

216 293

April 19, 2006

MARK J. ANDREWS
202.742.8601
mark.andrews@strasburger.com

VIA HAND DELIVERY

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



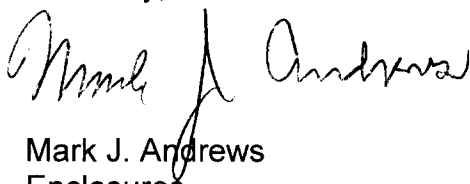
RE: Finance Docket No. 34865
Arkansas Midland Railroad Company, Inc. -- Petition for Declaratory Order --
Caddo Valley Railroad Company

Dear Secretary Williams:

Enclosed for filing in this proceeding are an original and ten (10) copies of a response by CertainTeed Corporation and its subsidiary GS Roofing Products Company, Inc., to the Petition in this matter. 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. Please 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 e-mail)
Parties on Certificate of Service
(via air courier and e-mail as indicated)

216293

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34865

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



RESPONSE BY CERTAINTED CORPORATION AND
ITS SUBSIDIARY, GS ROOFING PRODUCTS COMPANY, INC.,
TO PETITION FOR DECLARATORY ORDER,
INCORPORATING MOTION TO DISMISS PETITION

ENTERED
Office of Proceedings

APR 19 2006

Part of
Public Record

Introduction and Summary

In an apparent effort to make *Jarndyce and Jarndyce*¹ seem like a rocket docket, petitioner Arkansas Midland Railroad Company, Inc. ("AMR") is attempting to reopen and re-litigate the fate of the Norman Branch line in southwestern Arkansas. Following seven years of hard-fought agency and court proceedings under the Feeder Line Development Program (49 U.S.C. § 10907), AMR was required in September 2000 to sell the line to a shipper-controlled corporate entity, the Caddo Valley Railroad Company ("CVR"). After previously owning the line, after grievously neglecting it, after illegally embargoing most of it, and after doing its utmost to shed most of the line from its system, now AMR suddenly says it wants the line back. Toward that end, it has petitioned the Board for a determination that a potential sale of the *stock* of CVR would give AMR a right of first refusal under 49 U.S.C. § 10907(h), even though the plain language of that provision applies only if the current owners under the feeder program decide to abandon or sell the *line*.

¹ I.e., the interminable chancery proceeding recounted in Charles Dickens' 1853 novel, *Bleak House*.

This reply to AMR's petition is filed under 49 CFR 1104.13(a) by GS Roofing Products Company, Inc. ("GS") and its parent company CertainTeed Corporation ("CertainTeed"). GS has long been a shipper of roofing granules from a quarry and processing plant it operates at Birds Mill, Arkansas, a rural community in the foothills of the Ouachita Mountains. Birds Mill is at the northern terminus of the Norman Branch line, some 52 miles from its junction with the Union Pacific main line at Gurdon, Arkansas. Both geography and the commodity shipped make GS and CertainTeed heavily dependent on rail transportation for the very existence of the Birds Mill operation. GS observed the deterioration of the line under AMR's ownership, participated in the litigation to rescue the line from AMR, and has steadfastly supported CVR as the second largest shipper on the line. GS is not about to sit idly by while the former line owner uses unfounded legal theories in an effort to regain its grip on the Norman Branch line.

By and large, the feeder program has worked as intended on the Norman Branch. From September 2000 until the summer of 2005, CVR provided service for GS and other shippers on the line without any significant interruptions. Last summer, however, a safety inspection by the Federal Railroad Administration ("FRA") revealed for the first time that there was potentially catastrophic structural deterioration in several of the long, high trestles that carry the line through the rugged terrain south and east of the GS plant. This deterioration appeared to be the cumulative result of years of neglect under AMR's ownership, compounded by the lengthy litigation that left the line in legal limbo until 2000. Faced with this development, CVR took several steps. It embargoed the northern portion of the line (which serves GS); it obtained emergency funding from the State of Arkansas to repair the involved bridges (which enabled it to lift the embargo); but it also

began reassessing the ability of the current CVR shareholders to sustain the investments that in all likelihood would be required for future maintenance and rehabilitation of the line. Those future maintenance requirements may include expensive repairs to additional bridges, according to reports by FRA and CVR's own consulting engineers that GS has been able to examine.

As a result of the reassessment by the current CVR shareholders, contacts were initiated between them and Pioneer Railcorp ("Pioneer"), which is well known to this Board as an experienced and competent owner and operator of numerous short lines throughout this country. GS has met and conferred with Pioneer management personnel, and has been impressed with their ideas for rehabilitation of the line. GS agrees with the current CVR shareholders that the investments needed for future maintenance and upgrade of the line can most effectively be made by a new shareholder with extensive short-line management experience; see CVR Response to Petition, at p.2. Therefore, GS would welcome Pioneer as the new controlling shareholder of CVR.

Under these circumstances, it would be extremely unfortunate if AMR's latter-day legalistic arguments were to discourage Pioneer (or similar investors) from pursuing an acquisition of CVR. If CVR's current shareholders feel unable to sustain the future investments necessary on the line – and that is certainly the impression formed by GS after many discussions with them and their counsel – then new ownership of CVR's shares would become the last best hope for viable rail service on the Norman Branch line in the years to come. The Board should not countenance AMR's efforts to "chill[]" investor interest in CVR (see CVR Response, at p. 2) – especially when AMR's legal pretext for such interference is utterly without merit.

