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June 29, 2006

VIA ELECTRONIC FILING

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20423-0001

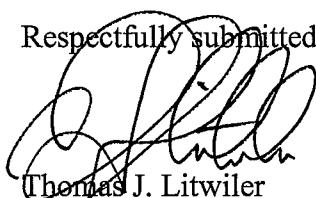
Re: **Finance Docket No. 34865**
Arkansas Midland Railroad Company, Inc. -- Petition for
Declaratory Order -- Caddo Valley Railroad Company

Dear Secretary Williams:

Attached for filing in the above-captioned proceeding are the **Reply Comments of Arkansas Midland Railroad Company, Inc.**, dated June 29, 2006.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Arkansas Midland
Railroad Company, Inc.

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34865

ARKANSAS MIDLAND RAILROAD COMPANY, INC.
-- PETITION FOR DECLARATORY ORDER --
CADD O VALLEY RAILROAD COMPANY

**REPLY COMMENTS OF
ARKANSAS MIDLAND RAILROAD COMPANY, INC.**

William C. Sippel
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**ATTORNEYS FOR ARKANSAS MIDLAND
RAILROAD COMPANY, INC.**

Dated: June 29, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34865

ARKANSAS MIDLAND RAILROAD COMPANY, INC.
-- PETITION FOR DECLARATORY ORDER --
CADDO VALLEY RAILROAD COMPANY

**REPLY COMMENTS OF
ARKANSAS MIDLAND RAILROAD COMPANY, INC.**

Pursuant to the Board's decision served May 12, 2006, Arkansas Midland Railroad Company, Inc. ("AKMD") hereby files these reply comments regarding the statutory right of first refusal under 49 U.S.C. § 10907(h) and its application to the Norman Branch that AKMD was previously forced to sell under the Feeder Line Development Program.¹ The arguments of Caddo Valley Railroad Company ("CVR") and GS Roofing Products Company, Inc./CertainTeed Corporation ("GS Roofing"), if accepted, would simply write that statutory provision out of existence with respect to prototypical feeder line transactions under 49 U.S.C. § 10907. The Board should find that the feeder line applicants in Caddo cannot dispose of their interests in the Norman Branch -- whether through a sale of CVR's stock or otherwise -- without according AKMD the right of first refusal specified by Section 10907(h).

We note initially the Board's observation that "[i]t is unclear who currently owns CVR's stock." Decision at 2, n.1. In response, CVR simply lists in a footnote to its comments

¹ See Caddo Antoine et al. -- Feeder Line Acq. -- Arkansas Midland RR, 4 S.T.B. 326 (1999) ("Caddo I"), 4 S.T.B. 610 (2000), aff'd sub nom. GS Roofing Products Co. v. STB, 262 F.3d 767 (8th Cir. 2001), granting the feeder line application of five shippers -- GS Roofing Products Company, Inc., Beazer West, Inc. d/b/a Gifford-Hill & Company, Bean Lumber Company, Curt Bean Lumber Company and Barksdale Lumber Company (collectively, "the Shippers") -- to acquire AKMD's Norman Branch between Gurdon and Birds Mill, Arkansas.

the names of four individual stockholders, with no further explanation. CVR Comments at 1, n.1 ("Its shareholders are Gina Garner, Tim Bean, Melanie Hall and Corey Thomason."). It is left to GS Roofing to advise that, to the best of its knowledge, these shareholders are "members of the family that controls Bean Lumber Company and Curt Bean Lumber Company." GS Roofing Opening Comments at 3. It thus appears that none of the actual feeder line applicants in Caddo have an ownership interest in CVR -- which was supposedly formed by those applicants to effectuate their feeder line authority. Caddo I, 4 S.T.B. at 331 ("The Shippers stated that if their acquisition of the line is approved, the new corporation would hold title to it even though the Shippers would provide financial backing and exercise control over the new entity."). Indeed, it is not clear that any of the Shippers have ever held an interest in CVR, although neither CVR nor GS Roofing purports to provide any history of CVR's ownership.²

