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December 23, 2014

**By E-Filing**

237307

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

ENTERED  
Office of Proceedings  
December 23, 2014  
Part of  
Public Record

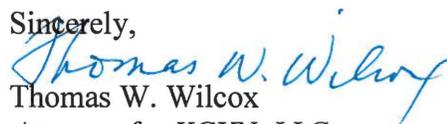
Re: Docket No. NOR 42140, Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation, and KCVN, LLC vs. V&S Railway, LLC

Dear Ms. Brown:

Accompanying this letter for e-filing in the captioned docket is the Supplement to Motion for Preliminary Injunction filed on behalf of the complainants in this proceeding. Please note that an attachment to this filing contains color photographs.

Do not hesitate to contact the undersigned with any questions.

Sincerely,

  
Thomas W. Wilcox  
Attorney for KCVN, LLC

cc: Counsel for Defendant  
William S. Osborn, Esq  
Mr. Terry Whiteside  
(w/ enclosure)

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**COLORADO WHEAT** )  
**ADMINISTRATIVE COMMITTEE,** )  
**COLORADO ASSOCIATION OF** )  
**WHEAT GROWERS, COLORADO** )  
**WHEAT RESEARCH FOUNDATION** )  
4026 South Timberline Road, Suite 120 )  
Fort Collins, CO 80525 )

And )

**KCVN, LLC** )  
515 Congress Avenue, Suite 2450 )  
Austin, Texas 78701 )

vs. )

**Docket No. NOR 42140**

**V&S RAILWAY, LLC** )  
1505 South Redwood Road )  
Salt Lake City, Utah 84104 )

**SUPPLEMENT TO MOTION FOR PRELIMINARY INJUNCTION**

Colorado Wheat Administrative Committee (“CWAC”), Colorado Association of Wheat Growers (“CAWG”) Colorado Wheat Research Foundation (“CWRF”) and KCVN, LLC (“KCVN”) (together “Complainants”), hereby submit this Supplement to their Motion for Preliminary Injunctive Relief, asserting additional grounds for the Board to enjoin Defendant V&S Railway, LLC (“V&S”) from resuming its dismantling and removal of the tracks and related assets of the railroad line that is the subject of this proceeding until V&S receives formal abandonment authority from the Board. In support thereof, Complainants state as follows:

1. Complainants' Motion for Emergency and Preliminary Injunctive Relief ("Motion"), filed on October 28, 2014, reminded the Board that V&S had formally represented

to it in August, 2012 that V&S would seek abandonment authority for the "Western Segment" of the Towner Line "in the near future." Motion at 3.

2. Complainants also informed the Board that V&S counsel formally represented to a United States Magistrate Judge of the U.S. District Court for the District of Colorado that V&S would "go back and refile . . . to seek the two year out of service exemption . . .to abandon both the middle and the eastern segment . . . in December of this year." Exhibit 1 to Complaint (October 10, 2014 court transcript) at page 70.

3. According to the filings and decisions referenced in the Complaint and Motion, the two year period under 49 C.F.R. §1152.50 expired on or around December 13, 2014. See, STB Docket No.FD 35664, *V and S Railway, LLC - Acquisition and Operation Exemption - Colorado Department of Transportation* (served November 13, 2012)(Establishing the effective date of the purchase to be December 13, 2012).

4. Counsel for V&S further confirmed to the Magistrate Judge that KCVN or another party "certainly would have the opportunity" to buy the middle and eastern segment using the Board's Offer of Financial Assistance ("OFA") procedures at "the time we that we filed a two-year out of service exemption." Exhibit 1 at 73.

5. As of the date of this filing V&S still has not sought authority to abandon any portion of the Towner Line.<sup>1</sup>

6. The Verified Statement of William Osborn, KCVN's attorney-in-fact, attached to Complainants' Motion, summarized KCVN's continuing desire try and acquire the Towner Line from V&S, "whether it is a mutually agreeable purchase arrangement, or through the means for

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<sup>1</sup> As explained in the Complaint and Motion, V&S actually did start the process of trying to abandon the "Eastern" and "Middle" segments of the Towner Line, but this effort was rejected because the two year period for seeking exempt abandonment authority had not yet run. Complaint at 6-7.

acquiring such lines of rail available through the statutes and regulations administered by this Board." Verified Statement of William Osborn at 4. The relevant statutes and regulations to which he alludes include the rules and procedures governing the OFA process under 49 U.S.C. §10904 and 49 C.F.R. §1152.57.