Discussion: AMR's Request for Relief under Subsection 10907(h)
Is Both Outrageous and Legally Specious

AMR is re-enacting the fable of the dog in the manger. When it owned the Norman Branch prior to September 2000, it made clear its ultimate desire to abandon it (except for a short stub at the southern end of the line). And there is nothing in AMR's recent petition to suggest that it has any more interest in operating the entire line now than it had then. Nonetheless, AMR now seems determined to prevent anyone else from operating the entire line either.

As grounds for trying to block the potential transaction with Pioneer, AMR argues that a sale of the shares of CVR – a duly established Arkansas corporation – is somehow equivalent to the abandonment or sale of the Norman Branch line that would trigger the first-refusal provision of 49 U.S.C. § 10907(h). Such an argument ignores the fundamental, decades-old distinction between line sales and carrier mergers/acquisitions that the ICC Termination Act of 1995 (“ICCTA,” Pub.L. No. 104-88) has carried forward from prior law. Under ICCTA, line sales are regulated by 49 U.S.C. § 10902 in a completely different way from carrier mergers and acquisitions under 49 U.S.C. § 11323. The same distinction existed between pre-ICCTA sections 10901 and 11343 of Title 49 as recodified in 1978 (Pub.L. No. 95-473), and also between sections 1(18) and 5 of the Act to Regulate Commerce prior to that. Congress was well aware of this distinction when it limited the applicability of the first-refusal clause in the feeder statute to situations where “a purchasing carrier under this section proposes to *sell or abandon* all or any portion of a purchased rail *line*”; 49 U.S.C. § 10907(h) (emphasis supplied).

Moreover, the very same quoted language makes it abundantly clear that Congress knew the difference between a “purchasing carrier” under the feeder program

and a “rail line” purchased by such a carrier. There is absolutely no reason for the Board here to disregard such a fundamental distinction under its governing law. As explained at pp. 3-4 of CVR’s response to the AMR petition, CVR is not some sort of evanescent shell or “stealth” entity. The Board has known since 1996 that the Norman Branch would be owned by a shipper-controlled corporate entity; the Board was informed in July 2000 that this corporate entity would be CVR; and AMR presumably knew it was deeding the line to CVR when it executed the deeds in September 2000. In addition, GS as a shipper on the Norman Branch line is well aware from direct observation that CVR as a carrier has an existence separate and distinct from the line itself and from its current shareholders. CVR owns real estate, has a corporate headquarters building separate from that of its shareholders, has its own employees and equipment, has a substantial book of business from GS and other shippers on the line, and conducts its own freight invoicing and collection operation. When GS remits freight payments, it makes them out to CVR, not to the Norman Branch or to any CVR shareholder.

Not only is AMR’s position devoid of merit as a matter of law; AMR also is flouting the fundamental equitable principle that it should come before the Board with clean hands. In addition to interfering with a potential business relationship between CVR and Pioneer in a manner that may be tortious, AMR is grossly out of compliance with the Board’s 1999 order that it “deliver all releases from any mortgages” relating to the Norman Branch line. See pp. 8-9 of CVR’s response to AMR’s petition. GS understands that this failure to release mortgages is yet another AMR-induced impediment to conclusion of a stock purchase agreement between Pioneer and CVR.

Conclusion and Request for Relief

Simply put, it is CVR and its shareholders which are attempting to further the purposes of the Feeder Line Development Program, by finding a new shareholder to enhance the future viability of service to GS and other rail shippers on the Norman Branch. While AMR shamelessly invokes the feeder statute as support for its position, it is patent that this former owner (who mismanaged the line in the past) now seeks to subvert the service-preservation objectives of the feeder program by "running off" potential new investors.

AMR had its chance to own and operate the line, but now its time is past. For all the reasons stated in this response and in those of CVR and its shareholders, GS and CertainTeed urge the Board to dismiss AMR's meritless petition summarily and immediately. This action should be taken before AMR can do any further damage to CVR's efforts to ensure the future of the Norman Branch line by bringing in a new controlling shareholder and investor.

Respectfully submitted,
CERTAINTEED CORPORATION
GS ROOFING PRODUCTS COMPANY, INC.

By Their Attorney



Mark J. Andrews
STRASBURGER & PRICE, LLP
1800 K Street, N.W., Suite 301
Washington, D.C. 20006
Telephone: 202.742.8601
Telefax: 202.742.8699
Mark.andrews@strasburger.com

Date Due: May 3, 2006
Date Filed: April 19, 2006

CERTIFICATE OF SERVICE

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

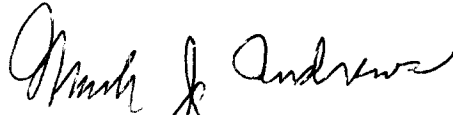
William C. Sippel
Thomas J. Litwiler (tlitwiler@fletcher-sippel.com)
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2832

In addition, a true copy has today been served upon the following by electronic mail only:

Daniel A. LaKemper (lakemper@mtco.com)
General Counsel
Pioneer Railcorp
1318 South Johanson Road
Peoria, IL 61607

Richard H. Streeter (Richard.streeter@btlaw.com)
Barnes & Thornburg
750 Seventeenth Street, N.W., Suite 900
Washington, D.C. 20006

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



Mark J. Andrews