Against this backdrop, it is particularly unconvincing for CVR and GS Roofing to argue the corporate niceties of a distinction between selling the Norman Branch and selling CVR -- whose sole rail asset is the Norman Branch and whose sole reason for being was to acquire the Norman Branch on behalf of (supposedly) the Shippers. Nor is such a distinction consistent with the plain purpose of 49 U.S.C. § 10907(h). As the Board's predecessor recognized numerous times, the Feeder Line Development Program is intended for use primarily by "shipper groups and communities." Feeder Railroad Development Program, 365 I.C.C. 93, 94 (1981); Feeder Railroad Development Program, 367 I.C.C. 261, 270 (1983); Revision of Feeder Railroad Development Rules, 7 I.C.C. 2d 902, 903 (1991). Such feeder line applicants would normally be expected to use a separate entity to effectuate their feeder line authority --

² GS Roofing indicates simply that "GS has no equity interest in CVR" GS Roofing Opening Comments at 3. Neither GS Roofing nor CVR explains how the feeder line authority specifically granted to the Shippers in Caddo was appropriately exercised by an entity in which none of those Shippers had an interest.

particularly where, as here, more than one shipper applicant is involved. GS Roofing admits as much. See GS Roofing Opening Comments at 4 (describing "business context in which directed sales under the feeder program typically occur").

In that type of prototypical feeder line case, the arguments of CVR and GS Roofing would mean that the acquired rail line could be transferred repeatedly and indefinitely via "stock sales" and never trigger the right of first refusal provided by Section 10907(h). The line could become part of a Class I or Class II rail system with no such right of first refusal, even though such entities would have been disqualified from acquiring the line under the feeder line provisions in the first place. 49 U.S.C. § 10907(a). The entity holding the rail line could be merged with a purchaser, and again supposedly not trigger the right of first refusal because no "sale" of the rail line was involved. If defeating the statutory right of first refusal is this easy, why would successful feeder line applicants ever structure a subsequent sale of their line any other way? Given that use of a separate entity by the feeder line applicants is the prototypical way that feeder line transactions occur, the effective result would be to write the right of first refusal out of the statute -- since it would never be applicable to the standard kinds of transactions that the feeder line statute would be expected to generate. Congress could not have intended such a result.

As International Paper Company ("IP") has explained, such a result is also inconsistent with the reality of a sale by CVR's present owners -- which will bring the Norman Branch into the Pioneer Railcorp shortline family and make the line a Pioneer operation. IP Comments at 1-2. While CVR's mere corporate form may remain intact, the sale would "represent[] a fundamental change in the identity of the company that is actually providing service to the shipping public." IP Comments at 2. Particularly curious in this regard is GS

Roofing's argument that denying AKMD's right of first refusal in the circumstances present here is necessary so that feeder line applicants can select "proper management" for their rail line and offer such managers an "equity interest" in the line. GS Roofing Opening Comments at 4-6.³ Whatever the merits of such an argument (and it is strained at best), its application here is a mystery. The Caddo feeder line applicants and the current owners of CVR (who should be the same entities, but apparently are not) do not seek to hire new management for their rail line, or to obtain a new equity investor in their enterprise. They want out of their involvement and ownership in the Norman Branch, and intend to sell out completely to Pioneer. See AKMD Petition for Declaratory Order at 13-17 (Exhibit 4, *Arkansas Democrat Gazette* article). In those circumstances, AKMD must be afforded the right of first refusal that Section 10907(h) plainly provides.

CVR and GS Roofing argue that the literal wording of Section 10907(h) does not specifically reference stock sales, and therefore cannot apply to the intended disposal of the Norman Branch. The Board's predecessor faced similar arguments when it found that affiliates of Class I and Class II rail carriers are not eligible feeder line applicants -- even though the statutory language refers only to the Class I and Class II rail carriers themselves. The ICC rejected those arguments as inconsistent with the meaning and purpose of the statute. Feeder Railroad Development Program, 367 I.C.C. at 270. And while the agency has found in the past that it is not required to ignore a distinction between an asset sale and a stock sale, it has in fact done so where warranted by the circumstances, and particularly where all of the assets of a railroad company were involved. E.g., Fox Valley & Western Ltd. -- Exempt., Acq. & Oper.,

³ In making this argument, GS Roofing relies in part on the ability of a feeder line applicant to elect to be exempt from most regulation under the Interstate Commerce Act. GS Roofing Opening Comments at 5 (citing 49 U.S.C. § 10907(g)(1)). The Shippers and CVR made no such election here.