7. KCVN continues to stand ready to engage in the OFA process and potentially acquire the entire Towner Line, but it cannot do so until V&S formally seeks to abandon the Towner Line. KCVN is certainly aware of the Board's "feeder line" statute and procedures, and could pursue that avenue to acquire the line if ultimately necessary, but a responsible party should not be forced to use the more involved and costly processes under 49 U.S.C. §10907 and 49 C.F.R. Part 1151 to acquire a line of rail when the owning railroad has repeatedly announced in formal agency and court proceedings that it will not only abandon the track at issue, but that it will do so within a particular time frame.

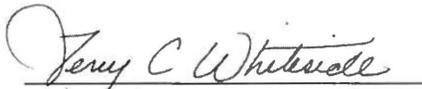
8. As explained in the accompanying Supplemental Verified Statement of Darrell L. Hanavan, despite the evidence in this proceeding that local wheat growers are interested in the Towner Line being put back into service, V&S has taken no steps to pursue this goal. On the contrary, V&S has simply left in place the remains of what rail of the Western Segment is still in place. More significantly, the railroad track removal equipment that was used to tear up the Western Segment track before the temporary restraining order was issued by the Colorado court remains in place and poised to immediately restart the process of removing the rail. See attached Verified Statement of Gerald W. Fauth III and accompanying photographs. This behavior cannot be consistent with V&S's obligations under 49 U.S.C. §11101 and the rules governing abandonments under 49 U.S.C. §10903.

9. Since Complainants filed their Complaint and Motion in this docket on October 28, 2014, V&S has done nothing to dispel the firm belief of the Complainants, and other parties who have filed submissions in the dockets related to this proceeding,<sup>2</sup> that V&S has no plans for the Western Segment other than to tear up its track assets and sell them. V&S also obviously has no plans to reinstate service on the remainder of the Towner Line, but it has inexplicably reneged on its stated intent to abandon the rest of the line. In short, V&S appears to be simply waiting for Board to lift its October 31, 2014 Emergency Order without issuing a more permanent injunction, thereby enabling V&S to resume tearing up the track of the Western Segment and selling it. In other words, V&S appears to see greater financial benefit from selling the track assets than enabling parties to potentially acquire the line through the Board's OFA process and pursue the possibility of reinstating common carrier rail service over it.

In light of foregoing, Complainants hereby respectfully submit that these additional facts provide further justification for the Board to enjoin V&S from removing any more of the Western Segment of the Towner Line until V&S obtains formal abandonment authority from this Board for that segment, which would mean that V&S had sought authority to abandon the Western Segment, the OFA process had been triggered, but no sale of the line resulted from it. In these circumstances, the Board should take action that requires V&S to seek abandonment authority for the entire Towner Line, thereby creating the possibility of KCVN or other responsible parties acquiring it through the OFA process and potentially reinstating rail service over it.

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<sup>2</sup> Docket Nos AB 603 (Sub-Nos. 2X, 3X, and 4X).

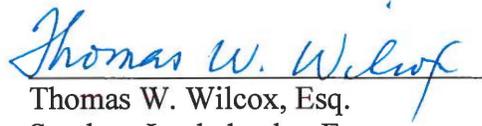


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*Representative for CWAC, CAWG  
and CWRP*

December 23, 2014

Respectfully submitted,



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*Counsel for KCVN, LLC*

# Attachment 1

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**COLORADO WHEAT** )  
**ADMINISTRATIVE COMMITTEE,** )  
**COLORADO ASSOCIATION OF** )  
**WHEAT GROWERS, COLORADO** )  
**WHEAT RESEARCH FOUNDATION** )  
4026 South Timberline Road, Suite 120 )  
Fort Collins, CO 80525 )

And )  
)

**KCVN, LLC** )  
515 Congress Avenue, Suite 2450 )  
Austin, Texas 78701 )

**vs** )  
)

**Docket No. NOR 42140**

**V&S RAILWAY, LLC** )  
1505 South Redwood Road )  
Salt Lake City, Utah 84104 )

SUPPLEMENTAL VERIFIED STATEMENT OF DARRELL L. HANAVAN

My name is Darrell L. Hanavan. I am filing this Supplemental Verified Statement to provide additional facts to the Board concerning this dispute.

