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January 15, 2002

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VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006



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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Opening Statement of Arkansas Midland Railroad Company**, dated January 15, 2002.

One extra copy of the statement and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T. Litwiler".

Thomas J. Litwiler
Attorney for Arkansas Midland
Railroad Company

TJL:tl

Enclosures

cc: Richard H. Streeter Esq.

ENTERED
Office of the Secretary

JAN 17 2002

Part of
Public Record

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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 41230

GS ROOFING PRODUCTS COMPANY, INC.

v.

ARKANSAS MIDLAND RAILROAD COMPANY



OPENING STATEMENT OF
ARKANSAS MIDLAND RAILROAD COMPANY

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**ATTORNEY FOR ARKANSAS MIDLAND
RAILROAD COMPANY**

Dated: January 15, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 41230

GS ROOFING PRODUCTS COMPANY, INC.
v.
ARKANSAS MIDLAND RAILROAD COMPANY

**FIRST SET OF INTERROGATORIES AND
REQUESTS TO PRODUCE DOCUMENTS OF
ARKANSAS MIDLAND RAILROAD COMPANY**

Pursuant to the Board's decision served in this matter on December 17, 2001, Arkansas Midland Railroad Company, defendant herein ("AMR"), submits this opening statement regarding the proper amount of "lost profit" damages to be awarded to complainant GS Roofing Products Company, Inc. ("GS Roofing"). GS Roofing not only bears the burden of proof in this proceeding, but must demonstrate with specificity and substantiation the amount of lost profits it allegedly suffered as a result of its inability to perform under a contractual arrangement with Celotex Corporation ("Celotex"). Mere representations or hypothetical statements regarding the extent of lost profits are insufficient. A specific AMR response to any more detailed lost profit numbers that GS Roofing may now choose to provide obviously must await review of GS Roofing's opening statement, as well as GS Roofing's responses to pending discovery requests from AMR. It is clear, however, that GS Roofing's prior, one-paragraph summary of alleged lost profits is not adequate to support any award of damages, and that GS Roofing now must provide evidence that allows the Board to make a reasoned, verifiable and sustainable calculation of any lost profits GS Roofing may have suffered.

This long-standing proceeding dates to 1993, when AMR embargoed rail service on a portion of its "Norman Branch" extending between Gurdon and Birds Mill, Arkansas. After a series of administrative and judicial proceedings, AMR was found not to have satisfied its common carrier duty to provide service to GS Roofing for the period between December 24, 1993 and April 15, 1994. In a May, 2000, decision, the Board awarded damages to certain shippers (including GS Roofing) for AMR's failure to serve. Caddo Antoine and Little Missouri Railroad Company -- Feeder Line Acquisition -- Arkansas Midland Railroad Company Line between Gurdon and Birds Mill, AR, Finance Docket No. 32479 (STB served May 5, 2000) ("CALM"). The Board, however, found that GS Roofing's claims for lost profit damages were "too speculative and remote to be persuasive" and, consistent with agency precedent, rejected those claims. CALM at 19-20 (citing Webb Coal v. New York Central R. Co., 278 I.C.C. 5, 15 (1950) and Crosby v. St. L.-S.F. Ry. Co., 112 I.C.C. 239, 243 (1926)). The Eighth Circuit Court of Appeals subsequently reversed that holding, making its own, apparently independent determinations that a letter offer from GS Roofing to Celotex constituted a contract, that motor carrier service was not a viable alternative for GS Roofing's shipments, and that GS Roofing has suffered some measure of recoverable lost profits. GS Roofing Products Co. v. STB, 262 F.3d 767, 777-778 (8th Cir. 2001) ("GS Roofing II").

While the Eighth Circuit's decision is binding on the Board and the parties with respect to the existence of a GS Roofing-Celotex contract and the viability of GS Roofing's lost profit claim, it remains the Board's unconstrained task in this proceeding to determine the amount of any such lost profit damages. See Decision served December 17, 2001 at 2 ("we have not previously addressed the computation of damages related to the Celotex contract . . ."). It is

GS Roofing's burden to provide sufficiently credible facts to allow a reasonable computation of such damages, something GS Roofing plainly has not done to date in this proceeding.

Agency precedent on the type of proof and evidence needed to support an asserted lost profit damage amount is sparse, reflecting the agency's general policy against such damages. See, e.g., Louisiana Railcar, Inc. v. Missouri Pacific R. Co., 5 I.C.C.2d 542, 548-549 (1989). Analogous contractual principles, however, are well-developed in the states of Arkansas and Texas, where any normal action seeking lost profit damages arising from the GS Roofing-Celotex contract would likely have been brought. That precedent makes clear that there must be sufficient evidence to remove a claim for lost profit damages "from the realm of speculation and conjecture." Robertson v. Ceola, 255 Ark. 703, 704, 501 S.W.2d 764, 766 (1973) ("Robertson").

As the Texas Supreme Court has explained:

Recovery for lost profits does not require that the loss be susceptible of exact calculation. However, the injured party must do more than show that they suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained.

Holt Atherton Industries, Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992) ("Holt") (citations omitted).

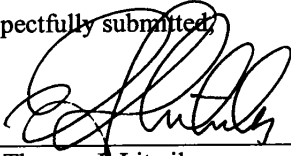
It is particularly clear that lost profit damages must be based on something more than the uncorroborated testimony of interested witnesses. Holt, 835 S.W.2d at 84-86; Snow v. C.I.T. Corp. of the South, 278 Ark 554, 560, 647 S.W.2d 465, 468 (1983) (lower court finding that lost profits not proved sufficiently affirmed where evidence largely based on interested witness testimony and no documentary proof of past profits provided). Yet that is all that GS

Roofing provided in its initial calculation of damages in this matter. While presumably GS Roofing will offer something more now, it remains the complainant's task to provide "objective facts, figures or data" from which the Board can itself rationally calculate lost profits.

In the words of the Texas Supreme Court, it is not enough that an injured party show "that they suffered some lost profits." Holt, 835 S.W.2d at 84. Such a finding of injury, however, was the extent of the Eighth Circuit's legal holding in GS Roofing II. Now, the actual amount of lost profits "must be shown by evidence which makes it reasonably certain what the [complainant] would have made," with the complainant producing a "reasonably complete set of figures." Ceola, 255 Ark. at 704, 501 S.W.2d at 766 (internal citations omitted). To date, GS Roofing has provided nothing more than three uncorroborated line items in a verified statement, with no evidence of any kind regarding GS Roofing's past profits. The essential components of GS Roofing's lost profit claim will hopefully be fleshed out in GS Roofing's opening statement and in its responses to pending discovery requests served by AMR. It is only with such information and sufficient underlying evidence that the Board can calculate and award lost profit damages as directed by the Eighth Circuit.

WHEREFORE, AMR respectfully requests that the Board accept this opening statement for filing and apply the standards discussed herein to the calculation of lost profit damages owing to GS Roofing.

Respectfully submitted,

By: 

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(312) 540-0500

**ATTORNEY FOR ARKANAS MIDLAND
RAILROAD COMPANY**

Dated: January 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2002, a copy of the foregoing
Opening Statement of Arkansas Midland Railroad Company was served by overnight
delivery upon:

Richard H. Streeter, Esq.
Barnes & Thornburg
750 Seventeenth Street, N.W.
Suite 900
Washington, DC 20006

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

Thomas J. Litwiler