9 I.C.C.2d 209, 216-217 (1992) (acquisition of all of the assets of two rail carriers is acquisition of "control" of those carriers, and "to conclude otherwise would exalt form over substance."), aff'd sub nom. Fox Valley & Western Ltd. v. ICC, 15 F.3d 641 (7th Cir. 1994). That of course is the case here, where the only rail line asset held by CVR is the Norman Branch that was the subject of the prior feeder line proceeding.

Indeed, the Board has already previously found that CVR is not distinct from its feeder line applicant owners for purposes of applying Section 10907. In Caddo I, AKMD had complained that the identity and financial responsibility of the actual intended operator of the line (what would eventually be CVR) were not clear. In response, the Board explained that "the Shippers submitted extensive evidence under seal showing the financial condition of the prospective purchasers of the line," and concluded that the statutory requisites were met because the Shippers had demonstrated that they were financially responsible parties. 4 S.T.B. at 345; see also 4 S.T.B. at 331 ("We also invited additional evidence on the Shippers' financial responsibility"); 4 S.T.B. at 343 ("The Shippers also submitted confidential financial data under seal showing that GS Roofing and Bean have the financial resources necessary to acquire the line.").⁴ The Shippers were the feeder line applicants and the parties that met the statutory requirements of Section 10907 to acquire the Norman Branch, and the Shippers' disposal of their ownership interests in the Norman Branch similarly triggers the right of first refusal under Section 10907(h).

Finally, we note the incessant invocation of the agency's prior determination that AKMD failed to provide adequate service on the Norman Branch in 1993 as somehow

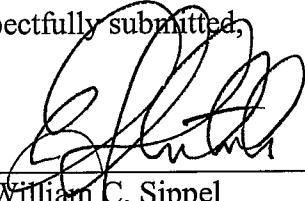
⁴ CVR now claims that the Board found that "CVR was a 'financially responsible person' as defined at § 10907(a)(1) and (2)." CVR Comments at 2 (emphasis added). That is plainly wrong.

supporting the position of CVR and GS Roofing here. E.g., CVR Comments at 1; GS Roofing Opening Comments at 2 & n.1.⁵ That finding involved a short period of time nearly thirteen years ago. In the period since then, AKMD has been name Short Line Railroad of the Year by *Railway Age* magazine in 2000, and this year received an ASLRRRA Marketing Award from the American Short Line and Regional Railroad Association based largely on AKMD's assumption of rail operations on another Arkansas branch line after service by the prior operator had deteriorated. See Exhibits A and B, attached hereto; Arkansas Midland Railroad Company, Inc. -- Alternative Rail Service -- Line of Delta Southern Railroad, Inc., Finance Docket No. 34479 (STB served March 11, 2004, March 19, 2004, May 4, 2004, July 30, 2004 and November 1, 2004); Arkansas Midland Railroad Company, Inc. -- Change in Operators -- Line of Union Pacific Railroad Company, Finance Docket No. 34567 (STB served November 17, 2004). To the extent relevant at all here, there should be no concerns about AKMD's ability to provide adequate rail service should it exercise its statutory right of first refusal to re-acquire the Norman Branch.

⁵ GS Roofing again declines to acknowledge the assistance that AKMD provided in handling nearly 400 cars of GS Roofing traffic via a transload operation when CVR itself embargoed the Norman Branch from August of 2005 through January of this year.

WHEREFORE, AKMD respectfully requests that the Board enter a declaratory order that any sale of the Norman Branch or of CVR triggers the right of first refusal provided by 49 U.S.C. § 10907(h).

