

STB DOCKET NO. 41230

GS ROOFING PRODUCTS COMPANY, INC.,
BEAZER WEST, INC., D/B/A GIFFORD-HILL &
COMPANY, BEAN LUMBER COMPANY AND
CURT BEAN LUMBER COMPANY

v.

ARKANSAS MIDLAND RAILROAD AND
PINSLY RAILROAD COMPANY, INC.

Decided March 5, 1997

The Board finds that carrier did not violate its duties under 49 U.S.C.
11101(a) in embargoing trackage on a branch line.

BY THE BOARD:

By complaint filed March 21, 1994,¹ GS Roofing Products Company, Inc. (GS Roofing), Beazer West, Inc. d/b/a/ Gifford-Hill & Company (Gifford-Hill), Bean Lumber Company (Bean), and Curt Bean Lumber Company (Curt Bean) (collectively the Shippers) allege that the Arkansas Midland Railroad (AMR) and AMR's parent corporation, Pinsly Railroad Company, Inc. (Pinsly), violated 49 U.S.C. 11101(a)² by failing to provide transportation or service upon

¹ The *ICC Termination Act of 1995*, Pub. L. 104-88, 109 Stat. 803 (*ICCTA*), abolished the Interstate Commerce Commission (ICC) and transferred certain rail functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the *ICCTA* provides, in general, that proceedings pending before the ICC on January 1, 1996, shall be decided under the prior law, insofar as they involve functions retained by the *ICCTA*. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to new 49 U.S.C. 11101. Thus, this decision applies the law in effect prior to the *ICCTA*, and citations are to the former sections of the statute, unless otherwise indicated.

² Old section 11101(a) provides, in pertinent part:

A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission * * * shall provide the transportation or service on reasonable request.

reasonable request over portions of the approximately 52-mile Norman Branch line³ in Arkansas⁴ that AMR had embargoed.⁵ They seek an award of damages in the amount of \$707,278.41, plus interest.⁶ On July 22, 1994, the Shippers filed their opening statement of facts and argument. On August 29, 1994, defendants AMR and Pinsly replied. On September 29, 1994, the Shippers filed their rebuttal statement. For the reasons discussed below, we find that AMR's failure to provide service between December 1993 and March 1994 was not unlawful; that there was no violation of section 11101(a); and that therefore neither AMR nor Pinsly is liable for damages.

BACKGROUND

AMR is a subsidiary of Pinsly, which owns other short line railroads in Arkansas and elsewhere.⁷ AMR purchased the Norman Branch line from what is now the Union Pacific Railroad Company (UP) in February 1992.⁸ The

³ See, Appendix A for a map of the Norman Branch line.

⁴ While the initial embargo was amended to include an additional line segment, for convenience we will simply refer to the "embargo" or the "embargoed line" in this decision.

⁵ An embargo is a notification to the railroad industry and affected shippers by a carrier that, in the carrier's opinion, a disability or interruption exists that temporarily prevents it from providing service or performing its duty as a common carrier. See, *ICC v. Chicago, Rock Island and Pac. R.R.*, 501 F.2d 908, 911 (8th Cir. 1974). As provided in the procedures of the Association of American Railroads (AAR) (AAR Circular TD-1, effective January 1, 1991), embargoes are issued by a railroad, through notice to the AAR, when the interference in operations or disability occurs. Embargoes, which do not require prior approval from the Board, allow carriers to cease operations immediately. Under Circular TD-1, embargoes may remain in effect for 1 year, unless canceled or amended by the carrier. During an embargo, the carrier's service obligation is temporarily excused, although the obligation is not extinguished until the carrier has received abandonment authority from the agency. *Gibbons v. United States*, 660 F.2d 1127, 1234 (7th Cir. 1981). The carrier may be liable for damages, but only if the embargo is found to be unreasonable.

⁶ The Shippers originally sought damages in the amount of \$760,528.16, plus interest, which represented approximately 25% of AMR's gross revenues for 1993. This figure was reduced in the Shippers' rebuttal statement.

⁷ The Shippers refer to the carrier as "AMR/Pinsly" because they allege that these companies are actually one and the same. However, the Shippers have not supported their position in this case. AMR and Pinsly are plainly separate corporate entities, and there is no basis on which to treat the two corporations as a single entity.

⁸ *Arkansas Midland Railroad Company, Inc.--Acquisition and Operation Exemption--Missouri Pacific Railroad Company*, Finance Docket No. 31999 (ICC served March 6, 1992);

(continued...)

southern end of the Norman Branch connects with UP's main line at Gurdon, AR.

The principal shipper on the Norman Branch is International Paper Co. (IP), which is located on the southernmost portion of the line approximately 3 miles from the connection with UP. The Norman Branch also serves the five shippers located on the northern part of the line at Birds Mill, AR.⁹ The traffic generated by IP has been and continues to be steady. In contrast, the traffic generated by the other shippers, which is somewhat seasonal, declined 22% from 1992 to 1993.¹⁰

Condition of the Line. Prior to the sale to AMR, UP let the Norman Branch fall into substantial disrepair.¹¹ In December 1993, it was estimated that rehabilitation of the 49-mile northern portion would cost \$1.6 million, and that replacement of the most seriously damaged bridge components would cost between \$100,000 and \$120,000.¹² AMR spent \$650,000 on track improvements and repairs resulting from numerous derailments on the Norman

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Pinsly Railroad Company, Inc.—Continuance in Control Exemption—Arkansas Midland Railroad Company, Inc., Finance Docket No. 32001 (ICC served March 6, 1992).

⁹ The five shippers include the four shippers who filed this action and Barksdale Lumber Company.

¹⁰ See, the ICC Investigation Report dated February 10, 1994 (*ICC Invest. Rept.*). The ICC *Invest. Rept.*, which was prepared in response to allegations by the Shippers that AMR had deprived them of essential rail service, was a principal basis for the ICC's decision not to "direct" service, but to authorize a substitute carrier to provide voluntary service over the embargoed portion of the line, with the approval of AMR, in Service Order No. 1516, discussed in more detail, *infra*. A copy of the narrative portion of the ICC *Invest. Rept.* is attached at Appendix B. The exhibits to the ICC *Invest. Rept.*, which are lengthy, are not attached to this decision, but are available for review at the Board's, Office of Compliance and Enforcement, 1925 K Street, N.W., Room 780, Washington, DC 20423-0001.

¹¹ See, e.g., *Request for the Rehabilitation of the Arkansas Midland Railroad, December 1992*, submitted by the Arkansas State Highway and Transportation Department to the Federal Railroad Administration (FRA) at 6, 21-22 (stating that track, crossties, and roadbed were in poor condition and that maintenance had been deferred for several years); Verified Statement (V.S.) of John P. Levine, Vice President and Secretary of Pinsly at 3-5 (Attachment 1 to AMR's Statement of Facts and Argument).

¹² V.S. Levine at 5; November 24, 1993 Preliminary Inspection Report prepared by Osmose Wood Preserving Inc. (Osmose) (Attachment 3 to AMR's Statement of Facts and Argument).

Branch in 1992-1993, but track conditions on the line continued to deteriorate.¹³ Moreover, because of poor tie and ballast conditions and excessively worn rail, train speeds were restricted to 5 miles per hour (m.p.h.), requiring the use of two crews (instead of one, as AMR had anticipated) to meet daily service requirements.¹⁴ The poor condition of the track, as well as the decline in traffic, were largely responsible for AMR's system-wide 1993 pre-tax loss of approximately \$464,000.¹⁵

In 1993, in the face of worsening track conditions, declining carloads and revenues, and increasing losses, AMR sought assistance from the Federal and State governments, UP, and the Shippers.¹⁶ AMR received a commitment from the State of Arkansas to channel \$200,000 in Federal Assistance Grant funds to the rehabilitation of a portion of the line. However, that commitment was well short of the \$750,000 in assistance that AMR needed and had sought.¹⁷ Moreover, it was conditional, as it was directed at only the 20-mile portion in the middle of this marginal line, which it required be upgraded to what is known as FRA class 2 standards.¹⁸ UP agreed to increase AMR's portion of existing freight rates, but only by an amount that did not cover even the direct cost of operating the northern part of the line. AMR also discussed the sale of a portion of the line to one of the Shippers for net liquidation value (NLV), but the parties were not able to come to terms.¹⁹

¹³ Between February and December 1992, there were 17 derailments on the line. See, *ICC Invest. Rept.* at 4-5.

¹⁴ *Id.* at 5, 11; V.S. Levine at 4.

¹⁵ See, AMR's Statement of Facts and Argument at 33.

¹⁶ V.S. Levine at 4-5.

¹⁷ See, *id.* at 4-6; *ICC Invest. Rept.* at 5-6.

¹⁸ The FRA has adopted standards governing track safety. See, 49 CFR part 213. Class 2 standards require that track be maintained at levels that permit operating speeds of up to 25 m.p.h. Class 1 standards require that track be maintained at levels that permit operating speeds of up to 10 m.p.h. Class 1 standards, because they represent the FRA's minimum safety levels, are the standards generally used to compute rehabilitation costs in abandonment cases (although carriers may use higher standards if they can justify them). See, *Southern Pacific Transp. Co.—Abandonment*, 360 I.C.C. 138, 144 (1979). In certain limited circumstances, track owners may seek to be "excepted" from class 1 standards, as a result of which their maximum train speeds would be capped at less than 10 m.p.h. Because of the condition of excepted track, carriers operating over it are limited in the operations that they can conduct.

¹⁹ The offer was for only \$500,000, one-fifth the amount the shipper had offered UP for the same track in 1990. See, letter dated November 19, 1993, to Tim Bean from Gary Hunter

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The Embargo and its Aftermath. On December 3, 1993, a storm caused flooding, washouts, and landslides on the Norman Branch. On December 15, 1993, AMR notified the affected shippers and AAR that track conditions required it to embargo service to four stations²⁰ located at or near the northern end of the line,²¹ thereby interrupting service to GS Roofing, Bean, and Curt Bean.²² On February 22, 1994, AMR embargoed an additional station to the south of the initially embargoed station due to track and bridge conditions, thereby interrupting service to Gifford-Hill.²³ However, AMR was able to continue to serve IP, which, as noted, is located on the southernmost portion of the line nearest the connection with UP, and was not affected by flooding.

Notwithstanding the embargo, AMR continued to try to resolve the problems on the line. AMR had secured commitments for rehabilitation (a commitment of 28,000 used relay ties from UP and a commitment of \$200,000 from Pinsly). Even with those additional resources, however, AMR still remained \$500,000 short of the \$1.6 million it believed was needed to rehabilitate the line.²⁴

On December 29, 1993, GS Roofing, the principal shipper on the embargoed line, filed a complaint with the ICC's Office of Compliance and Consumer Assistance (OCCA), alleging that the embargo had unlawfully deprived it of essential rail service. In response, OCCA assigned a special agent to make an on-site inspection of the Norman Branch.²⁵ The special agent reported that the general condition of the AMR track was poor and that the track

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(Attachment 2 to AMR's Statement of Facts and Argument); letter dated January 13, 1994, to William K. Robbins from Gary Hunter (Attachment 6 to AMR's Statement of Facts and Argument); *ICC Invest. Rept.* at 19-21.

²⁰ Amity, Rosboro, Glenwood, and Birds Mill, AR.

²¹ The reason given to the Shippers by the railroad was that, due to recent washouts and bridge problems, the track conditions made it no longer safe to operate over this portion of the line. See letter of December 15, 1993, attached to *ICC Invest. Rept.*

²² AMR Embargo No. 2-93.

²³ V.S. Levine at 6.

²⁴ *Id.* at 5.