In review, I have been the Executive Director of the Colorado Wheat Administrative Committee (CWAC) since 1982, Colorado Association of Wheat Growers (CAWG) since 1998, and Colorado Wheat Research Foundation (CWRF) since 1989. There are 287 CWAC producers and 62 CAWG members which own and operate wheat farms in Central Colorado

along the "Towner Line" that is the subject of the captioned litigation.<sup>1</sup> As Executive Director of CWAC, I have responsibility for developing a team to oversee the research and development of wheat and wheat marketing for the Colorado wheat both domestically and internationally. We work both in private and government based public entities, as the CWAC is administratively attached to the Colorado State Government.<sup>2</sup>

As I previously testified in my Opening Verified Statement, since 1985 I have traveled to over 25 countries on market development missions with USWA representing Colorado wheat growers. In November 2014 I participated in a USWA crop quality tour to Indonesia, Thailand, The Philippines, South Korea, Taiwan, China and Japan which re-affirmed that there is huge unfulfilled demand for hard white wheat. Colorado is one of the top three hard white wheat producing states and our goal is to expand production to fulfill this unmet export demand. Production of hard white wheat in Kiowa County is key to this effort but cannot be successful without a viable Towner rail line to ship to export markets. Nearly one-half of Kiowa County's winter wheat acreage was planted to hard white wheat in 2006 so I am confident that farmers will produce to meet this unfilled export market demand if given the opportunity, but a viable Towner rail line is essential. Despite the presence of this potential demand for railroad service V&S has not given any indication that it is interested in reactivating service over the line or any

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<sup>1</sup> The CWAC and CAWG Boards of Directors separately passed the following motion on August 14, 2014: "CWAC/CAWG oppose the abandonment and scrapping of the Towner Rail Line by the V&S, LLC Railway and support the sale and continued operation of this rail line to KCVN, LLC or other viable rail line operator."

<sup>2</sup> CWAC belongs to a national organization consisting of state Wheat Commissions/Committees from the United States called U.S. Wheat Associates (USWA). This organization is focused on development of wheat markets all over the world. I currently serve and have served, in the past, on numerous action and study Committees within U.S. Wheat Associates including chairing the joint USWA/National Association of Wheat Growers (NAWG) Biotechnology Committee for eight years. CWAC is also involved in transportation policy since 80 percent of Colorado's winter wheat production is typically exported, and it has contracted with Mr. Terry Whiteside as Transportation Consultant since 1998.

indication that it is interested in working with CWAC, CAWG, CWRF or the growers in the area to facilitate this growing wheat movement.

As I testified in my Opening Verified Statement, CWAC and CAWG have a long history with the Towner Line, which runs for nearly 122 miles from Towner Junction, Colorado to NA Junction, Colorado. We continue to work with KCVN, LLC and the local wheat growers to develop marketing plans to reinstitute rail service over this line. However, there is only limited opportunity to develop these marketing plans until we can see the path clear towards restoration of rail service over the line.

In my prior verified statement I explained how the area of Colorado the Towner Line runs through is one of the prime development areas for the growing of the Snowmass strain of wheat described in my original Verified Statement. I also explained that the V&S Railway has no present interest in providing rail service over the Towner Line, and instead desires to sell its tracks and other assets. The Towner Line is effectively embargoed.

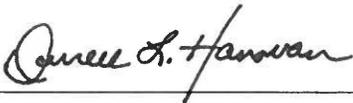
Rather than engage in discussions with CWAC, CAWG, CWRF, growers and other local interests to explore how service over the Towner Line might be reinstated, the V&S has, since mid-2012, repeatedly informed the STB of its intention to abandon the Towner Line. Yet, as of December 22, 2014, no activity has been forthcoming by V&S to apply to the Board for abandonment of any segment of the Towner line. The seven potential wheat shippers located on the line, as well as KCVN, cannot cement plans for development of shipments over the line until V&S indicates its intention to operate the line, or to abandon it, which would initiate the Board's Offer of Financial Assistance process.

The wheat growers and CWAC, CAWG and CWRF are continuing to be faced with the combined effects in this case of a railroad that doesn't want to serve the public and desires to

circumvent its public responsibility by tearing out the track and selling it for profit, without exploring alternative servicing of the shippers on that line.