Respectfully submitted,

By: 

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**ATTORNEYS FOR ARKANSAS MIDLAND
RAILROAD COMPANY, INC.**

Dated: June 29, 2006



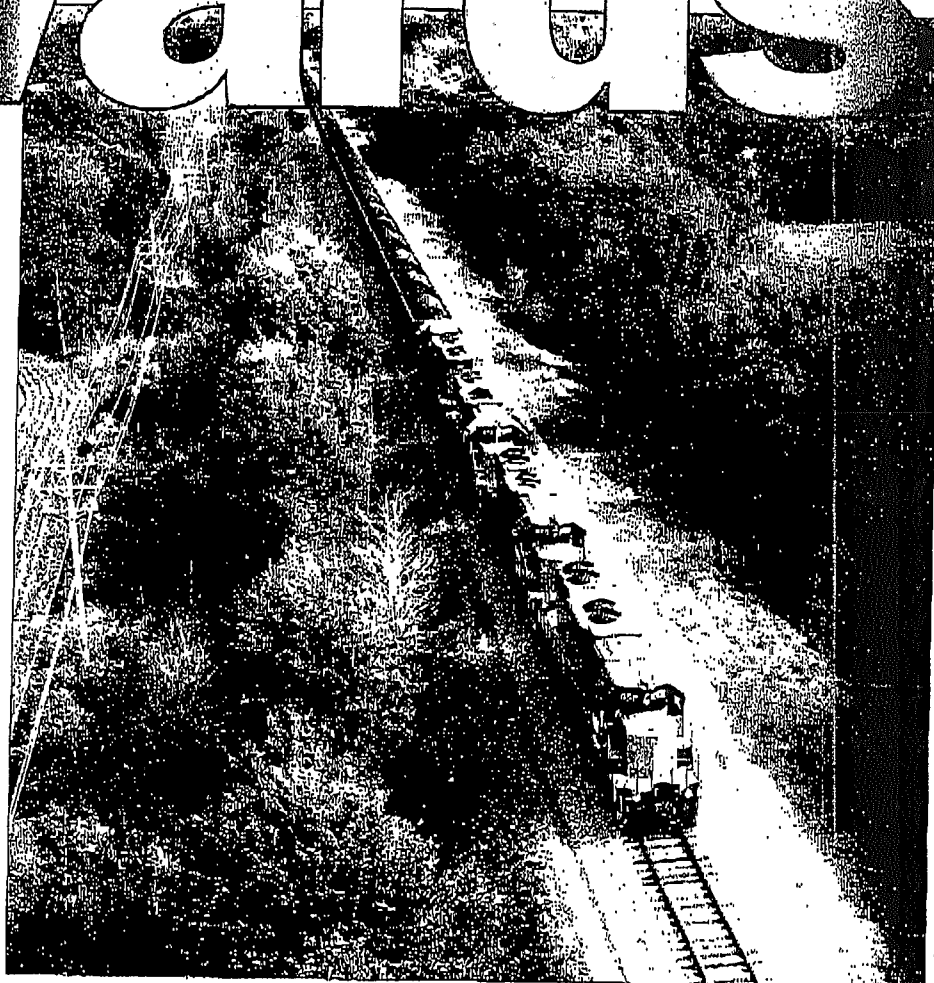
Short Line & Regional Railroad of the Year Awards

Arkansas Midland,
Bessemer & Lake Erie
take top honors.

