVR, the Board is hereby advised that – to the best of GS's knowledge – the shares in that carrier currently are owned by members of the family that controls Bean Lumber Company and Curt Bean Lumber Company, two other shippers on the Norman Branch line. GS has no equity interest in CVR, or in Pioneer for that matter. Additionally, GS has even waived certain provisions of a previous surcharge agreement with CVR to the extent they might have allowed GS to recover some of its surcharge payments upon a stock acquisition of CVR by Pioneer.

Thus, GS does not stand to reap direct financial gain from any stock transaction involving CVR. The sole interest of GS in this proceeding, and in the ultimate disposition of CVR, is to maintain and if possible, improve freight service over the Norman Branch. As pointed out at page 2 of its response to the AKMD petition, GS is vitally dependent on keeping the Norman Branch open for rail shipments of roofing granules produced by its plant in Bird's Mill, Arkansas, a rural community 52 miles from the nearest main line of a Class I rail carrier. Thus, when the current CVR shareholders informed GS of their conclusion that the necessary maintenance and rehabilitation of the Norman Branch could best be accomplished by bringing in Pioneer or another experienced short-line railroad operator as a new controlling shareholder, GS took them at their word. GS agreed to facilitate a stock sale to Pioneer through the above-mentioned waiver. If necessary, GS also stands ready to work with other prospective CVR investors having proven, positive short-line experience.

The same overriding concern for preserving service on the Norman Branch has led GS to participate in this proceeding out of apprehension that AKMD's petition would "chill" a stock sale of CVR to Pioneer or anyone else.⁴ Simply stated, the longer that AKMD's petition is allowed to cast a cloud of uncertainty over the fate of the Norman Branch, the more likely it becomes that all the efforts to save the line over the past thirteen years⁵ will have been for naught.

**Expansion of the Section 10907(h) First-Refusal Right to Cover Stock Sales
Would Frustrate the Purposes of the Feeder Line Program by
Singling Out Feeder-Line Acquirers for Uniquely Intrusive Reregulation**

Even if the plain words of section 10907(h) were not so clearly limited to line sales or abandonments, expansion of the first-refusal right to include stock sale proposals would be a peculiarly bad idea because of the business context in which directed sales under the feeder program typically occur. Lines conveyed under the feeder program are inherently more likely to be troubled properties because of neglect by the prior owner who was directed to sell the line – certainly the case here when AKMD owned the Norman Branch. Moreover, the shipper consortia or other persons acquiring such lines are inherently likely to be inexperienced with rail operations, especially considering that Class I and Class II railroads are not eligible to acquire lines under the feeder program (see 49 U.S.C. § 10907(a)). Such was certainly the case here, where GS believes the current CVR shareholders would be the first to admit their inexperience with railroad management.

Given these circumstances, feeder line acquirers are more likely than other line acquirers to go through a trial-and-error process before they find proper management for

⁴ That apprehension appears to have been well-founded, as GS understands that discussions between Pioneer and CVR are currently on indefinite hold due to the Board's decision to open this proceeding.

⁵ See procedural history summarized at pp. 1-2 of CVR's reply to AKMD's petition.

the troubled property they have acquired. In the search for proper management, feeder line acquirers should not be limited to working with prospective line managers who are willing to forego the major economic incentive of having an equity interest in the entity owning the line. In all likelihood, managers willing to settle for a fixed fee will lack the incentive or ability to be proactive in fixing a troubled rail line. And surely the acquirers should not be placed in the position of having to “guess right” in picking an initial manager who wants an equity interest, while facing the constant threat that a wrong guess would forfeit the line to the former owner whose neglect required feeder-program relief in the first place. Yet these would be precisely the pernicious and punitive effects of AKMD’s proposed reading of section 10907(h).

The drafters of the feeder program recognized that fledgling acquirers of troubled lines under that program required *even more freedom* from traditional economic regulation than was provided to other rail service providers under the Staggers Rail Act of 1980 (Pub.L. No. 96-448), and that same degree of freedom was retained when the program was carried forward into the ICC Termination Act of 1995 (Pub.L. No. 104-88) (“ICCTA”). As the feeder program is currently codified, the line operator after a directed sale is afforded an extraordinary remedy, unparalleled elsewhere in ICCTA. Specifically, the feeder operator “may *elect* to be exempt from *any* of the provisions” for economic regulation of railroads that were retained and transferred to the Board under ICCTA, with an exception for joint-rate matters not pertinent here. See 49 U.S.C. § 10907(g)(1) (emphasis supplied).

It is highly improbable that Congress, having just granted feeder line operators this extraordinary degree of regulatory freedom under section 10907(g)(1), would turn

around in section 10907(h) and impose a *sui generis* encumbrance on stock sales of feeder line operators that does not exist for stock sales of any other rail carriers under ICCTA. As illustrated by the situation here, such an encumbrance would frustrate the objectives of the feeder program in several ways – (i) by limiting the options available to feeder-line operators who determine that a management change is necessary to maintain service on the line after its directed sale; (ii) by empowering the former owner to recapture the very line it mismanaged if the buyers in a directed sale “guess wrong” in their initial selection and structuring of line management; and (iii) by enabling that same former owner to dampen the interest of prospective replacement managers who want an equity interest in the feeder line operator.

Conclusion and Request for Relief

For all the reasons stated, GS Roofing Products Company, Inc. and CertainTeed Corporation respectfully submit that freedom of stock sale for feeder-line operators is essential in order to further the objectives of the feeder line program, and is therefore in the public interest. Consequently, the Board should conclude that there is no good reason for including stock sales within the scope of the first-refusal provision at 49 U.S.C. § 10907(h), even if such a reading of the provision were consistent with its plain language (which it is not). Moreover, the Board should avoid compounding the already-evident chilling effect of AKMD’s petition on CVR’s efforts to bring in experienced railroad managers who can enhance the future viability of the Norman Branch. The Board can

remove the chill by promptly issuing a decision denying the declaratory relief sought by AKMD.

Respectfully submitted,

CERTAINTED CORPORATION
GS ROOFING PRODUCTS COMPANY, INC.
By Their Attorney

A handwritten signature in black ink, appearing to read "Mark J. Andrews", is written over the printed name.

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Date Due and Filed: June 19, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have today caused a true copy of the foregoing to be served
by first-class and electronic mail upon the following:

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Dated at Washington, D.C. this nineteenth day of June, 2006.



Mark J. Andrews