VERIFICATION:

I hereby certify that the foregoing is true and correct on penalty of perjury.

S/  Date: December 22, 2014

Darrell L. Hanavan  
Executive Director  
CWAC/CAWG/CWRF  
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(970) 449-6994  
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[ghanavan@coloradowheat.org](mailto:ghanavan@coloradowheat.org)  
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# Attachment 2

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

**COLORADO WHEAT** )  
**ADMINISTRATIVE COMMITTEE,** )  
**COLORADO ASSOCIATION OF** )  
**WHEAT GROWERS, COLORADO** )  
**WHEAT RESEARCH FOUNDATION** )  
4026 South Timberline Road, Suite 120 )  
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And )

**KCVN, LLC** )  
515 Congress Avenue, Suite 2450 )  
Austin, Texas 78701 )

vs )

**Docket No. NOR 42140**

**V&S RAILWAY, LLC** )  
1505 South Redwood Road )  
Salt Lake City, Utah 84104 )

**VERIFIED STATEMENT OF GERALD W. FAUTH III**

My name is Gerald W. Fauth III. I am President of G. W. Fauth & Associates, Inc., an economic consulting firm with offices at 116 South Royal Street, Alexandria, Virginia 22314. A statement describing my background, experience and qualifications is attached hereto as Appendix GWF-1.

On December 2 and 3, 2014, I conducted an inspection of the so-called Towner Line in Colorado, which runs a distance of approximately 122 miles from Milepost (MP) 747.5 near Towner, Colorado (which is approximately 2 miles west of the Colorado/Kansas state line) to

North Avondale (NA) Junction, Colorado at MP 869.4 (which is approximately 27 miles east of Pueblo, Colorado). Currently, V and S Railway, Inc. (V&S), a shortline railroad company headquartered in Salt Lake City, Utah, is the owner of the subject line. I conducted this inspection at the request of KCVN, LLC, which is interested in possibly purchasing the Towner Line, whether directly from V&S, or through an Offer of Financial Assistance pursuant to 49 U.S.C. §10904 should V&S seek authority to abandon the Towner Line.

The Towner line generally follows parallel to Route 96 in an east (Towner) to west (NA Junction) direction. I drove the entire 122-mile length of the line twice and stopped at numerous many public crossings and other locations on the line. During this inspection of the line, I observed a parked train on a section of track between Eads and Haswell, Colorado, (between MP 785.8 and MP 807.7, respectively). I have attached pictures as Appendix GWF-2. This parked train included:

- A single locomotive with the markings SMNR 3518 (SMNR is abbreviation for the Southern Manitoba Railway, Inc.) (see Picture 1);
- What appeared to be a rail removal machine (see Picture 2); and,
- Many flats cars with rail racks, most of which had VSR markings (e.g. VSR 332), which I assume are owned by V&S (see Pictures 3 and 4)

The rail removal machine was unmarked, but it appears to be very similar to one featured on the web site of A&K Materials, Inc. (which is affiliated with V&S) and shown below:<sup>1</sup>

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<sup>1</sup> See <http://www.akrailroad.com/track-removal>. V&S and A&K share the same corporate address with V&S (i.e., 1505 South Redwood Road, Salt Lake City, Utah 84130) and V&S, in its Reply dated October 30, 2014 in this docket describes A&K as an “affiliate” (Reply at page 5).

### A&K Rail Removal Machine



As far as I could tell, the rail racks on the cars were all empty and it appeared that the rails were still in place in that section of the line. However, the signs were clearly evident to me that V&S was intending to harvest the rail. In the town of Haswell and other locations, I observed many areas where most of the pins had been pulled and many of the tie plates removed in preparation for the removal of the rail. (see, for example, Picture 5). While stopping for gas in Haswell, the operator of the local gas station confirmed for me that crews had been through town over the summer pulling pins.

VERIFICATION

The foregoing statement is true and accurate to the best of my belief and knowledge.



Gerald W. Fauth, III

Subscribed and sworn to before me this 23 day of December 2014.