²⁵ See, *Dardanelle & Russellville Railroad Company -- Authorized to Operate -- Lines of Arkansas Midland Railroad Company*, Service Order No. 1516 (ICC served March 28, 1994), at 1 (Service Order No. 1516).

was in need of significant and costly repairs.²⁶ Subsequently, the ICC, deferring to the primary jurisdiction of the FRA over railroad safety, requested that FRA inspect the northern portion of the line and provide a report on its condition. FRA's report, dated March 2, 1994 (FRA Report),²⁷ noted over 85 instances of non-compliance with FRA minimum track safety regulations and concluded that extensive rehabilitation would be necessary to bring the line up to FRA class 1 standards (10 m.p.h.). The FRA Report also concluded that, on certain segments of the line, there was a constant potential for failure and derailment.²⁸

Pinsly sent a proposal to each of the Shippers, notifying them of its willingness to make a capital contribution of \$200,000 if the Shippers agreed to pay a \$10 surcharge per car and assure the shipment of a certain number of cars.²⁹ According to Pinsly, the Shippers refused to contribute, through higher rates or traffic commitments, to the improvement of the track that served their respective facilities.³⁰ Moreover, the Shippers reportedly advised AMR that any rate discussions would have to be with UP, not with AMR, even though AMR was the serving carrier.

On February 18, 1994, AMR filed a system diagram map (SDM) with the ICC, on which it designated the entire Norman Branch as being a candidate for abandonment. Thereafter, AMR amended its SDM to modify the designation by removing the southernmost 3-mile portion of the line on which IP is located. That portion of the line was changed from a category 1 status, which designates a line as being a potential candidate for abandonment, to a category 5 status,

²⁶ *ICC Invest. Rept.* at 9-11 (noting that AMR needed about 28,000 ties for rehabilitation, as well as extensive repairs to bridges, and that AMR would need about \$500,000 and 60-90 days to put the line back in service).

²⁷ A copy of the FRA Report is attached as Appendix C.

²⁸ Relying on 45 U.S.C. 41 (which has been recodified as 49 U.S.C. 20903), the Shippers assert that the FRA Report is not properly part of the record in this case. We disagree. Section 41 applies in civil actions for damages in cases in which the FRA has investigated collisions, derailments, or other accidents resulting in serious injury to a person or to the property of a railroad. See former 45 U.S.C. 40. The FRA Report involved here, which is not being used in a civil action for damages, and which did not involve an accident resulting in serious injury, was prepared at the request of the ICC in response to complaints by the Shippers that AMR should not have embargoed the line. The condition of the track—a matter as to which FRA has considerable expertise and primary responsibility—was directly relevant to the question of the reasonableness of the embargo. Moreover, inasmuch as directed service under 49 U.S.C. 11125 was being sought, the ICC was statutorily obligated to consider the FRA Report and its evaluation of the line's condition.

²⁹ V.S. Levine at 6-7; AMR's Statement of Facts and Argument at 12 & Attachments 11a-c.

³⁰ The Shippers claim that they did agree to pay a surcharge.

meaning that the carrier had no plans to abandon that portion of the line. See, 49 CFR 1152.10(b)(1) and (5).

The Shippers and certain carrier entities with which they were affiliated then filed three different actions at the ICC. First, the Caddo, Antoine, Little Missouri Railroad Company (CALM), a noncarrier subsidiary of the Dardanelle and Russellville Railroad Company (DRRC), filed a feeder line application under 49 U.S.C. 10910 (now 49 U.S.C. 10907) to acquire the entire Norman Branch.³¹ Second, on March 18, 1994, as supplemented on March 22, 1994, DRRC and CALM requested that the ICC issue a directed service order pursuant to 49 U.S.C. 11125³² directing DRRC/CALM to begin immediate operations over the entire Norman Branch. Finally, the Shippers filed this damage action against AMR and Pinsly.

Service Order No. 1516. In Service Order No. 1516, the ICC, by decision served March 28, 1994, denied the request for a directed service order under 49 U.S.C. 11125 because the prerequisites of that statutory provision had not been met.³³ Pursuant to 49 U.S.C. 11123, however, the ICC authorized DRRC/CALM, based on its willingness to do so and AMR's willingness to permit it to do so, to provide voluntary interim service over the northern portion of the Norman Branch, including the portion affected by the embargo.³⁴ The ICC also authorized DRRC/CALM to enter into an agreement with AMR for trackage rights over the southern segment of the line on which AMR continued to serve IP, so that DRRC/CALM could interchange directly with UP.

In authorizing the service, the ICC noted (Service Order No. 1516 at 3-4) that AMR consented to the service order requested by DRRC/CALM and the Shippers, and that, before operations could commence, DRRC/CALM was

³¹ *Caddo Antoine and Little Missouri Railroad Company -- Feeder Line Acquisition -- Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, ICC Finance Docket No. 32479.

³² Pursuant to 49 U.S.C. 11125, the ICC could direct service when a carrier lacked the funds to operate; a court had ordered the cessation of operations; or the railroad had unlawfully discontinued operations. Under 49 U.S.C. 11125(b)(2), the ICC was expressly prohibited from directing service that would violate the Federal Railroad Safety Act of 1976.

³³ See *id.*, and the decision served June 6, 1994, extending the service order at 3. As particularly relevant here, the ICC found that there had not been an unlawful discontinuance of service.

³⁴ Section 11123 authorized the ICC to issue a 30-day service order (which could be extended) to remedy a transportation emergency resulting from a shortage of equipment, congestion of traffic, or other failure in traffic movement.

required to certify to the ICC that it had made repairs to the damaged portions of the line and that, in its opinion, the line was safe to operate. Also, once operations began, DRRC/CALM's agreement with AMR required it to provide limited rehabilitation of the line. In addition, the ICC stated that, according to the terms of 49 U.S.C. 11123, DRRC/CALM would have to compensate AMR for the use of the line, including trackage rights over the approximately 3-mile southernmost portion of the line that AMR continued to operate.³⁵ As noted, the ICC did not order directed service because it concluded that AMR's discontinuance of service had not been shown to be unlawful. See, Service Order No. 1516 at 3.

DRRC/CALM began operations in April 1994, pursuant to the ICC service order.³⁶ DRRC/CALM's service continued until August 30, 1996, when it ceased operations. At the request of the Shippers, and with the consent of all parties, including AMR, we then amended Service Order No. 1516 and substituted the East Texas Central Railroad Company as the authorized operator.³⁷

³⁵ The compensation for the use of the embargoed portion of the line was limited to maintenance expenses and indemnification of AMR from liability. We initially established the monetary compensation to be paid by DRRC/CALM for the trackage rights in *Dardanelle & Russellville Railroad Company -- Trackage Rights Compensation -- Arkansas Midland Railroad Company*, Finance Docket No. 32625 (STB served June 3, 1996 and September 5, 1996). DRRC/CALM filed a petition for review of those compensation decisions in the United States Court of Appeals for the Eighth Circuit. *Caddo Antoine and Little Missouri Railroad Company et al. v. STB et al.* No. 96-3352 (filed September 9, 1996). The court granted our motion to hold the case in abeyance pending our consideration of DRRC/CALM's supplement to its administrative appeal, which had not been considered in our September 5, 1996 decision denying rehearing. By decision served December 23, 1996, in Finance Docket No. 32625, we reopened the compensation proceeding to stay the effect of our June 3, 1996, and September 5, 1996 decisions until the feeder line proceeding (which, as discussed below, has also been reopened) is resolved. The parties then stipulated that the petition for review filed in No. 96-3352 should be dismissed. The court granted the stipulation and dismissed that court case by order served January 22, 1997.

³⁶ MR also continued to explore possible solutions to provide service on the line. See, AMR's Statement of Facts and Argument at 15-19.

³⁷ *East Texas Central Railroad Company -- Authorized to Operate -- Lines of Arkansas Midland Railroad Company*, Supplemental Order No. 7 to Service Order No. 1516 (STB served September 24, 1996).

*The Feeder Line Proceeding.*³⁸ As noted, CALM sought, through the feeder line provisions of the statute, to acquire the entire Norman Branch. The ICC, however, by decision served April 18, 1995, granted the feeder line application only as to the approximately 49-mile portion of the Norman Branch that AMR had sought to abandon. CALM declined to acquire that portion on the ground that those operations would not be profitable, and filed a petition for review of the ICC's decision in the United States Court of Appeals for the Eighth Circuit. On judicial review, the court set aside the ICC's decision permitting CALM to purchase only the northern portion under the feeder line provisions. The court remanded the feeder line proceeding for the Board to consider the entire Norman Branch as a single line.³⁹ By decision served November 15, 1996, we reopened the feeder line proceeding and provided an opportunity for all interested parties to present their views on how the Board should proceed on remand when, as directed by the court, we treat the Norman Branch as a single line. That proceeding, which has no bearing on the reasonableness of the embargo--the question at issue here--is still pending.

DISCUSSION AND CONCLUSIONS

An embargo issued by a carrier justifies a cessation or limitation of service as a temporary measure when the carrier is of the view that it is unable to serve specific shipper locations and thus unable to perform its duty as a common carrier. Embargoes, which may be of varying duration, are quite common in the railroad industry, and, typically, they do not result in government intervention at all. They can be challenged, however, and in the rare case in which they are used improperly--for example, if they are used as a permanent measure to route or control traffic--a rail carrier may be liable for damages and/or an injunction. In addition, under its common carrier obligation, a railroad's primary responsibility is to restore safe and adequate service within a reasonable period of time over any line as to which it has not applied for abandonment authority. The curtailment of service beyond a reasonable time unaccompanied by an application to abandon can be construed to be an illegal abandonment.

³⁸ *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.

³⁹ *Caddo Antoine and Little Missouri R. Co. v. United States*, 95 F.3d 740 (8th Cir. 1996).

The reasonableness of an embargo is determined by a balancing test. *Overbrook Farmers Union - Petition for Declar. Order*, 5 I.C.C.2d 316, 322 (1989) (*Overbrook*). Even a conclusion that the carrier's own negligence was the partial cause of the embargo does not require a finding that it is unlawful. *General Foods Corp. v. Baker*, 451 F. Supp. 873 (D. Md. 1978) (*General Foods*). Rather, reasonableness is determined by considering such factors as the length of the service cessation, the intent of the railroad, the cost of repairs, the amount of traffic on the line, and the financial condition of the carrier. *ICC v. Baltimore and Annapolis Railroad Company*, 398 F. Supp. 454 (D. Md. 1975), *aff'd*, 537 F.2d 77 (4th Cir.), *cert. denied*, 429 U.S. 859 (1976); *Louisiana Railcar, Inc. v. Missouri Pacific R. Co.*, 5 I.C.C.2d 542, 545 (1989) (*Louisiana Railcar*). Often, the cost of repairs, compared both to the amount of traffic on the line and the financial condition of the carrier, has been critical to the conclusion. *Overbrook*, 5 I.C.C.2d at 323. Typically, an embargo is found to be invalid, or to constitute an unlawful abandonment, where the embargo is a long one, and the cost of repairs is not substantial. *Id.*

The embargo in this case was not extraordinary, and was of the type that would not ordinarily have come to our attention. Given the obvious animosity between AMR and the Shippers, however, virtually every difference of opinion seems to produce litigation, and, as a result, we have been asked to rule on this matter. In applying the balancing historically used to determine reasonableness, we will look at two questions: (1) whether AMR's initial determination to impose an embargo was reasonable under the circumstances; and (2) whether AMR made all efforts that it reasonably could be expected to make to facilitate the reinstitution of service. We believe that the answer to both of these questions is yes, and hence that AMR should not be found to be liable for damages for the brief period during which no rail service was available.

A. *The Imposition of the Embargo.* At the outset, we find that AMR acted reasonably in imposing the embargo in the first place. As we have noted, under well established railroad procedures, the carrier decides in the first instance whether an unsafe condition exists that prevents it temporarily from providing service. Where, as here, we are called upon to review such a determination, we must defer to a carrier's opinion, so long as it is reasonable, as to whether a line is safe to operate at a given point in time. The evidence presented by both the Shippers and AMR shows that storm damage did occur; that it was substantial; that it aggravated the existing problems caused by the poor overall condition of the track; that adequate repairs would have been expensive; that AMR could not

afford to make them; that the prospects for improved traffic or revenues over the line were dim; and thus that there was a reasonable basis for AMR's initial decision not to repair the line immediately, at least until it had an opportunity to determine whether to seek authority to abandon it or to make some other disposition of the property.