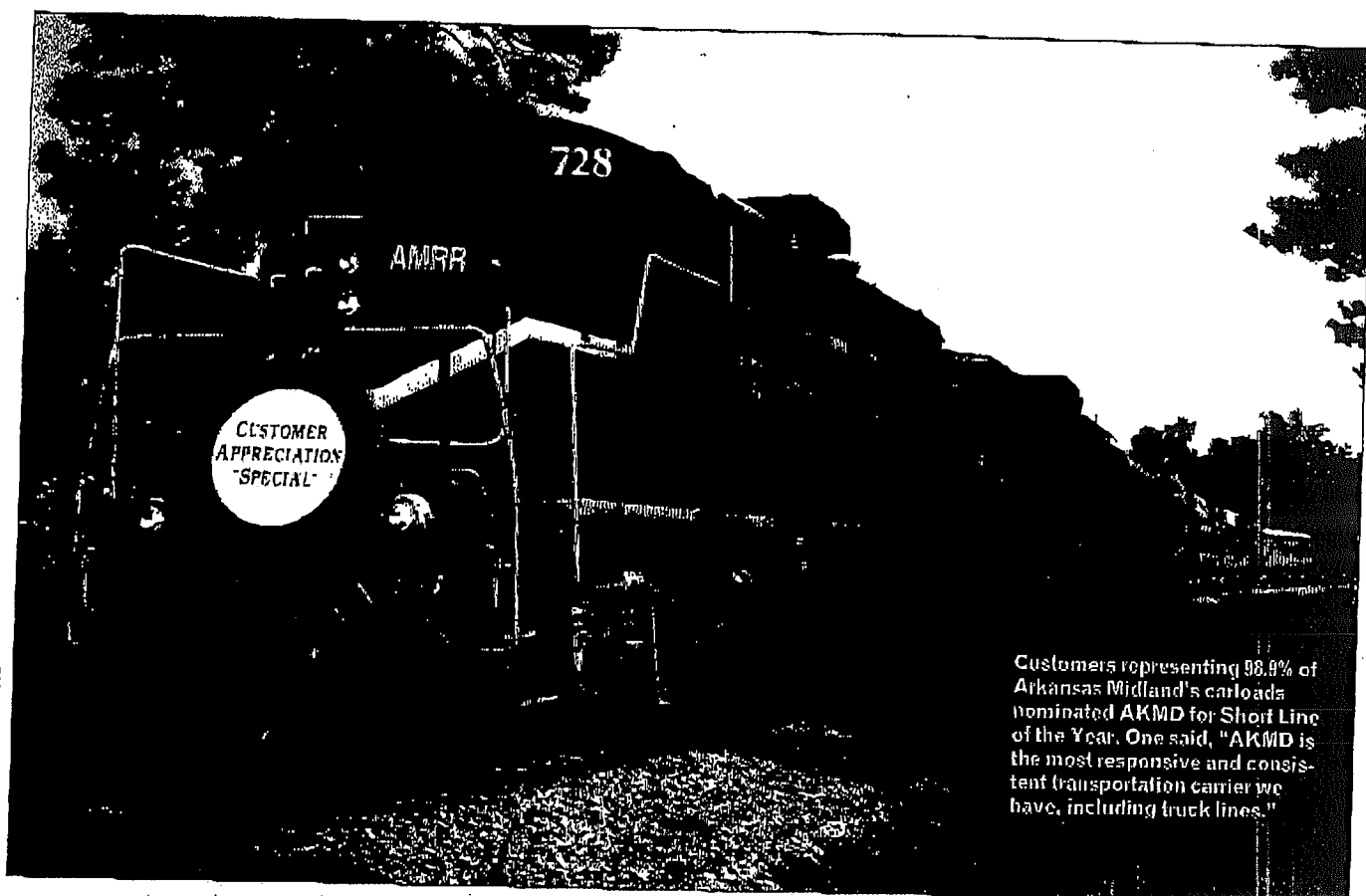
By Tom Judge,
Engineering Editor

Choosing the 2000 Short Line and Regional Railroads of the Year was difficult, as this year's entries reflect the very high standards of entrepreneurship and service smaller railroads are providing to customers. The two winners—short line Arkansas Midland and regional Bessemer & Lake Erie—“represent the cream of a very special crop,” says *Railway Age* Publisher Robert P. DeMarco, who will present the awards at the American Short Line and Regional Railroad Association Annual Meeting in Chicago Oct. 2.

Winners: Arkansas Midland (top) and
Bessemer & Lake Erie (right).



ARKANSAS MIDLAND (TOP); BESSEMER & LAKE ERIE (RIGHT).



Customers representing 98.9% of Arkansas Midland's carloads nominated AKMD for Short Line of the Year. One said, "AKMD is the most responsive and consistent transportation carrier we have, including truck lines."