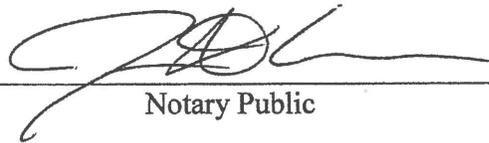
County/City of Alexandria

Commonwealth of Virginia

The foregoing instrument was subscribed and sworn before me this 23rd day of Dec. 2014

by Juan Cam Notary Public

My commission expires 9/30/18



Notary Public

My commission expires: 9/30/18



**STATEMENT  
OF  
BACKGROUND, QUALIFICATIONS AND EXPERIENCE  
OF  
GERALD W. FAUTH III**

My name is Gerald W. Fauth III. I am President of G. W. Fauth & Associates, Inc. (GWF), an economic consulting firm with offices at 116 S. Royal Street, Alexandria, Virginia 22314. I am a recognized expert on transportation issues with over 35 years experience in the private sector and in the Federal government.

This statement generally describes my background, qualifications and experience. The majority of experience has involved economic, regulatory, public policy and legislative issues primarily associated with, or related to, the U. S. railroad industry. Most of my work has involved regulatory proceedings and related projects before, or related to, the U.S. Surface Transportation Board (STB) and its predecessor, the Interstate Commerce Commission (ICC).

I have extensive experience in working in regulatory and other proceedings and projects involving railroad mergers, transactions, acquisitions, rail line construction, rail line abandonments, rate reasonableness and other railroad related issues. These matters have involved railroad issues on a nation-wide, system-wide and individual railroad line basis.

GWF has been engaged in the economic consulting business for over 50 years. My part time affiliation with GWF began in 1972. I began working for GWF on a full-time basis on May 15, 1978 and was employed by GWF continuously until November 1, 1999 at which time I took a leave of absence in order to take a position with the STB.

At the STB, I served as Chief of Staff for one of the three Board Members appointed by the President, Vice Chairman Wayne O. Burkes. I returned to GWF and consulting work effective June 23, 2003 after Mr. Burkes resigned his position to run for a political office.

Over the years, I have submitted expert testimony before ICC, STB, state regulatory commissions, courts and arbitration panels on a wide-variety of issues in numerous proceedings. In addition, I worked for 3½ years at the STB where I reviewed, analyzed and made recommendations on over 600 written formal decisions that were decided by the entire Board. These proceedings and decisions involved all matters of STB jurisdiction and had an impact on the transportation industry and the national economy.

Railroad transactions have long been the subject of ICC and STB regulatory proceedings and other matters involving: railroad merger and acquisition approval and oversight proceedings; railroad line abandonment proceedings; line sales; feeder line application proceedings; and other railroad transaction-related proceedings. I have been involved in numerous such proceedings and projects as an expert witness and as an STB staff advisor.

For example, I was an expert witness in the last two major Class I railroad merger proceedings: STB Finance Docket No. 32760, Union Pacific Corporation, et al. – Control and Merger – Southern Pacific Rail Corporation, et al. and STB Finance Docket No. 33388, CSX Corporation, et al., Norfolk Southern Corporation, et al. – Control and Operating Leases / Agreements – Conrail, Inc., et al. My testimony in these major merger proceedings concerned the potential adverse competitive impact of these mergers on two key areas.

In addition to my work in major railroad merger proceedings, I have submitted expert testimony in other railroad finance docket and abandonment proceedings before the ICC and STB. In these proceeding, I have developed and submitted evidence relating to the impacted railroad traffic and the valuation and economics of the railroad line at issue (such as: going concern and net liquidation values; freight revenues and traffic; operating costs; maintenance costs; right-of-way valuation; etc).

In addition to my testimony in railroad mergers and other rail finance and transaction proceedings, I served as an original member of the Conrail Transaction Council, which was established by the Board in Finance Docket No. 33388. This council consisted of representatives of the CSX, NS and shipper organization and provided a forum for timely and efficient communication of information and problems concerning the transaction. I was one of the original members of the Conrail Transaction Council and attended every meeting of the council until my employment with the Board.

During my time at the Board, I was actively involved in the STB merger oversight proceedings associated with the UP/SP and Conrail transactions. Perhaps the most significant merger-related proceedings that I was involved in during my time at the Board were STB Ex Parte No. 582, Public Views on Major Rail Consolidations and STB Ex Parte No. 582 (Sub-No.1), Major Rail Consolidation Procedures. These STB major rulemaking proceedings involved extensive oral hearings and written testimony from hundreds of witnesses.