1. *The Condition of the Track and the Cost of Repairs.* The poor condition of the line at the time AMR bought it is confirmed by the Arkansas State Highway and Transportation Department's submission to the FRA in December 1992. The Shippers really do not contest AMR's assertion that the line was in bad shape when AMR bought it, and that it continued to deteriorate notwithstanding AMR's substantial investments shortly after buying it.⁴⁰ It is clear to us that, after the flooding, the already marginal track was not safe to operate.

Indeed, the FRA Report and the *ICC Invest. Rept.*, both of which were based on site visits by impartial inspectors, identified track defects on the line that raised serious safety concerns. The *ICC Invest. Rept.* notes (at 9-11) that AMR needed about 28,000 ties for rehabilitation, as well as extensive repairs to bridges. FRA's report sets out over 85 instances of non-compliance with minimum FRA track safety regulations and concludes that extensive rehabilitation would be necessary even to bring the line up to its class 1 (10 m.p.h.) standards. Some of the problems specifically noted in the FRA Report (at 3, 5) include bridge problems ("perform repair work of utmost importance on three bridges"); deteriorating rails ("the 75-pound rail * * * is deteriorating and developing internal defects leading to failure, sometimes under trains. It will not carry the 100-ton cars of rock and gravel without constant potential for failure and derailment"); and flood damage ("the current washouts resulted from an unusually high flood").

The Shippers argue that the FRA Report is entitled to little weight because it was keyed to FRA class 1 standards, while the Shippers sought only a restoration of the existing "excepted" service. But, as noted, class 1 standards are the FRA's *minimum* standards; they are the lowest standards to which the

⁴⁰ The Shippers do not challenge the fact that there were 17 derailments during an 11-month period in 1992. Moreover, they do not challenge the substantial expenditures undertaken by AMR during 1992 and 1993, but instead, contend that the expenditures were for derailment repairs instead of maintenance or rehabilitation. Regardless of the Shippers' semantical arguments, the record supports AMR's contentions regarding the poor condition of the line and the carrier's willingness to attempt to address it.

ICC and now the Board have looked in assessing rehabilitation costs in abandonment cases; and, notwithstanding the fact that a carrier may, in unusual circumstances, seek (at its own election) to operate under excepted standards, class 1 standards represent the minimum level of safety compliance at which a carrier can be required to operate. They are therefore the appropriate level to be used in the typical embargo proceeding.⁴¹ Moreover, the statements in the FRA Report that "the line was in poor condition" and that "operations over the line in its current condition would likely result in derailments" refer to excepted track. The fact that numerous derailments occurred on the line both before and during DRRC/CALM's common carrier operations under Service Order 1516,⁴² and that the \$200,000 Federal assistance offer was contingent on an upgrading of a substantial portion of the line to class 2 standards, supports AMR's contention that the restoration of excepted service on this line would have been inadequate, at least in the long run, with a substantial risk of derailment and a loss of operating efficiencies.

We also find that AMR acted reasonably in not repairing the line immediately, in light of the substantial rehabilitation costs necessary for safe and economical operations. At the time of the embargo, AMR's personnel estimated that rehabilitation of the 49-mile portion of the line on which the Shippers are located would cost \$1.6 million, while a private contractor estimated that repair or replacement of the most seriously deteriorated bridge components would cost between \$100,000 and \$120,000.⁴³ The *ICC Invest. Rept.* also identified significant rehabilitation costs (\$500,000 to put the line back into service and as much as \$3 million to bring the track to FRA class 2 standards), and \$125,000

⁴¹ We recognize that, in *Louisiana Railcar*, 5 I.C.C.2d at 546, the ICC found that the carrier could have returned the line to service by rehabilitating it to FRA excepted track standards. In contrast to this case, however, that line "was satisfactorily operated at excepted levels prior to the embargo." *Id.* Here, of course, the operations—which involved very heavy shipments moving over very dangerous track—were marginal before the embargo, as reflected by the numerous derailments that occurred (and have continued to occur). Moreover, we note that, in *Louisiana Railcar*, the ICC found that the \$18,000 cost of restoration was "an amount that [the railroad], a large Class I carrier, could afford." *Id.* Here, as discussed below, the cost of rehabilitation is significantly higher, and AMR is a small short line railroad with few of the resources available to a Class I carrier.

⁴² V.S. Levine at 7.

⁴³ V.S. Levine at 5; November 24, 1993 Preliminary Inspection Report prepared by Osmose. Although they characterize the Osmose report differently, the Shippers do not dispute the fact that substantial rehabilitation expenses will be required for necessary bridge repairs. See, V.S. Ron Finkbeiner at 3 (Complainants' Opening Statement, Vol. II, Attachment D).

to correct the drainage problems along the line from Pike Junction, AR to Birds Mill. The FRA Report does not estimate the cost of the repairs it suggests, but it is quite apparent that the cost will be substantial. Finally, we cannot ignore AMR's concern about the fact that, unless the line were repaired to a level that would permit speeds sufficient to accommodate a single crew, substantially higher rates would be needed to make continued operations economically feasible.

The Shippers argue that the embargo was "contrived," because the flood damage to the line was not severe, and AMR's descriptions of the bridge and track deterioration were overstated. To support this contention, DRRC/CALM's president, William K. Robbins, Jr., stated that two small washouts on the line required "less than four hours" to repair; that DRRC/CALM's total repair time was 3 weeks; and that its total repair cost was less than \$10,000.⁴⁴ In Mr. Robbins' opinion, the storm damage could have been repaired before the first embargo was imposed.⁴⁵ The Shippers also maintain that, in fact, the track conditions were better on the northern segment of the line that was initially embargoed than on the remainder of the Norman Branch.⁴⁶ They also allege that AMR removed numerous cars that had previously been delivered to the Shippers from the line in mid-December.⁴⁷ Thus, they conclude that, despite the storm damage, transportation was possible over the washed-out segments of the line.⁴⁸

The Shippers have not made their case. The argument that \$10,000 and 3 weeks of work is all that was required here is refuted by the fact that DRRC/CALM itself had proposed to spend \$1.15 million in its first year of

⁴⁴ See, V.S. William K. Robbins at 6 (Complainants' Opening Statement, Vol. II, Attachment F).

⁴⁵ *Id.*

⁴⁶ V.S. Finkbeiner at 3.

⁴⁷ Specifically, GS Roofing states that, on the very day that it was advised of the embargo, and advised that service north of milepost 477 would be halted, AMR moved locomotives over the line to remove approximately 25 or 30 cars from GS Roofing's facility. See, V.S. John W. Smith at 6 (Complainants' Opening Statement, Vol. II, Attachment A). Not noted, however, was that the cars removed from the line were empty cars, not loaded cars. See, *ICC Invest. Rept.* Obviously, empty cars can be transported over questionable track more easily than cars loaded with the extremely heavy commodities such as those shipped by the Shippers. The fact that AMR removed its empty cars is of no relevance to whether continued operations of heavily loaded cars were feasible.

⁴⁸ See, V.S. Bradley Batson at 2 (Complainants' Opening Statement, Vol II, Attachment H).

operation and \$800,000 in its second year under its plan submitted in the feeder line application proceeding.⁴⁹ Moreover, the derailments that AMR experienced and that DRRC/CALM continued to experience during its operation of the line support AMR's argument that the cost of properly rehabilitating the line has been vastly understated by the Shippers. AMR did not act unreasonably in eschewing the temporary fixes that DRRC/CALM applied to address the washouts, and the continual subsequent problems on the line. Particularly given the initiative assigned to the operating railroad in determining whether or not to embargo a line, the fact that the Shipper-owned DRRC/CALM elected to perform only minimal work before it began operating, to address derailments as they occurred (all too frequently), and to apply "band-aids" as it went along is not determinative of the reasonableness of AMR's conclusion that more would be needed--even in the short run--by a going concern such as AMR.⁵⁰

2. *AMR's Intent.* The Shippers contend that the real reason that AMR imposed the embargo was unilaterally to terminate service on the unprofitable portion of the Norman Branch, while retaining the profitable southernmost portion of the line to serve IP.⁵¹ But that argument is belied by credible evidence, which we have already chronicled in considerable detail, that AMR tried to resolve the problems on the entire line, both in terms of its revenue needs and maintenance, and to provide reliable and safe transportation over it.⁵² As the record shows, AMR made numerous efforts to secure adequate funding, and revenue and volume commitments from the Shippers, so that it could

⁴⁹ See, Shippers Comments in the feeder line proceeding, Vol. IA, V.S. William K. Robbins (June 13, 1994).

⁵⁰ The fact that the ICC authorized DRRC/CALM to operate over the line in Service Order No. 1516 does not discredit the evidence showing that the overall condition of the line was poor and that significant rehabilitation was required. In issuing the voluntary service order, the ICC noted that, before operations could begin, DRRC/CALM was required to notify the ICC that it had made repairs to the damaged portions of the line and to certify that the line was, in its opinion, safe to operate. DRRC/CALM's determination to make only minimal repairs does not indicate that the line is in fact safe or that AMR should have made or supported the types of repairs apparently made by DRRC/CALM.

⁵¹ See, V.S. Roy Martin at 5-6 (Complainants' Opening Statement, Vol. II, Attachment I).

⁵² Thus, the cases suggesting that a carrier can be held liable even in the case of an act of God where the carrier has been negligent or directly responsible for track conditions are inapposite here. *E.g., Johnson v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 400 F.2d 968, 972 (9th Cir. 1968); *ICC v. St. Johnsbury & Lamoille County Railroad*, 403 F. Supp. 903 (D. Vt. 1973). See also, *Overbrook*, 5 I.C.C.2d at 322, citing *General Foods* (conclusion that carrier negligence was the partial cause of the embargo does not require a finding that the embargo is unlawful).

upgrade the line to what AMR believed would be a reasonably serviceable level. AMR, however, was unable to obtain enough assistance from outside sources, or assurances from shippers of increased revenues and traffic volume needed to make the operations compensatory. AMR eventually concluded that there was little chance of operating the embargoed portion of the line successfully, and hence little basis for expending the substantial sums necessary to repair it properly. Its determination, which was consistent with the determination that any prudent business would have made, not to commit substantial funds without first exploring other options, including abandonment, was reasonable.

The Shippers, on the other hand, suggest a contrived embargo designed to force an abandonment. But in our view, this case is substantially similar to many other cases in which a carrier first (lawfully) embargoes a line, and then (lawfully) obtains authority to abandon it.⁵³ It is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will lose money on the operation. *Purcell v. United States*, 315 U.S. 381, 385 (1942) ("When materials and labor are devoted to the [re]building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill."). *Cf. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) (carrier authorized to abandon a line damaged by

⁵³ See, e.g., *Consolidated Rail Corporation -- Abandonment Exemption -- In Northampton County, PA*, STB Docket No. AB-167 (Sub-No. 1163X) (STB served December 20, 1996) (granting petition for abandonment exemption where railroad estimated it would cost approximately \$498,930 to restore the line to service); *Dakota, Minnesota & Eastern Railroad Corporation -- Abandonment Exemption -- In Wabasha and Olmsted Counties, MN*, STB Docket No. AB-337 (Sub-No. 5X) (STB served December 16, 1996) (authorizing abandonment of line embargoed since 1995 where railroad estimated rehabilitation costs of \$1,038,347 to restore the line to service); *Wheeling & Lake Erie Railway Company -- Abandonment Exemption -- In Huron County, OH*, STB Docket No. AB-227 (Sub-No. 8X) (STB served December 5, 1996) (same result in case where railroad estimated it would cost approximately \$400,000 to repair flood damage and bring the line to FRA class 1 standards); *Indiana Hi-Rail Corporation -- Abandonment Exemption -- Between Newton and Browns IL*, STB Docket No. AB-336 (Sub-No. 4X) (STB served May 3, 1996) (continued operation of line not justified where line had been embargoed for more than a year and bankrupt carrier lacked resources to make needed repairs estimated to cost \$500,000 - \$1.5 million); *Consolidated Rail Corporation -- Abandonment Exemption -- In Bergen and Passaic Counties, NJ*, ICC Docket No. AB-167 (Sub-No. 1151X) (STB served May 23, 1996) (authorizing abandonment of line embargoed since March 1995 due to unsafe track conditions where railroad indicated it would cost \$180,948 to rehabilitate a portion of the track and that the pre-embargo level of traffic did not justify rehabilitation expense).

mud slides rather than repair it; duty to serve is not absolute, but rather, the law exacts only what is reasonable of the railroad under the existing circumstances). It has long been recognized that this view has a Constitutional dimension. *See, Brooks-Scanlon Co. v. R.R. Commission of Louisiana*, 251 U.S. 396, 397-99 (1921) (to compel a carrier "to carry * * * at a loss" could "deprive [it] of its property without due process"); *accord, Bullock v. R.R. Commission of Florida*, 254 U.S. 513 (1921); *R.R. Commission of Texas v. Eastern Texas R.R.*, 264 U.S. 79 (1924).