Arkansas Midland: "Responsive and consistent"

Customers representing 98.9% of Arkansas Midland's carloads nominated AKMD for Short Line of the Year. "They're always ready to help, from working with us to improve the track in our plant to providing a turnkey operation to save money on inbound raw materials," says Everett Vincent, operations manager of U.S. Vanadium.

Last year, AKMD won the American Short Line and Regional Railroad Association Marketing Award for its innovative use of the Railroad Industry Agreement. AKMD established truck-competitive rates for handling ingots from the Port of Little Rock to Reynolds Metals Rolling Plant at Jones Mill, Ark. Reynolds, now part of Alcoa, is AKMD's highest-revenue customer. Bill Cribbs, Reynolds' quality assurance & materials manager, says, "AKMD is the most responsive and consistent transportation carrier we have, including truck lines."

AKMD's largest carload customer is Martin Marietta Aggregates. John Regenhardt, general manager-Arkansas Area, is managing a major expansion of its Jones Mill, Ark., quarry. "AKMD helped us to become a 60-car unit train shipper three years ago," he says. "Now we are gearing up to ship 100-car trains with a goal of tripling our business. During the recon-

struction of our plant, AKMD has been meeting with us daily to schedule extra switches to maximize outbound shipments during this difficult period."

When Anthony Timberlands, Inc., had a fire at one of its plants, AKMD asked if it could help. "AKMD had read about the fire and offered to provide extra centerbeam cars if orders could be transferred to the AKMD-served plant," says Anthony Timberlands Executive Vice President Rick Green. "Shipments nearly doubled during this period, and our contracts were met."

"Without AKMD, we may not have been able to locate our new plant in Helena, Ark.," says Larry Mohme, president of CMC Foods. "AKMD suggested we talk to the local economic development people. They constructed our new track, and now we enjoy the benefits of timely service, which, in these days, means everything."

AKMD recently entered the car storage business. Idle assets that have been put to use now bring in more revenue than some AKMD branches. Union Carbide has been happy with this service. "They store loaded and empty cars for us," says Doug Brodführer, fleet operations manager. "They receive and deliver our cars efficiently, charge a fair rate, and are ideally located for our needs."

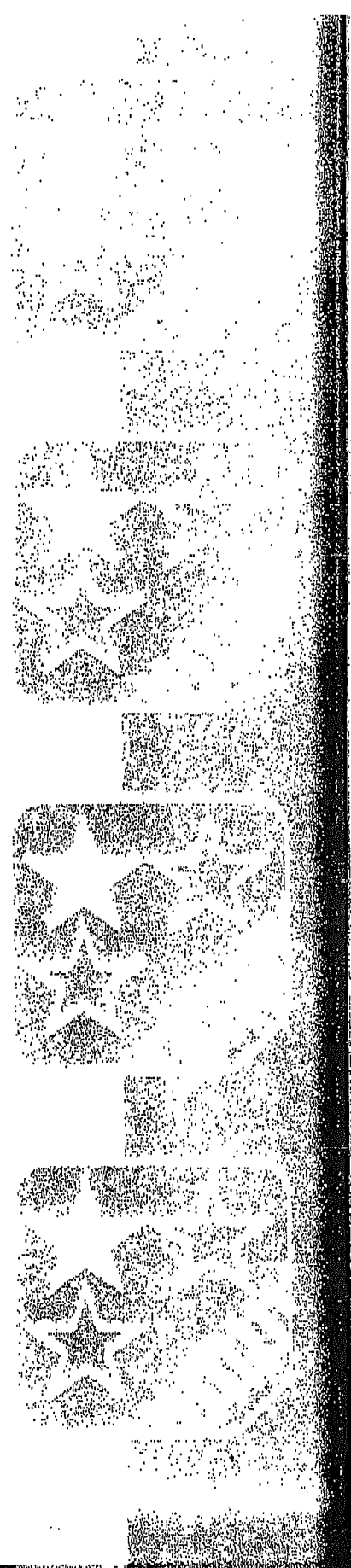
Reprinted from
RailwayAge September 2000.