The Board concluded that its existing rules governing railroad mergers and consolidations, which had been developed nearly 20 years earlier, were not adequate for addressing the broad concerns expressed and initiated a major rulemaking proceeding which resulted in a major revision to the Board's railroad merger rules.

I have a significant amount of experience in issues involving railroad rate reasonableness. I was actively involved in the initial ICC regulatory proceedings over 30 years ago in which the ICC first proposed and established guidelines which have since evolved into the STB's current railroad rate reasonableness guidelines. I was actively involved in several of the first cases to test the ICC's then proposed guidelines. For example, I was the primary expert witness in ICC Docket No. 40073, South-West Railroad. Car Parts Co. v. Missouri. Pacific Railroad, which was the *first* case to test the ICC's proposed simplified guidelines, which have since evolved into STB's Three-Benchmark approach.

I submitted extensive written and oral testimony in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards For Rail Rate Cases, on behalf of a group of 30 major stakeholders and my testimony was cited by the Board in its decision served September 5, 2007. My work and testimony in these ICC/STB proceedings has helped shape the STB's current railroad rate reasonableness guidelines.

I have extensive experience in working in STB regulatory proceedings, litigation and other projects involving railroad valuation issues. These matters have involved railroad valuation issues on a nation-wide, system-wide, individual line and individual movement scope and basis.

Many of our projects have involved the development of railroad variable cost analyses based on the application of URCS and its predecessor, Rail Form A (RFA). URCS is used to determine STB jurisdiction and is an integral component of the STB's Full-SAC method, new Simplified-SAC standard and recently modified Three-Benchmark approach. I have an extensive working knowledge of the development and application of URCS and RFA. I have prepared URCS cost analyses for thousands of individual railroad movements. I also submitted expert testimony in ICC Ex Parte No. 431 (Sub-No.1), Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for Regulatory Costing Purposes and more recently in STB Ex Parte No. 431 (Sub-No. 3), Review of the Surface Transportation Board's General Costing System.

Proceedings before the Board often involve traffic and market analyses using the Board's Waybill Sample, which is a computer database of approximately 600,000 records of sampled railroad movements. I am extremely familiar with this railroad traffic database. Over the years, I have performed hundreds of analyses using this data which has been used as evidence in merger and other proceedings before the Board.

I am a 1978 graduate of Hampden-Sydney College in Hampden-Sydney, Virginia where I earned a Bachelor of Arts degree. My major areas of study were history and government. My senior paper in college dealt with the History of Railroad Deregulation. I am a 1974 graduate of St. Stephen's School for Boys (now St. Stephen's and St. Agnes School), located in Alexandria, Virginia. My senior project and paper in high school dealt with the ICC and the Energy Crisis of 1973.

My professional memberships included the Transportation Research Forum and the Association of Transportation Law Professionals.

**Pictures From Gerald W. Fauth III's  
12/02/14 to 12/03/14 Inspection of Towner Railroad Line**

**Picture 1  
Locomotive SMNR 3518**



**Pictures From Gerald W. Fauth III's  
12/02/14 to 12/03/14 Inspection of Towner Railroad Line**

**Picture 2  
A&K Rail Removal Machine**



**Pictures From Gerald W. Fauth III's  
12/02/14 to 12/03/14 Inspection of Towner Railroad Line**

**Pictures 3 and 4  
VSR Flat Cars with Rail Racks**



**Pictures From Gerald W. Fauth III's  
12/02/14 to 12/03/14 Inspection of Towner Railroad Line**

**Picture 5  
Picture of Rail With Pins and Tie Plates Removed**



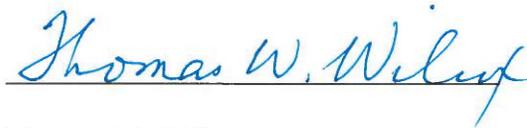
**CERTIFICATE OF SERVICE**

I do hereby certify that on this 23rd day of December 2014, I have served a copy of the foregoing Supplement to Motion for Preliminary Injunction on counsel for Defendant by first class mail to:

Gregory E. Goldberg  
Sean M. Hanlon  
Holland & Hart LLP  
Post Office Box 8749  
Denver, CO 80201-8749  
Tel. (303) 295-8270

and by email and hand-delivery to:

Fritz Kahn  
Fritz R. Kahn, P.C.  
1919 M Street, NW (7th fl.)  
Washington, DC 20036  
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Thomas W. Wilcox