We would not presume to prejudge the result of any abandonment application that may someday be filed as to all or part of this line. Insofar as the reasonableness of AMR's actions are concerned, however, it is clear that rehabilitation costs would have been substantial, and that the Shippers were unwilling or unable to provide enough support to make AMR's operations worthwhile. Thus, viewed through AMR's eyes, it was perfectly rational not to sink any new money into the operation before reviewing the situation and the options available. The fact that, shortly after imposing the embargo, the carrier indicated its intent to abandon all or part of the line supports the reasonableness of its decision not to rehabilitate it immediately.

3. *The Shippers and the Amount of Traffic on the Line.* Another of the criteria to be considered in assessing the reasonableness of the embargo is the amount and type of traffic on the line. The traffic over the embargoed portion of the line is minimal, and certainly inadequate to warrant substantial repairs without a thorough review of the options available. Only five shippers are located on the 49-mile northern portion of the approximately 52-mile line, the largest of which is at the far end of the line. The rail traffic of those shippers has declined significantly since AMR acquired the line, and in fact, only one of the Shippers is totally dependent on rail service for as much as 75% of its shipments.⁵⁴ Indeed, the record shows that certain Shippers (including G.S. Roofing, the largest affected shipper) used truck transportation as a matter of course during the period of the embargo, because it was their normal slow period, not because rail transportation was unavailable.⁵⁵ Given the Shippers' apparent inability to make adequate traffic commitments, AMR reasonably

⁵⁴ For example, only 20% of Barksdale Lumber's total volume (70 carloads during 1993) was shipped by rail. *See, ICC Invest. Rept.* at 16.

⁵⁵ Specifically, G.S. Roofing stated that the months from December to February are slow and that it can get by with loading trucks for those months. It does not need rail service until March, when its business increases. *See, Invest. Rept.* at 14.

decided not to repair the line before exploring its options, inasmuch as the prospect of increased traffic levels that would justify substantial rehabilitation expenditures was dim.

4. *AMR's Financial Condition.* Another of the criteria to be considered is the financial condition of the carrier imposing the embargo. AMR is a struggling Class III carrier with limited financial resources.⁵⁶ It sought increased rates and traffic commitments from the Shippers, but they were unable or unwilling to provide enough assistance.⁵⁷ Without substantial additional revenues, it would have been impossible for the carrier to have supported the cost of the necessary repairs, which would have been significant even assuming *arguendo* that the line could have been safely operated if something less than a rehabilitation to FRA's class 1 or 2 standards had been achieved.

B. *The Length of the Embargo.* Having concluded that the embargo was not unlawful when it was first imposed, we must now consider whether the embargo was in place for too long, and whether the carrier did too little to try to resolve the situation. Here, the embargo was initiated in mid-December; an intent to abandon was announced by mid-February; and a new operator was announced by the end of March. That means that the embargo was in place for only 2 months before the carrier publicly announced its intentions to no longer provide service itself,⁵⁸ and for only slightly more than 3 months before a new operator had been found. The *ICC Invest. Rept.* noted that AMR would need about 60-90 days to put the line back into service. Thus, even if work had begun right away, the length of the embargo would not likely have been

⁵⁶ AMR states that it suffered a 25% decline in revenues during its first 2 years of operation; the loss in 1993 amounted to \$464,000 based on revenues of just over \$3 million.

⁵⁷ The Shippers criticize AMR's efforts to secure their assistance through rate and traffic commitments as an alternative to a sale of the embargoed segment to a qualified purchaser for NLV or a request to the ICC for authority to abandon that portion of the line. It is well settled, however, that a surcharge (or request that a shipper guarantee a certain level of traffic) is not per se unlawful, even if its effect will be to eliminate the movement of traffic from the line. *City of Cherokee v. ICC*, 671 F.2d 1080, 1084 (8th Cir. 1982); *Mississippi Public Service Commission v. ICC*, 662 F.2d 314, 317 (5th Cir. 1981).

⁵⁸ The Shippers are correct that AMR could have indicated an intention to seek abandonment authority earlier. But that does not mean that the embargo became unlawful because the railroad decided to wait until February 1994 to list the embargoed portion of the line as a candidate for abandonment on its SDM. As AMR states, it properly used the time between the December 3rd flooding and February 1994 to assess the damage to the line, determine what it would take to rehabilitate the line so as to not compromise safety, and explore other options, including a sale of the embargoed portion to one of the Shippers for NLV.

substantially shorter than the embargo that the Shippers now claim was unreasonable.

Moreover, beginning in January 1994, just about a month after the embargo began, there were substantive discussions between AMR, DRRC/CALM, and affected shippers aimed at reaching an agreement that would allow DRRC/CALM to substitute for AMR as the operator over the embargoed portion. The presumption of these discussions was that there would not be a violation of section 11101, but instead the establishment of an agreement by which DRRC/CALM would succeed AMR. As noted, Service Order No. 1516 accomplished that substitution of operations, conditioned upon DRRC/CALM's representation to the ICC that the line had been made, in its opinion, safe to operate.

Thus, all of the circumstances demonstrate that AMR's intent here plainly was not to leave the line in an embargoed status indefinitely. As noted, the record shows that AMR sought a lessee/purchaser to continue rail service on the embargoed line. Furthermore, AMR was open to arrangements with DRRC/CALM to operate under Service Order No. 1516, which took effect on March 29, 1994, approximately 3 months after the initial embargo and only 11 days after DRRC/CALM and the Shippers had requested ICC authority to restore service over the line.⁵⁹ Accordingly, the service interruption lasted only 1 month with respect to Gifford-Hill and approximately 3 months for the other Shippers. Typically, embargoes that have been found to be unlawful have been in force much longer.⁶⁰

SUMMARY

In sum, consistent with decisions such as *Overbrook* and *Louisiana Railcar*, we have balanced the length of the out-of-service period, the apparent intent of the railroad, the cost of required repairs, the amount of traffic and the Shippers'

⁵⁹ AMR also agreed to subsequent extensions of the service order and to the substitution of another carrier after DRRC/CALM ceased its operations.

⁶⁰ Compare *Ethan Allen, Inc. v. Maine Cent. R. Co.*, 431 F. Supp. 740, (D. Vt. 1977) (railroad liable for damages in case where a line was embargoed, several months elapsed before repairs were begun or the embargo was lifted, and the ICC commenced a civil action seeking to enjoin the railroad from an alleged illegal abandonment); *Overbrook* (embargo unlawful where embargo continued for almost 3 years, despite the shipper's protestations and offers of financial assistance); *Louisiana Railcar* (violation of section 11101 based on unlawful embargo lasting 19 months).

needs, and the financial ability of the carrier to make repairs in determining whether the embargo and its continuation were justified. The balancing test as applied to the circumstances of this case persuades us that here, the cessation of service was warranted initially and at no point became unreasonable. Accordingly, we find no violation of section 11101(a) in this case, and hence no basis for damages.⁶¹

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

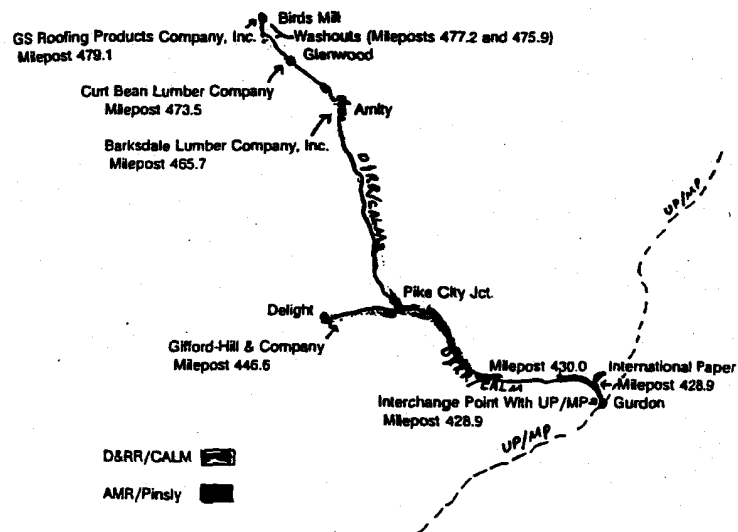
1. The complaint and the request for damages are denied.
2. This proceeding is discontinued.
3. This decision is effective March 11, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

⁶¹ We thus do not need to calculate an appropriate level of damages. We note that the damages requested by the Shippers—including attorneys fees, lost profits, and the cost of constructing a transloading facility—appear excessive in light of the Shippers' regular use of alternative transportation as a matter of course.

APPENDIX A

Map of the Norman Branch
Gurdon, Arkansas to Birds Mill, Arkansas
Milepost 426.83 to Milepost 479.2





U.S. Department
of Transportation
Federal Railroad
Administration

Memorandum

Date: Little Rock, AR
March 2, 1994

Reply to Attn. of:

Subject: Assessment of Arkansas Midland Railroad (AKMD)

From: Roy N. Cline
Railroad Safety Inspector (Track)

To: Regional Director, RRS-45

On February 22, 23, 24 and 28, 1994, I inspected the trackage of the Norman Branch of the Arkansas Midland Railroad. This line extends from its junction with the Union Pacific Railroad at Gurdon, AR, Milepost 426.8, northward to Milepost 479.2, north of Glenwood, AR. It includes the Pike City Industrial Lead, extending from Pike City Junction at Milepost 446.6, westward (or northward) to Milepost 449.5. I was accompanied on these inspections by Jerry L. Bryant, Roadmaster.

The purpose of my inspection was to determine what would be required to bring the track into compliance with Federal Railroad Administration Class 1 Track Standards, and, additionally, what would be required to maintain the track to these standards.

In compiling the data to provide this required information, I used a combination of extrapolation of a 10-percent sampling (a walking inspection of 1/10th mile at each milepost) and actual existing conditions, to give as accurate information as possible. My Track Inspection Reports 061, 062, 063, 064, and 065 (copies attached), reported all broken rails (break out in rail head), and all surface deviations in excess of FRA minimum requirements. In addition, the reports identify joints with less than one bolt per rail, excessive tie defects, critical drainage problems, and switch defects. All items reported on the Track Inspection Reports are items which were excessive or items which would not be captured in the 10-percent sampling.

In assessing the requirements for this trackage, it is necessary to

MAF - 7 1994

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consider the branch as three distinct line segments. A color coded map is attached, identifying these segments.

Segment A - Main Track from Gurdon to Milepost 448

Segment B - Main Track from Milepost 448 to end of track at Milepost 479.2

Segment C - Pike City Industrial Lead, Milepost 446.6 to end of track at Milepost 449.5

Segment A is currently in operation as FRA designated "Excepted Track." It is laid with 85-pound conventional rail to Milepost 446.6, then 90-pound conventional rail to Milepost 448. It includes 21 bridges, totalling 919 feet, mostly of open deck, timber pile construction. There are 34 curves on this line segment, with maximum curvature of 7 degrees, 25 minutes.

The following work would be required to bring the track to FRA Class 1 standards:

- Insert 14 crossties
- Replace 12 broken rails
- Replace 7 track bolts, nuts & nutlocks
- Replace 70 center-cracked or broken joint bars
- Tighten 450 loose joint bars
- Surface (level and line) 350 feet of track
- Apply 7 cars of ballast
- Clean out 1400 feet of slides and blocked drainage ditches
- Clean out 2 blocked culverts
- Remove vegetation adjacent to one timber bridge
- Cut 200 feet of vegetation brushing sides of rolling stock
- Straighten slewed ties at two locations which are causing tight gage
- Replace 1 heel filler block bolt
- Repair spring assembly on a spring wing rail frog

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The following work would be required within one to three years to maintain FRA Class 1 status:

- Insert 2270 crossties
- Replace 30 curve worn rails
- Replace 880 track bolts, nuts & nutlocks
- Surface (level and line) 4,250 feet of marginal and chronic "soft spots"
- Spot (raise and tamp) 70 low joints
- Apply 10 cars of ballast
- Replace 31 bridge ties

Segment B is currently out of service and under an embargo, which was placed on the track on December 15, 1993. The track is laid with 90-pound conventional rail. It includes 18 bridges, totalling 2053 feet, with heights to 49 feet. Most of the bridges are open deck, timber pile structures. There are 54 curves on this line segment with maximum curvature of 6 degrees. Funds were made available through the State of Arkansas, from the Federal Assistance Program to rehabilitate the trackage from Milepost 447 to Milepost 464 (a portion of the funds were to be used to rehabilitate Segment C, the Pike City Industrial Lead.) To date, none of the funds have been expended. This segment includes two areas of track, near the north end, which were washed out by an overflow of the Caddo River. These washout areas have been cribbed up with ties and timbers, but have not been filled in with ballast. Items 8 and 9 of my attached Track Inspection Report 065 describe these conditions and they are depicted in attached photographs.

The following work would be required to bring the track on this segment to FRA Class 1 standards:

- Insert 310 crossties
- Replace 2 broken rails
- Replace 3 track bolts, nuts & nutlocks
- Tighten 140 loose joint bars
- Surface (level and line) 900 feet of track (this includes the 2 washout areas)
- Apply 9 cars of ballast
- Replace 16 bridge ties
- Clean out 1 blocked culvert
- Remove driftwood against a timber pile bridge
- Replace 66 feet of switch ties
- Clean out 1000 feet of slides and drainage ditches
- Perform repair work "of utmost importance" on three bridges 458.4, 462.3 and 472.0, as recommended in the attached Osmose Bridge Inspection Report

2 S.T.B.

Page 4

The following work would be required within the next one to three years to maintain the track to FRA Class 1 status:

- Insert 15,190 crossties
- Replace 440 track bolts, nuts & nutlocks
- Surface (level and line) 650 feet of marginal and chronic "soft spots"
- Spot (raise and tamp) 15 low joints
- Apply 13 cars of ballast
- Replace 55 bridge ties
- Remove beaver dam at bridge
- Clean out 2700 feet of slides and blocked drainage
- Replace 6 concrete blocks in retaining wall
- Perform bridge work as recommended in attached Osmose Bridge Inspection Report (those items not designated "of utmost importance")

It will also be necessary, within the first year, to apply vegetation control and make minor repairs to some road crossings.

Segment C is currently out of service and under an embargo which was placed on the track February 22, 1994. The track is laid with 75-pound conventional rail. There is about 500 feet of 90-pound rail on a curve at the south (or east) end, about 500 feet of 115-pound rail on another curve, and a runaround track, adjacent to the main lead track, is laid with 112-pound rail. This segment was included in a rehabilitation program with funds available through the State of Arkansas from the Federal Assistance Program. None of the funds have been expended, as of this time. There are three bridges on this line, totalling 131 feet, maximum height, 49 feet. There are seven curves, maximum curvature 3 degrees, 6 minutes.

The following work would be required to bring this track to FRA Class 1 standards:

- Insert 5 crossties
- Replace 11 broken rails
- Replace 7 track bolts, nuts & nutlocks
- Replace 6 center cracked or broken joint bars
- Tighten 10 loose joints
- Surface (level and line) 400 feet of track
- Cut 1000 feet of vegetation brushing sides of rolling stock
- Clean out 200 feet of blocked drainage ditches
- Apply 6 cars of ballast
- Perform repair work "of utmost importance" on Bridge 446.7, as recommended in the attached Osmose Bridge Inspection Report

2 S.T.B.

Page 5

The following work would be required within the next one to three years to maintain the track to FRA Class 1 status:

Insert 580 crossties

*Replace 6 rails with internal vertical split head defects

Replace 100 track bolts, nuts & nutlocks

Surface (level & line) 500 feet of marginal and chronic

"soft spots"

Spot (raise and tamp) 30 low joints

Replace 15 bridge ties

Perform bridge work as recommended in the attached Osmose

Bridge Inspection Report not designated "of utmost

importance"

*The 75-pound rail on this segment of track is deteriorating and developing internal defects leading to failure, sometimes under trains. It will not continue to carry the 100-ton cars of rock and gravel without constant potential for failure and derailment. All this rail should eventually be removed and replaced with at least 90-pound, and preferably, 112-pound rail. About one mile of this track is filled with gravel and rock. This not only makes it impossible to determine the condition of the rails and ties, but it increases greatly the time required to effect repairs on the track.

The last overall bridge inspection on this branch was performed by Osmose Corporation in 1981. I would highly recommend a complete inspection of all bridges within the next three years.

Proper maintenance of the trackage on this railroad to FRA Class 1 standards will require the constant presence of a crew of maintenance-of-way personnel on site. There are numerous cuts where rock and dirt slides obstruct proper drainage. When the water stands in the track, it saturates and softens the roadbed, resulting in loss of crosslevel, softening of ties, wide gage and low joints. Also, much of the trackage is adjacent to the Caddo River or other streams. Although the current washouts resulted from an unusually high flood, there is need for maintenance of shoulders, retaining walls, and drainage facilities, especially during the spring and fall. Also, it is very common for brush and trees to fall on the track during heavy rains and windstorms.

Attachments: Track Inspection Reports 061, 062, 063, 064, and 065
Preliminary Inspection Report of Bridges by Osmose
Wood Preserving, Inc., of November 24, 1993
Photographs
Color Coded Map

SURFACE TRANSPORTATION BOARD REPORTS

[illegible]

FORM 616-1 (Rev. 1-64) PREVIOUS EDITIONS ARE OBSOLETE

2 S.T.B.

2 S.T.B.

2 S.T.B.

[illegible]

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2 S.T.B.

TRACK IMPROVEMENT SHEET

PAGE 1
OAR ACTING NO. 1-11-1908

CONTRACT NO. 16536
MIDLAND
SYST. M. Norman

RECORDS
1064 5
94 03 124
YES 2 NO 2

DATE
10/19/19

CITY
Clark

STATE
Arkansas

LOCATION TO
95

FROM
1019

RAILROAD OFFICIAL
J. B. Bryant

RAILROAD FOLLOW-UP
1

TYPE LINES	MAN LINE	S. SING	Y. W.D.	INDUSTRIAL	T. TURNOUT	X. CROSSOVER	FOR ADDITIONAL SPACE USE FORM FRA 1-11-1908, CONTINUATION SHEET
1452.3	5	11213	107102	10	X		Def't ties
2452.3	5	11213	107102	10	X		Def't ties
3452.4	5	11213	107103	10	X		8 def't ties incl ft
4453.2	5	11213	107106	10	X		less 4 then 1 bolt pr
5454.4	5	11213	031205	10	X		11 w.r.
6462.3	5	11213	031201	10	X		upstream side of culvert blocked with debris
7464.1	5	11213	121206	10	X		Driftwood against timber piling bridge 462.3 keep them 1 bolt pr or F. 12

FORM FRA 1-11-1908 (Rev. 1/41) PREVIOUS EDITIONS ARE OBSOLETE

WASHINGTON OFFICE

TRACK INSPECTION REPORT

PAGE 1 OF 2

INSPECTOR: J. L. Bryant

DATE: 11/12/03

FILE NUMBER: 0097

LOCATION: 05 STATE: Arkansas CITY: 0110

RAILROAD: Norman

TRACK: 13

TURNOUTS: 11

RECORD: 065 5

REMARKS: 16586

AKMD

MP 479.2

MP 466

SYSTEM

11

13

1478.5 S T 213 11309 10 X

2478.3 S M 213 10903 10 X

3478.3 S M 213 10903 10 X

4478.3 S M 213 03302 10 X

5477.5 S M 213 10902 10 X

6477.4 S M 213 10902 10 X

7477.4 S M 213 10903 10 X

8477.2 S M 213 10301 10 X

9477.8 S M 213 10301 10 X

1473.9

DESCRIPTION: 3 1/2" BHB Rail at toe

1109 South Bird's Mill

122 Adj def ties 6

113 No of Bridge 478.3

10 Adj def ties 5

113 No of Bridge 478.3

Preinzege facility

cracked by Beaver Dam

Bridge 478.3

Def of ties

10 Adj def ties 10

11 just so of

Bird House

Insufficient ballast

100 feet washout

Insufficient ballast

600 feet washout

RAILROAD FOLLOW-UP

ACTION

DATE

FOR ADDITIONAL SPACE USE

FORM FRA F 8100 3A CONTINUATION SHEET

WASHINGTON OFFICE

2 S.T.B.



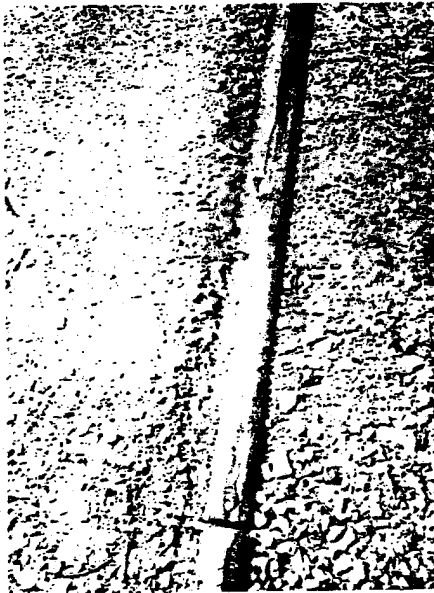
Bridge 446.7 on Pike City Industrial
Lead over Antoine River (looking west)



Bridge 446.7 on Pike City Industrial
Lead over Antoine River (looking east)



Item 15, Inspection
Report 063: 3 1/4"
deviation from zero
crosslevel Milepost
448.3 on Pike City
Industrial Lead



Item 30, Inspection
Report 063:
Vertical Split head
57 inches broken
through head of rail
Milepost 449.4 Pike
City Industrial Lead

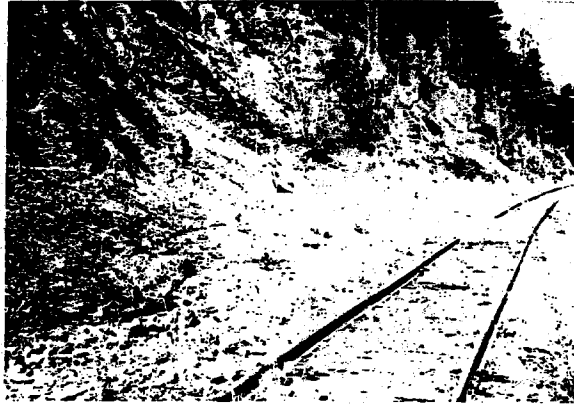


Drainage Problem
Milepost 450.5



Large boulder in drainage ditch
Milepost 452.6

2 S.T.B.



Slide blocking drainage ditch
Milepost 454.2



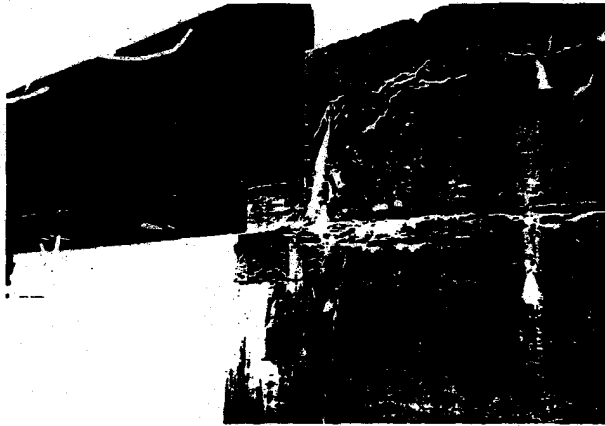
Rocks and slide in
drainage ditch
Milepost 455.6



Rock slide in drainage ditch
Milepost 457.1



Bridge 458.4: View of southwest corner
showing section of concrete wall
broken off beneath bearing block



Bridge 458.4: View of southwest corner showing section of concrete wall broken off beneath bearing block



Bridge 458.4: View of southeast corner showing cracked, deteriorated concrete beneath bearing block



Bridge 458.4: View of pier #3
and southwest corner showing concrete
broken off beneath bearing block



Bridge 458.4: Showing irregular
surface on deck plate girder span



Item 6, Track Inspection
Report 064, showing driftwood
against piling Bridge 462.3



Fouled ballast at Bird's Mill
Milepost 478.6

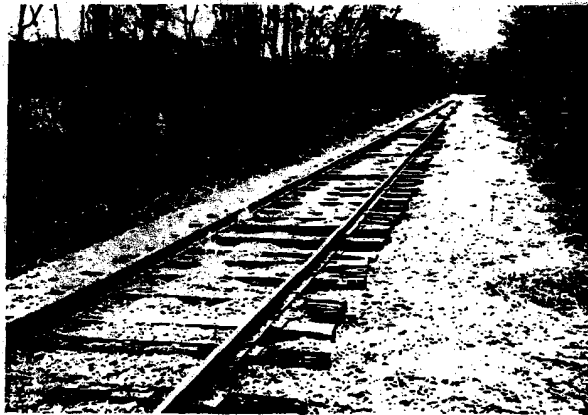


Item 4, Track Inspection
Report 065: Beaver dam obstructing
flow of water at Bridge 478.3

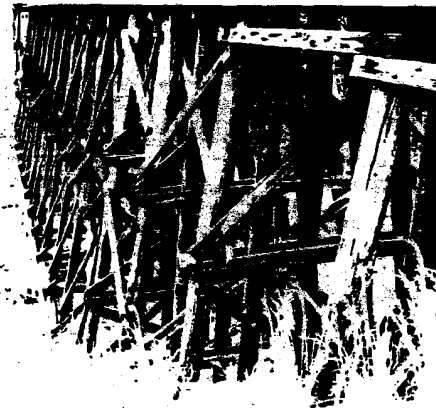


Item 8, Track Inspection
Report 065: Insufficient ballast
(washout) at Milepost 477.2

SURFACE TRANSPORTATION BOARD REPORTS



Item 9, Track Inspection
Report 065: Insufficient ballast
(washout) at Milepost 475.9



Item 14, Track Inspection
Report 065: Driftwood against
timber piling Bridge 472.0

INTERSTATE COMMERCE COMMISSION REPORT OF INVESTIGATION		PAGE 1 OF 23
SUBJECT OF INVESTIGATION ARKANSAS MIDLAND RAILROAD P. O. Box 696 Malvern, AR 72104-0696	INVESTIGATION NO. C-160-94	DATE OF REPORT 2/10/94
	INVESTIGATOR'S NAME(S) Loyd O. Addy	OFFICE AND PHONE NO. Ft. Worth, TX 817-885-7051
DOCKET NO. RC-???	ASSIGNED ATTORNEY Dennis Starks	OFFICE AND PHONE NO. Chicago, IL
SYNOPSIS: Give a synopsis of case investigation subsequent to last report.		
<p style="text-align: center;"><u>SYNOPSIS</u></p> <p>This report concerns approximately 32 miles of railroad trackage placed under an embargo on December 15, 1993, after a rainstorm undermined the track roadbed between Amity and Birds Mill, AR on or about December 3, 1993. The tracks are owned by the Arkansas Midland Railroad. The shippers filed a complaint with the Commission because they could not get a commitment from the railroad that the tracks would be repaired and placed back in service, and believed that the embargo is a prelude to a permanent abandonment.</p> <p style="text-align: center;"><u>DESCRIPTION</u></p> <p>The Arkansas Midland Railroad (AKMD), RC-???, is a switching line railroad owned by the Pinsky Railroad Company. The AKMD was purchased by the Pinsky RR under ICC Finance Docket No. 31999. It was incorporated in 1992 in Arkansas. The AKMD's principal officers are M. P. Silver, President and Treasurer, and John P. Levine, Vice President. Gary V. Hunter is the General Manager. AKMD offices are located at Jones Mill Industrial Park, Jones Mill, Arkansas (mailing address: P. O. Box 696, Malvern, AR 72104-0696). Their phone is (501) 844-4444.</p>		
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ICC-F-15 (7/81)

The AKMD's gross operating revenues for the eleven months from January 1 to November 30, 1993 were \$2,943,000. The freight transportation revenues were \$2,854,000. A brief P & L statement was given by Mr. Levine as:

Gross Operating Revenues		\$2,943,000
Freight Transportation Revenues		2,854,000
Operating Expenses:		
Transportation	1,204,000	
Maintenance of Way	720,000	
Maintenance - Equipment	272,000	
Rail Car Repair	48,000	
G & A	306,000	
Marketing	46,000	
Depreciation & Amortization	273,000	
Total Operating Expenses		2,871,000
Net Operating Income		72,000
Total other non-operating expenses		
(includes interest)		420,000
Income before taxes		(\$347,000)

The Pinsly Railroad Company (Pinsly) is a holding company with corporate offices at Westfield Executive Park, 53 Southampton Road, Westfield, MA 01085, phone 413-568-6426. Principal officers are M. P. Silver, President and John P. Levine, Vice President. Pinsly owns the Pioneer Valley Railroad (RC-513030), Westfield, MA; the Greenville & Northern Railway (RC-???), Greenville, SC; the Florida Central Railroad (RC-???), Plymouth, FL; the Florida Midland (RC-???), Plymouth, FL; the Florida Northern (RC-???), Plymouth, FL; and the AKMD. Pinsly also owns Railroad Distribution Services, with offices in Westfield, MA and Gordonville, FL.

BASIS OF INVESTIGATION

A complaint was received in our Washington, D.C. office on December 29, 1993, from Richard H. Streeter, an attorney representing GS Roofing Products. GS Roofing has a plant located at Birds Mill,

AR, the end of AKMD's Norman Branch line. The complainant stated that the AKMD had placed 32 miles of the Norman Branch under an embargo on December 15, 1993, due to track conditions which had been worsened by rain storms and flooding on or about December 3, 1993. The complainant could not get a commitment from the railroad that the tracks would be repaired and placed back in service, and believed that the embargo is a prelude to a permanent abandonment.

NARRATIVE

In February, 1992, the AKMD purchased four rail lines from the Union Pacific Railroad (UP): the Norman Branch, Helena Branch, Carlisle Branch, and the Hot Springs Branch. The four branches are not connected, and consists of a total of 131 miles of trackage. Each branch connects with the UP, and shipments from these branches are billed via the UP as the line-haul carrier. The branch that is the subject of this investigation is their Norman Branch, which extends from the UP connection at Gurdon to Birds Mill, Arkansas, a total of 52 miles. The Norman Branch serves six shippers:

<u>Shipper:</u>	<u>Location:</u>	<u>Mile Post</u>	<u>1992 Annualized</u>	
			<u># Cars</u>	<u>Revenues:</u>
International Paper	Gurdon	430.0	2,521	\$343,759
Gifford Hill	Pike	446.6	2,212	165,927
Barksdale Lumber	Amity	459.9	47	9,123
Cargill Grain	Glenwood	473.9	none	none
Bean Lumber Co.	Glenwood	474.4	305	59,869
GS Roofing	Birds Mill	479.2	1,964	384,873

On or about December 3, 1993, a rain storm in southwest Arkansas caused flooding along some parts of AKMD's right-of-way, resulting in erosion and washouts in portions of its roadbed between Amity and Birds Mill. On December 15, 1993, the AKMD notified shippers that the

portion of AKMD's tracks between mile post (MP) 447 north of Pike Junction to MP 479.2 at Birds Mill was placed under an embargo (see map on page 1 of Exhibit "A"). The reason given was that due to the recent washouts, bridge problems and track conditions, it was no longer safe to operate over this portion of track. The notice was given verbally, and followed up with a letter. The AKMD further stated that "As for long term prospects, the future of this line does not look positive because of the track conditions and economics." (See Exhibit "B".) On the same date, the AKMD sent in a locomotive to pull out the loaded cars and the cars that were placed for loading at GS Roofing Co. in Birds Mill.

The AKMD also sent a letter dated December 15, 1993, to the Association of American Railroads that, effective 11:59 p.m., December 16, 1993, the stations of Amity, Rosboro, Glenwood, and Birds Mill are placed under embargo against all inbound traffic due to track conditions. (See Exhibit "C".)

Mr. Streeter, on behalf of GS Roofing, registered the complaint with the Commission on December 29, assignment was made on December 30, 1993, and I began the investigation on January 10, 1994.

State Funds Through the Local Rail Freight Assistance Program

The AKMD filed a request for funds from the State of Arkansas for the rehabilitation of the Norman Branch Line between Gurdon and Birds Mill, AR in December 1992. Justification for the request, as stated in application, was that all four branch lines, before being purchased, were marginally maintained with the Norman Branch being the most deteriorated. The application (dated December 9, 1992) stated:

that there had been seventeen derailments since February 1992¹, and that the railroad had already invested \$200,000 in addressing the derailment problem. The derailments had forced the company to lower train speeds to only 5 mph between MP 446.5 and MP 479.2²

The proposal was to rehabilitate the worst section of the Norman Branch to FRA Class 2 track (25 mph), between MP 447 and MP 464, including 3 miles of spur track serving Gifford Hill. The funds were to be provided through the Local Rail Freight Assistance Program (LRFA) under the Local Rail Service Assistance Act. The project cost was to be \$746,391, with the LRFA's share \$496,391 (67%) and the AKMD's \$250,000. A copy of the proposal is included as Exhibit "D".

On August 2, 1993, the Arkansas State Highway Commission entered into an agreement with the AKMD to provide funding, but less than the amount requested. The state will provide \$200,000 (70%) funding for an estimated \$285,715 track rehabilitation project.

The agreement between the State Highway Commission and the AKMD stipulates that the funds are to be used to rehabilitate the portion of the track and roadbed to meet FRA Class 2 (25 mph) Track Safety Standards from MP 447.00 to MP 464.00, and includes three miles of spur track from MP 447.00 to Gifford Hill & Co. This is a total distance of twenty miles to be rehabilitated. (There is no mention of rehabilitation of trackage in the agreement from MP 464.00 to 479.20, nor any option allowing the railroad to use the funds for

¹Deraillments occurred at the following locations: 7 derailments between MP 427 and MP 446.5; 9 derailments between MP 446.5 and MP 465.5; and 1 derailment between MP 465.5 and MP 479.2.

²AKMD General Order #2 dated January 1, 1993.

other than those specified). The work schedule shows two months for drainage improvements (August-September 1993), seven months for crosstie replacement (October 1993 to April 1994) and three months for surfacing (May to July 1994).

The effective dates of the agreement are from date of execution, August 2, 1993, to July 31, 1994. The payment of the \$200,000 will be through reimbursements made in monthly progress payments. Ten percent of the reimbursements will be withheld until the project is fifty percent complete. The moneys withheld are to be placed in escrow and will be paid to the railroad within 30 days after the project is completed. A copy of the agreement is included as Exhibit "F".

The UP RR's Offer of Assistance

The AKMD approached the UP to assist them in the rehabilitation of the Norman Branch. Mr. Hunter wrote to UP's Warren C. Wilson on December 28, 1993 (see Exhibit "F").

"Our goal is to make the AMR (AKMD) a profitable operation serving our customers and Union Pacific for many years to come. We need to eliminate the unprofitable portions of our business to protect the rest. This past year we have diverted a large portion of our Maintenance of Way funds to the Norman Branch and we would be jeopardizing the future of the AMR if we continue to do so.

"To continue the operation of the Norman Branch from Gurdon to Pike Junction including the Gifford lead, the following would be required:

- UP to increase the divisions on aggregates as proposed
- UP to provide second hand ties for upgrading the line
- UP to provide rail and OTH from AMR's Carlisle Branch and reduce the contingent purchase price accordingly
- AMR to rehabilitate the line with LRFA funds and UP materials
- After rehabilitation of the line, Gifford Hill would assume the operation and maintenance of the lead track
- Gifford Hill would agree to ship a minimum of 2700 cars per year

"To continue the operation of the Norman Branch from Pike Junction to Birds Mill, the following would be required:

- \$1,369,000 in funds and/or materials to rehabilitate the line
- Revenues totalling \$667,000 generated from serving G.S. Roofing, Bean Lumber and Barksdale Lumber

"Regarding the sale of the entire Norman Branch, it is not our plan to do so. Our goal is to make the AMR profitable and we believe that by discontinuing the losing operations and maintaining the profitable ones, we can turn the AMR around. With that in mind, we would be willing to sell the Norman Branch north of International Paper to a new carrier with trackage rights over our line for the new carrier to connect with UP at Gurdon.

"As you are aware, the line from Pike Junction north is presently embargoed. Also, the lead track to Gifford Hill is in poor condition and the situation must be addressed immediately. If we should have a derailment on this track or track conditions reach a level that make it unsafe to operate, we would be forced to embargo this section as well."

Mr. Jim Hanrahan, Manager-Shortline Development for the UP, said that the UP has offered the AKMD in excess of \$1 million in assistance. He said the UP has offered them 28,000 relay ties, and that he has 10,000 of them loaded now in Julesburg, CO and they are on hold (as of January 26, 1994). This has a value of over \$600,000. He has offered them 3 miles of relay rail that has a value in excess of \$100,000. On top of this, the UP has offered the AKMD an increase in per-car charges that represents approximately 77% over the amount the UP is currently paying them. This increase is over a three year period, after which, the rates roll back to their present level.

Mr. Hanrahan said that when Pinsly initially bid this package Pinsly RR said they could get by on the amount they are currently being paid by the UP to take care of the maintenance. He said that now, even with the 77% revenue increase, the AKMD has indicated to them they still can't make a go of it.

FRA INSPECTIONS

I met with Mr. L. H. Sapp, Deputy Regional Director, FRA, on January 14, and requested a copy of track inspections reports made on

the AKMD during 1993. I was later furnished three inspections reports submitted by inspector Roy A. Cline, FRA, Little Rock. Report No. 161 dated 6/2/93 was for inspection between MP 426.9 to 446.5. Report No. 162 dated 6/2/93 was for MP 446.6 to 449.5. Report No. 160 dated 6/1/93 was for MP 446.9 to 479.2. The inspections were made while accompanied by AKMD Roadmaster J. L. Bryant. Each of the reports show operating speed as 10 mph, and FRA excepted³ track. Each report shows that all violations found by the FRA inspector were repaired between June 4 and June 26. Copy of the inspection reports is included as Exhibit "G".

Inspection report No. 160 for MP 446.9 to 479.2 covers the same portion of tracks under embargo. This report lists 12 violations of 49 CFR 213. Seven of these violations involved replacement of cross ties. Again, all violations found are shown to have been corrected by the AKMD.

TRACK CONDITIONS ON THE AKMD

I accompanied AKMD Roadmaster Bryant and General Manager Hunter during a hi-rail trip over the embargoed line on January 27, 1994. During the trip, I made photographs along the way to have a visual record of the conditions of the tracks. I also made notes of my observations during the trip. The photographs and the accompanying notes are included as Exhibit "H".

³FRA Excepted Track is defined in 49 CFR 213.4. Basically, operating speed are limited to 10 mph, no revenue passenger train operated, and less than five cars required to be placarded by Hazardous Material Regulations.

We began at GS Roofing's plant at Birds Mill and finished at Pike Junction. My observations were that the tracks between Amity and Birds Mill were the most adversely affected by the rains, with a few washouts up to 11" deep under the tracks. Roadmaster Bryant said that there had been a washout near the Barksdale Lumber Co. at Glenwood deep enough for him to stand under. He said this was due to debris from the plant had plugged up the culvert and caused the water to run across the tracks. This roadbed damage near Barksdale Lumber has been repaired. The other washouts have not been repaired. Roadmaster Bryant said that he had to shore up the washouts that have not been repaired by placing ties or other materials under the tracks in order to get the cars out from GS Roofing on the day of the embargo.

During the hi-rail inspection, I observed many broken ties under the rails. The roadmaster pointed out several places where there were as many as eight broken ties in a row, over 60", which is a violation of FRA regulations. I saw two broken rails. One of the major problems is that the right-of-way has inadequate drainage.

A track profile is included as Exhibit "I". The profile shows mile posts, bridge locations, elevations, speed allowances, grades, degree of curves, weight of the rail, the date rail was laid, date of surfacing and lining, and worked by the tie gang. According to the profile, the tracks were placed between 1945 and 1948, and surfaced, lined and worked by the tie gang in 1986. The rail is 85 pound rail from the UP connection to MP 446.6, and 90 pound rail from that point (PK Junction) to Birds Mill. Many sections of the rail show extensive wear. Roadmaster Bryant said he has had to swap various sections of

the track from the "hi-side" to the "low-side" because of wear.

I also copied a report of inspection of four bridges conducted November 9-11, 1993, by Osmose Wood Preserving, Inc. The bridges are located at MP 446.7, MP 458.4, MP 462.3, and MP 472.0. The estimated costs to make repairs on three bridges were estimated to be about \$15,000 to \$20,000 each, while one (at MP 446.7) was estimated to be between \$55,000 to \$60,000. Each of the bridges identified defects that, according to Osmose, should be addressed immediately. See Exhibit "J" for a copy of this report, which also includes photographs.

During the hi-rail inspection, AKMD Roadmaster J. L. Bryant made the following comments:

(1) He has spent about 50% of his time for maintenance on the Norman Branch, and 56% of the materials used for maintenance by the AKMD were on this branch.

(2) There are 2,993 crossties per mile. This is based on 39' rail sections with 22 ties per rail. The average life of a Crosstie is 20 years. A used crosstie purchased must have at least five years' life left in them. The average life of a used tie is 10 years.

(3) The AKMD put in about 300 ties between MP 447 and MP 449, and transposed tracks (swapped tracks) from the hi-side to low-side. They have spent about \$28,000 on this 2½ miles. Tie replacements have been by "manpower". No machines are available. On the Norman Branch, the only road running along side the tracks is less than ¼ mile. The rest of the track is inaccessible except by rail.

(4) The AKMD needs about 28,000 ties for rehabilitation of the Norman Branch. A contractor would charge \$11.00 per tie to put them in place. If the railroad rented the machine, the rental charge for the machinery would be \$5.00 per tie, plus the AKMD would have to bear the cost of manpower, fuel, etc.

(5) The AKMD would need about \$500,000 to put the line back in service, and that it would take from 60 to 90 days. The line has to pass FRA inspection before it can be put

back in service because it had been placed under embargo for safety reasons.

(6) It would take in excess of \$3 million to bring track back up to Class 2 standards. It would take \$125,000 in work to correct the drainage problems along the line from PK Junction to Birds Mill.

(7) The AKMD has been running two GP8 130-ton diesel engines on this branch.

The Railroad's Position:

I met with General Manager Hunter on 1/18/94. He said the AKMD has been trying to work with the shippers to bring the railroad back up to standards, but it doesn't look good at this point. He said when the AKMD first acquired the branch line from the UP in February 1992, the tracks were "FRA excepted" tracks, meaning that speeds were not to be over 10 mph. The track conditions on the Norman Branch were bad and caused a number of derailments. This prompted the AKMD to place a 5 mph limit on the line north of PK Junction (mile posts 446.5 to 479.2) in February 1993. The slower speed limits forced the railroad to use two train crews to run over the 32 miles to serve GS Roofing and added to the railroad's expenses.

Mr. Hunter said the railroad has lost a lot of money trying to keep this line open, but they are still open to ideas. John Levine has tried to solicit help from the UP, the state and the shippers in an effort to rehab the line back to 10 mph. Several months ago, the AKMD approached the UP and was successful in getting a commitment from them for ties, rail and an increase in the amount of switching charges the UP was paying AKMD. He said he became the General Manager in November 1993, and since then he has visited with each of the shippers and explained the situation to them. He said he asked for help from

them by paying a "per car" fee and a commitment from them that their business would be sufficient for the long-term to justify the railroad's expenses to rehab the line. He said that none of the shippers have made a commitment.

Mr. Hunter said that the state has awarded the AKMD a grant of \$200,000 to rehab a part of the line now under embargo, but they actually don't have the funds in hand now. And even with the help the UP has offered, the AKMD is still \$500,000 short. He said the AKMD is not spending any more money on the line until they get the commitments from the shippers that the business and revenues will be there. He said the prospects for the long-term do not look good, and the alternative would be abandonment.

The tracks were in bad shape and needed extensive rehabilitation before the storm. He said that it was not safe to operate the line before the storm hit them in December. The storm caused flooding and run-off over their tracks in several places between Amity and Birds Mill. There are wash-outs under the roadbed at these places that need extensive work before they could be placed back in service. There were 14 empty cars at GS Roofing's plant that the UP wanted back, so the AKMD patched up the tracks, and shored up the washout spots enough to "walk" the cars out.

The storm left the track conditions completely inoperable. That was the reason for the embargo on December 15th. He said that the decision should be made within the next few weeks whether to repair the tracks or to file for abandonment.

Mr. Hunter said the projection for GS Roofing for 1994 and beyond

shows the number of carloads will be reduced by about 500 cars because GS Roofing lost a big customer in Shreveport.

I talked to John Levine by phone on February 2, 1994. He said the shippers have not cooperated with them and could not understand why they would spend a lot of money for attorneys and go to court rather than make a commitment to the AKMD to assure they would have rail service. He could not understand why the shippers would not pay a "per car" fee when the alternative would be abandonment and then they would have to pay a higher truck rate.

He said he was not informed that there would be a meeting of the shippers on January 26th until it was too late to make plans to attend. He had been planning a similar meeting, and said he had already reserved a meeting room at the Holiday Inn in Arkadelphia for the meeting.

I asked him about their initial bid to the UP to acquire the tracks if it included a margin enough to rehabilitate the line. He said the UP let the line run down before they sold it, and he thought there was enough built into the bid to maintain it. He assured me that they did not buy the line to scrap it. After they got into it, the tracks were just too bad and there's not enough revenue to rehab the line without help.

Mr. Levine said that in his conversations, the UP has told him that if the UP was to assist the AKMD with the materials for refurbishing the Norman Branch, it would have to be the whole branch. He said the UP told him it would be "all or nothing at all".

I asked Mr. Levine about the possibility of selling the Norman

Branch. He was emphatic that he wanted to keep the part of the branch serving International Paper Co.

Documents furnished by the AKMD and reports of interview are included as Exhibit "K".

The Shippers' Position:

GS Roofing Products Company, Inc., Birds Mill, AR

The largest shipper on the tracks under embargo is GS Roofing Co., located at Birds Mill, the end of the line at mile post 479.2. GS Roofing plant produces roofing granules and mineral filler and ships approximately 1,400 to 1,800 carloads annually. The plant has been in operation since 1940 and employs 30 workers, which increases in the peak season, with an annual payroll and benefits of \$1,065,137.

Mr. John W. Smith, Director of Production Distribution for GS Roofing at Irving, TX said that the Glenwood plant at Birds Mill was designed for rail shipments, and that truck shipments are the exception. The ratio of rail shipments to truck is about 75% rail. He said that December to February months are slow and they can get by with loading trucks in those months. However, beginning in March, the demand for their product increases and using trucks instead of rail for loading just will not work. They use a pneumatic-loading type trailer normally used for loading bulk dry cement. The cement business also increases about March because the cement business takes priority loading and those trailers become harder to get.

In mid-November, Mr. Smith was contacted by John Levine. Mr. Levine said he was concerned about the economics on the Norman Branch line and wanted Mr. Smith to make an annual volume commitment of 1,800

cars, plus a \$150 per-car fee on top of the rates that GS was currently paying. Mr. Smith told him that he was not in a position to make a commitment of that nature and that his marketing and rate dealings were to be with the UP, and until he hears differently from the UP it would stay that way.

Mr. Smith acknowledged the loss of their filler product business to Shreveport, but stated it was only 406 carloads. He said this has been more than off-set, and furnished correspondence between GS Roofing and the Celotex Corp. for the purchase of 20-25,000 tons of granules that was to begin moving in January 1994. This sale has been placed on hold because of the embargo, and GS Roofing is to notify Celotex of the status of rail service. Their choice is to lose the business or truck it and pay the penalty for the rate difference. The difference between the rail rate and the truck rate is \$12.00 per ton. This business is new for GS Roofing and would have added 200-250 carloads.

He also said GS Roofing had a new granule contract for 25,000 tons which had just began in November 1993, and that and the Celotex contract would more than off-set the carloads lost from the Shreveport movement. Additionally, Mr. Smith said that their forecast is to sell 10,000 tons of bagged stone dust in 1994, where only 500 tons had been shipped in 1993.

Mr. Smith filed a complaint with the Commission because he couldn't get a commitment from the AKMD that their tracks would be placed back in service, and their business was suffering. Without the ability to ship their product to market by railroad, they would lose

about 75% of their business.

GS Roofing and several of their customers have written to the AKMD to inform the railroad that they will pursue damages attributed to the failure of the railroad to lift the embargo. As a precedent for the action, Attorney Richard Streeter wrote to Pinsly's attorney, Larry Latourette, on February 1, 1994, in which he cites several cases, one of which is *I.C.C. v. St. Johnsbury and Lamoille County Railroad and S. M. Pinsly*, 403 F. Supp. 903 (D.Vt. 1973). Mr. Streeter told me the facts of that case are nearly identical to the issues involved in the AKMD's embargo situation. Mr. Streeter stated in his letter that it is estimated that loss of service for a year would result in well over \$500,000 damages to GS Roofing alone. He also said:

"Finally, based on comments made by Gary Hunter, the Arkansas Midland's General Manager, it appears to me that the cost of restoring service is minimal. As he indicated, questions of long-term economics aside, service could be restored in seven days or less. It also appears to me, from a long-term standpoint, that the concessions promised to the Arkansas Midland Railroad by the Union Pacific should alleviate most, if not all, of the financial 'shortfalls' that appear to be driving the decision to embargo most of the line. Given its willingness to acquire the line and provide service to all shippers on the line, the Dardanelle & Russellville R.R. appears to agree with my assessment of the situation."

Documents furnished by GS Roofing and reports of interview are included as Exhibit "L".

Barksdale Lumber Co., Amity, AR

Mr. Bob Moore, Sales Manager, said his company ships treated southern pine lumber. About 20% of his total volume is shipped by rail, with 70 carloads billed out during 1993. They use I-beam and bulkhead flat cars. During the embargo, they have had to haul their products to Gurdon by truck. At Gurdon, they have been allowed to use

the tracks belonging to Hicks Lumber for loading. This is an inconvenience to both Barksdale Lumber and Hicks Lumber. There are no team tracks in Gurdon for loading cars.

He said that Barksdale is putting together new business to Hazelwood and Kansas City, MO and anticipating more car movements this year if the rail lines are restored. He estimates there would have been a total of 90 to 100 carloads in 1994.

He was visited twice by Mr. Hunter. The first was about 6 weeks before the washouts, and the second just prior to the washout, but not since. He was asking an additional \$100 per car, with an annual minimum of 105 cars. This was a verbal request. He said that if his company had to pay the additional cost it would make the price of their products less appealing and therefore non-competitive.

He said that if they lose the rail service, they would lose their customer base. Often a customer would call up for an order to be shipped by rail car, and would at the same time give them additional orders to be shipped by truck. He said that the customer who uses the heaviest rail service is also the customer who uses the heaviest truck service (see Exhibit "M").

Bean Lumber Co., Glenwood, AR

Curt Bean said that Bean Lumber Co. employs 400 and is the largest employer in Glenwood, and one of the largest in Pike County. He said that his plant just completed a one-half million dollar expansion and the railroad is vital to his business. He is planning to buy property in Kansas City for distribution of his products. With the distribution center in Kansas City, his business at the Glenwood

plant will increase. The expansion was made under the presumption that it would be served by rail. If the plant loses its rail service it would also effect their choice of plant sites in Kansas City. They would be forced to load trucks to Mena, AR on the Kansas City Southern for movement to Kansas City, so instead of locating on the Union Pacific in Kansas City, they would look for a location on the Kansas City Southern. Their projections for 1994 is about 450 cars, an increase of about 100 cars a year, and they expect to increase in the years to follow, if rail service is available at their Glenwood plant.

Tim Bean said that Gary Hunter came in their office about twice, and the last time Mr. Hunter said the railroad wanted a per-car charge added to their carloads. He thinks that it was about \$150 per car. There was also an annual minimum number of carloads, but did recall how many. Mr. Hunter also wanted Bean Lumber to start shipping "chip" cars again. Wood chips was a big business at Bean Lumber Co., but rail rates kept rising and eventually priced itself out of the market. Mr. Hunter's demands were verbal, not in writing. Tim Bean said they have not responded to this because they have relied on the rates in effect now to get established in the market. An increase in the carload rates would make Bean Lumber Company less competitive in certain markets.

Curt Bean told me he has agreed to form a partnership with William Robbins, President of Dardanelle & Russellville Railroad (D&R RR), in an effort to acquire the Norman Branch from the AKMD (see Exhibit "N").

D&R RR's Offer to Purchase the Norman Branch

Butch Cowart, GS Roofing's Plant Manager at Birds Mill, called William Robbins, President of Dardanelle & Russellville Railroad and the Ouachita Railroad, on January 7, 1994 concerning the embargo of the Norman Branch of the AKMD, and at Mr. Cowart's request, Mr. Robbins called Curt Bean to discuss their possibly of forming a joint venture to purchase the Norman Branch from the AKMD. Mr. Bean is agreeable to a partnership. Mr. Robbins said he will provide the expertise for the rehabilitation of the tracks and operation of the railroad, and Mr. Bean will provide the necessary capital.

Mr. Robbins wrote to Gary Hunter, General Manager of the AKMD on January 11, 1994, in reference to the embargo of the Glenwood line. He wrote that he and Curt Bean, owner of Bean Lumber Co. at Glenwood, AR, have agreed to form a joint venture to purchase the Glenwood branch of the AKMD, and offered \$500,000 for the line. Mr. Hunter responded on January 13, 1994 that they would be willing to sell all of the branch of railroad to Mr. Robbins except the first 3.7 miles of trackage from the UP connection at Gurdon, AR. This 3.7 miles serves the International Paper Company and generates about 2,800 to 3,000 carloads a year. That is more than the other four shippers on the line generate all together. Mr. Robbins said this was not acceptable. He would need all of the shippers on the entire line to make it work.

Mr. Robbins told me that he was one of the original bidders for the line when the UP sold the tracks in 1991, and that he thinks there was about \$100,000 difference in his bid and the Pinsky RR. He said

the Pinsly RR's bid was too low, and the per car rates they named were not enough to make enough to maintain the tracks and send money back to Massachusetts. He said that Pinsly people relied on consultants and probably got some bad advice.

He said that he is "home folk" and knows the conditions in this part of the country that effect railroad tracks. He said he can take what's there and make a profit. He said he has the expertise and knows how to fix the tracks. In addition to the two railroads he owns, he also owns three other companies: (1) Arkansas Railroad Contractors, Inc.; (2) Arkansas Motive Power Services; and (3) Railcar Repair of the South. He said he has a plan and ready to go. He said he has the experience needed for refurbishing a rail line from his own companies. The D&R's line has been brought up from conditions that were inoperable to FRA Class 2 rating.

Mr. Robbins said that he still has the track profiles from the bid package from two years ago, and still has the notes from the time he "hi-railed" the tracks then. He said he is ready to move - just a matter of his attorneys doing their work. They will draw up a simple partnership agreement with Curt Bean and could begin work within a week, and estimates that it could be placed back in service and running in seven working days. He wants to eventually refurbish the line and bring it up to FRA Class 2 standards, beginning at the end at Birds Mill. He will name the railroad the "Caddo, Antoine, and Little Missouri Railroad", the names of the three rivers in the area served by the rail line.

I asked him if he intends to ask the shippers for a "per-car" surcharge similar to that proposed by the AKMD RR. He said he does not believe in surcharges, and will not ask for them. He said that he has talked to the UP RR and they have agreed to make all of the concessions and help they have offered the AKMD. He's worked up a "best case" and a "worst case" scenario, with projections for number of carloads, breakdown of cost categories and revenues. In both scenarios, it shows a pre-tax/pre-interest income figure in the black.

The UP has made a verbal agreement that if he is successful in getting the Glenwood line, that the UP will lease him the trackage from Gurdon to El Dorado, AR. He said this would bring the woodchip traffic back to the railroad, and that he could get the equipment to handle them.

Mr. Robbins said his original offer of \$500,000 to the AKMD is negotiable. He is willing to go more. He said the salvage value of the line is actually about \$780,000, but the AKMD people will probably say its worth more. The difference is that the rail is badly worn and will bring in considerably less than the AKMD's figure. A third party appraiser could be brought in, or a "scrapper", who would give a true salvage value.

He said that with Curt Bean backing him with cash, and with his expertise, they can make it work.

Documents furnished by Mr. Robbins, and a report of interview is included as Exhibit "O".

Meeting of the Shippers Held on January 26, 1994

Mr. Smith arranged to have a meeting of the shippers, which was held in the conference room of Bean Lumber Co. in Glenwood on January 26, 1994. Attending the meeting were Arkansas State Senator Neely Cassady, Arkansas Representative Ted E. Mullenix, attorneys representing GS Roofing, Bean Lumber Co., and the D&R RR., and representatives from the UP RR, the D&R RR, GS Roofing, Bean Lumber, Barksdale Lumber, and Gifford Hill & Co. I attended the meeting, but stated the purpose of my attendance was only as an observer, not a participant. Arkansas Governor Jim Guy Tucker came into the meeting at the close, but did not participate.

Mr. Smith stated that the meeting was to get their thoughts altogether where they could be a little more united and focused on their thoughts and comments. After about an hour of meeting, AKMD General Manager Gary Hunter was invited into the meeting. Mr. Smith told Mr. Hunter that they know he did not have the authority to make the decisions, but wanted him to convey a "message" back to the Pinsky RR people. The message was that the shippers demanded the tracks be put back in service, or to sell the line to D&R RR. Mr. Smith told Mr. Hunter that the shippers are prepared to force AKMD to sell the entire line. Mr. Streeter told him that they will file with the ICC and the courts, and if they can't get the OCCA to do it, they will go to the State of Arkansas and get the Attorney General to go after them.

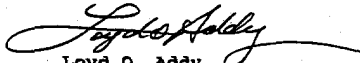
A transcript of the meeting is included as Exhibit "P".

REMARKS

Although Gifford Hill & Co., located on a spur track at Pike Junction, MP 446.6, is not on a part of the tracks under embargo, it is concerned "they are next". They have also been approached by the AKMD for additional "per-car" charges and an annual minimum number of carloads.

The spur track serving Gifford Hill is a part of the trackage scheduled to be rehabilitated with the help of the grant money from the state. If the state funds are not used, then the spur probably would not be rehabilitated. I asked Mr. Hunter if the AKMD is also considering including the Gifford Hill spur if they decide to abandon the rest of the Norman Branch (except the portion serving International Paper). He said it probably would be.

Respectfully submitted,


Loyd O. Addy,
Special Agent