2006 ASLRRA MARKETING AWARD

Presented to

**ARKANSAS MIDLAND
RAILROAD COMPANY**

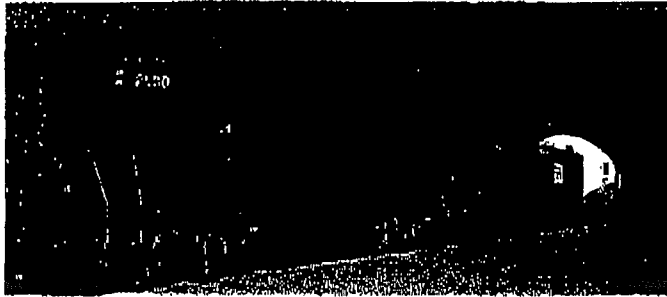
For demonstrating innovative
service and outstanding marketing
achievement





ASLRRA MARKETING AWARDS

Arkansas Midland Railroad:



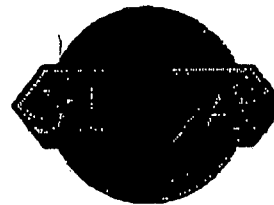
The Arkansas Midland (AKMD) overcame the challenges of poor conditions on track taken over from the Union Pacific to become an award winner. The UP asked the AKMD to assume responsibility for service on their 40-mile Warren Branch in southeastern Arkansas after the previous short line operator had ceased operations due to the inferior quality of the track. Poor track conditions had already caused Potlatch and other customers to shift to truck.

After quickly assessing the situation, the AKMD requested and received a Surface Transportation Board Emergency Service Order to operate the branch. The AKMD performed a maintenance blitz, replacing cross-ties, track and repairing 79 recorded FRA defects. Service was promptly restored and Potlatch and the other customers resumed rail shipments.

Most of Potlatch's traffic consisted of wood chips destined for a paper mill on UP's Cypress Bend Branch 60 miles away. The AKMD subsequently took over operations of both this branch and the McGehee Yard from the UP. The AKMD acquired 140 wood chip cars from the Union Pacific, rebuilding 40 of them in the AKMD shop.

The new federal tax credit legislation played a substantial role in restoring rail service to the Warren Branch and in developing a long-term rehabilitation plan. The project has resulted in the creation of new jobs and customers and has retained an annual volume of over 8,000 carloads.

St. Lawrence & Atlantic Railroad:



a Genesee & Wyoming Company

Bark mulch from Canada is not typically moved by rail. However, the St. Lawrence & Atlantic (SLR) was able to capture this business by turning 40-foot containers into gondolas and handling them as intermodal traffic.

In cooperation with the Canadian National, the SLR modified containers by removing their tops and raising their sides to a height of 13 feet. The SLR loads two containers, owned by the customer, Morse Brothers Mulch, on surplus GE-leased 89-foot flat cars. Purchase of the containers was partially funded by the State of Maine's Industrial Rail Access Program (IRAP), a program designed to reduce highway congestion by establishing industries on rail.

The containers are positioned on the CN in Parent, Quebec, and handled in the SLR intermodal block to Auburn, Maine. At Auburn, the containers are driven down a new private road from the intermodal terminal to the Morse Brothers Mulch manufacturing site.

The SLR moved 42,500 tons (1,418 loaded lifts) of bark mulch for the Morse Brothers processing plant in 2005. The SLR estimates additional market potential of 250,000 tons to serve the biomass and mid-Atlantic landscape markets.

CERTIFICATE OF SERVICE

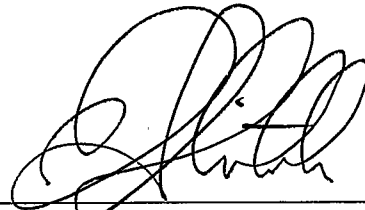
I hereby certify that on this 29th day of June, 2006, a copy of the foregoing **Petition for Declaratory Order of Arkansas Midland Railroad Company, Inc.** was served by electronic delivery and first-class mail, postage prepaid, upon:

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A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler