

ENTERED
Office of Proceedings
December 16, 2014
Part of
Public Record

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

Docket No. NOR 42140

COMPLAINANTS' MOTION TO COMPEL DISCOVERY

Pursuant to 49 C.F.R. §1114.31, Colorado Wheat Administrative Committee (“CWAC”), Colorado Association of Wheat Growers (“CAWG”) Colorado Wheat Research Foundation (“CWRF”) and KCVN, LLC (“KCVN”) (together “Complainants”), hereby move for an order compelling Defendant V&S Railway, LLC (“V&S”) to respond to the Complainants’ First Discovery Requests served on V&S on November 21, 2014, appended hereto as Attachment 1, and to grant other relief set forth herein below. In support thereof, Complainants demonstrate as follows:

On October 28, 2014, Complainants filed a Complaint in this docket alleging that V&S violated 49 USC §10903 and §11101 by beginning to dismantle, remove, and sell railroad track

assets of an approximately 121.9 mile line of a railroad in Colorado owned by V&S known as the "Towner Line" without first seeking abandonment authority from the Board (the "Complaint"). Concurrently, Complainants submitted with the Board a Motion for Emergency and Preliminary Injunctive Relief, requesting that the Board issue an order enjoining V&S from dismantling and removing the tracks and related assets of the "Western Segment" of the Towner Line until the Board reviews and rules on the Complaint (the "Motion"). On October 31, 2014, the Board issued a decision that granted Complainants' Motion to the extent it asked for emergency relief, and enjoined V&S from dismantling the track or related assets of the Western Segment. The Board took no other action in that decision.

Since filing a reply to Complainant's Motion on October 30, 2014, V&S has refused to comply with the Board's rules governing the processing of formal complaints. First, V&S intentionally did not file an answer to the Complaint. Second, V&S refused to engage in a discussion of procedural and discovery issues pursuant to 49 C.F.R. §1111.10(a). This forced Complainants to file a Report Pursuant to 49 C.F.R. §1111.10(a) and Motion for Establishment of Procedural Schedule ("Schedule Motion") on December 5, 2014, to which V&S has yet to reply. Third, counsel for V&S informed counsel for Complainants that V&S would not respond to Complainants' First Discovery Requests, served on November 21, 2014 because V&S deemed the requests to be "premature." *See* correspondence appended as Attachment 2 to the Schedule Motion. Complainants requested that V&S respond to their First Discovery Requests by December 11, 2014, but that date passed without any responses or objections from V&S being received.

V&S has no justification for refusing to respond to Complainants' discovery requests, and it has offered none, except for its obviously wrong position that the Board's October 31 decision

granting Complainants' request for emergency relief somehow stayed all actions by the parties in this complaint proceeding. Pursuant to the Board's rules of procedure, a party may obtain discovery "regarding any matter, not privileged which is relevant to the subject matter involved in a proceeding." 49 CFR §1114.21. All of Complainants' discovery requests are clearly relevant to the issues presented by their Complaint. The requests were timely served, and V&S was given more than the required 15 days to respond with either objections or responses. The Board has previously found the failure to answer discovery requests "not sufficient to satisfy a party's discovery obligations" and held that it expects parties to comply with discovery requests in a "prompt and forthright manner." See *Ocean Logistics Management, Inc. v. NPR, Inc. and Holt Cargo Systems, Inc.*, 2000 WL 28235 (STB Served January 14, 2000). *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, 2000 WL 1616612 (STB Served October 27, 2000).

In light of foregoing, Complainants hereby respectfully request that the Board issue an order granting the following relief, and for such other relief as the Board deems just and appropriate under the circumstances:

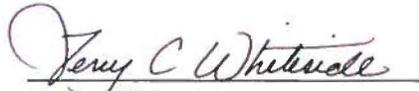
(a) That Complainants' Requests for Admission are deemed admitted pursuant to 49 C.F.R. §1114.27(a) because V&S failed to serve any written answers or objections to them within 15 days of their service;

(b) Compelling V&S to immediately provide complete answers to all of Complainants' written interrogatories and responses to Complainants' document requests pursuant to 49 C.F.R. §1114.31, and that V&S has waived any objections to such requests; and

(c) Requiring V&S, pursuant to 49 C.F.R. §1114.31(d), to pay the reasonable expenses of Complainants, including attorneys fees, associated with the preparing and filing of

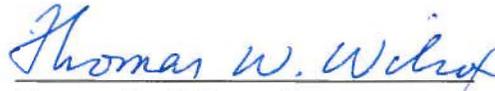
this motion, since V&S's failure to respond to Complainant's discovery requests was clearly willful, and without any justification.

Respectfully submitted,



Terry Whiteside
Registered STB Practitioner
Whiteside & Associates
3203 Third Avenue North, Suite 301
Billings, MT 59101
(406) 245-5132

*Representative for CWAC, CAWG
and CWRP*



Thomas W. Wilcox, Esq.
Svetlana Lyubchenko, Esq.
GKG Law, P.C.
Canal Square
1054 31st Street, N.W., Suite 200
Washington, DC 20007
(202) 342-5248

Counsel for KCVN, LLC

December 16, 2014

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)

COMPLAINANTS' FIRST DISCOVERY REQUESTS

Complainants Colorado Wheat Administrative Committee (“CWAC”), Colorado Association of Wheat Growers (“CAWG”) Colorado Wheat Research Foundation (“CWFR”) and KCVN, LLC (“KCVN”) (together “Complainants”) hereby serve their First Discovery Requests upon Defendant V & S Railway, LLC (“V & S”) pursuant to 49 C.F.R. Part 1114. Responses and responsive documents, as well as any objections, must be delivered by December 11, 2014 to counsel for KCVN, LLC, Thomas W. Wilcox and Svetlana V. Lyubchenko, GKG Law, P.C., 1054 31st Street, N.W., Suite 200, Washington, DC 20007, and also to Mr. Terry Whiteside,

Whiteside & Associates, 3203 Third Avenue North, Suite 301, Billings, Montana, 59101, representative of CWAC, CAWG, and CWFR.

INSTRUCTIONS

1. The Requests for Admissions, Written Interrogatories and Document Requests ("Requests") call for all non-privileged information which is in the possession, custody, or control of Defendant and its affiliates, subsidiaries and counsel.

2. Where a Request has a number of separate subdivisions, or related parts or portions, a complete response is required to each part or portion. Any objection to a Request should clearly indicate the subdivision, part, or portion of the Request to which it is directed.

3. Each Request shall operate and be construed independently, and, unless otherwise indicated, no Request limits the scope of any other Request.

4. Words used in the singular shall include the plural and words used in the plural shall include the singular, whenever the context permits. Terms such as "and," "or," or "including" shall be construed in the broadest and most inclusive manner, in the disjunctive or conjunctive as necessary, in order to call for all responsive information without limitation.

5. References to the present tense shall be construed to include the past tense, and references to the past tense shall be construed to include the present tense, as necessary to bring within the scope of each Request all documents that might otherwise be construed to be outside the scope of the Request.

6. If Defendant believes that any request or definition or instruction applicable thereto is ambiguous, it should set forth the language that it believes is ambiguous and the interpretation that it is using in responding to the Request.

7. If any document covered by a Request is withheld for whatever reason, including any privilege, Defendant shall furnish a written document identifying all withheld documents in the following manner:

- a. the specific Request to which the document is responsive;
- b. the date of the document;
- c. the name of each author or preparer;
- d. the name of each person who received the document and the name of such person's employer at the time the person received the document;
- e. a brief description of the subject matter of the document and any withheld attachments or appendices;
- f. the specific factual and legal basis for withholding; and
- g. the number of pages withheld.

8. Each document produced shall be an authentic original document or a true duplicate of an authentic original document.

9. These Requests cover the period from December 1, 2005 to the date you serve your response, unless otherwise indicated.

10. All Requests are continuing and amended or supplemental responses shall be provided if and when responsive new information and documents are discovered by Defendant.

11. Identify all persons who provided information for each response.

DEFINITIONS

“Acquisition Petition” means the filing made by Defendant in STB Docket No. FD 35664 on August 15, 2012, seeking the Board’s authorization to purchase the Towner Line and to have approval of the purchase made retroactive to December 29, 2005.

“Document” means all writings in any form whatsoever, including but not limited to letters, electronic mail, memoranda, reports, agendas, hand-written materials and meeting notes. The term “documents” also includes all drafts of all writings in any form whatsoever.

“Eastern segment” means the 38-mile segment of the Towner Line between MP 749.5 and MP 787.5.

“Identity” or “Identify” means to state the name, employer, and title of the subject of the request.

“Middle segment” means the 20.8-mile segment of the Towner Line between MP 808.3 and MP 787.5.

“Possession, custody or control” means any document or other information that is within the possession or control of a defendant or any of its employees, agents, or affiliates or subsidiaries and their employees.

“Rail Track Material” means railroad track, ties, spikes, tie plates and other materials typically utilized to construct a freight railroad line of rail, either together or individually.

“Refer or relate” means to have any direct or implied reference or relationship to any subject matters to which such phrase is applied.

“Towner Line” means the Class III railway located in eastern Colorado and running through Kiowa, Otero and Crowley Counties, extending approximately 121.9 miles between milepost 747.5 near Towner on its eastern terminus, and milepost 869.4 near NA Junction, an interchange with BNSF Railway, on its Western terminus.

“You or your” means Defendant or any of its affiliates and consultants. The terms “you,” “your,” and any other nouns or pronouns shall be gender inclusive.

“Western segment” means the 60.2 miles of the Towner Line between MP 868.5 and MP 808.3 near Haswell, Colorado.

REQUESTS FOR ADMISSION

1. Please admit that by the time KCVN submitted its offer to purchase the Towner Line on July 28, 2014, Defendant and/or its affiliate, A&K Railroad Material, Inc. had already been having discussions with third parties about selling the Rail Track Material making up the Towner Line.

2. Please admit that between the time KCVN submitted its offer to purchase the Towner Line on July 28, 2014 and the end of August, at the earliest, Defendant and/or its affiliate, A&K Railroad Material, Inc. had already been engaged in activities to prepare the rail line for dismantlement, including but not limited to, removing spikes and/or tie plates and other activities from the rail track making up the Towner Line.

WRITTEN INTERROGATORIES

1. Please identify all persons who participated in any and all discussions, negotiations, or decision-making regarding selling the Rail Track Material of any portion of the Towner Line.

2. Please provide the names of any third party consultant that Defendant has retained to conduct any valuation of the Towner Line, the underlying land and the Rail Track Material making up the Towner Line.

3. Please identify all persons who have been in contact with Defendant regarding purchasing the Rail Track Material of the Towner Line, whether or not such persons contracted with Defendant to purchase the Rail Track Material.

4. Please identify all persons who have contacted Defendant with requests for transportation over the Towner Line in the past three years, including all persons who requested quotes for such transportation.

5. Please identify all persons employed by Defendant and/or its affiliates who participated in any and all discussions, negotiations, or decision-making regarding selling the Rail Track Material of the Towner Line.

6. Please describe the corporate relationship between Defendant and A&K Railroad Material, Inc., and the interrelationship between Defendant and A&K Railroad Material, Inc. when it comes to the acquisition, operation, and disposition of common carrier lines of rail.

7. Please provide the total amount of Defendant's maintenance expenditures in 2011, 2012, 2013, and 2014 to date, for each segment of the Towner Line, specifically, the Western Segment, the Eastern Segment, the Middle Segment, and the portions of the track on either end that were not included in either the Western or Eastern Segments.

8. Please provide a description of all actions Defendant took to formally abandon the Western Segment after August 15, 2012, when Defendant informed the STB in the Acquisition Petition that it expected to seek authority to abandon the Western Segment "in the near future."

9. Please provide the date on which Defendant first discussed selling the Rail Track Material of the Western Segment to any potential purchaser.

10. Please provide a listing of all acquisitions of common carrier lines of rail by A&K Railroad Material, Inc. Defendant, and any other affiliate of A&K Railroad Material, Inc. over

the past 10 years, and indicate (1) how many of the acquired lines of rail are currently operated in common carrier service, either by Defendant or another railroad operator; (2) how many of the lines were abandoned by Defendant or an affiliate pursuant to 49 U.S.C. §10903 and the applicable regulations; (3) whether any of the Rail Track Material of the acquired lines of rail were sold and removed subsequent to the acquisition and, if sold and removed, and how much of the assets identified were re-used and how much of the assets were sold for scrap or otherwise disposed of.

11. Please provide a detailed description of all actions that have been taken by Defendant and its affiliate A&K Railroad Material, Inc. associated with the removal of any Rail Track Materials from any segment of the Towner Line, and a complete listing of all Rail Track Materials that have been removed from the Towner Line by Defendant and/or its affiliates since the Towner Line was purchased by Defendant in December, 2005.

DOCUMENT REQUESTS

1. Please produce all documents relating to, discussing, referring to, or commenting on Defendant's purchase of the Towner Line in 2005.

2. Please produce all documents relating to, discussing, referring to, or commenting on that Defendant utilized, and/or relied upon for establishing the valuation of the Towner Line when the Defendant purchased it in 2005.

3. Please provide all documents relating to, discussing, referring to, or commenting on the Acquisition Petition, both before and after it was filed.

4. Please provide all documents relating to, discussing, referring to, or commenting on the decision to seek discontinuance authority from the STB for the Western Segment.

5. Please provide all documents relating to, discussing, referring to, or commenting on Defendant's plans, and actions taken, to abandon:

- a. The Western segment;
- b. The Eastern segment; and
- c. The Middle segment.

6. Please provide all documents comprising, relating to, responding to, discussing, or referring to any requests by a rail shipper for rail service from Defendant over any portion of the Towner Line between December 1, 2005 to date, including any and all communications from prospective, current and former shippers, quotes of transportation rates and any and all discussions relating to providing rail transportation service over the Towner Line. Such information to include, but not be limited to:

- a. All requests for rates and service terms
- b. All internal discussions of Defendant about how to respond to such requests;
- c. Summaries of commodities and volumes transported by Defendant over the Towner Line as a result of such requests.

7. Please provide all documents relating to, discussing, referring to, or commenting on the letter of counsel of Kiowa County, Colorado to Defendant, sent on August 22, 2014, requesting that Defendant cease and desist the removal of Rail Track Material from the Towner Line.

8. Please provide all documents relating to, discussing, referring to, or commenting on the potential or actual sale of the Rail Track Material of the Towner Line to A&K Railroad Material, Inc. or any other purchaser.

9. Please provide all documents relating to, discussing, referring to, or commenting on dismantling and removing of any Rail Track Material of the Towner Line.

10. Please provide all documents relating to, discussing, referring to, or commenting on:

- a. 0.9 miles of the Towner Line from MP 868.5 to MP 869.4; and
- b. 2 miles of the Towner Line between MP 749.5 and the eastern terminus at MP 747.5.

11. Please provide all documents relating to, discussing, referring to, or commenting on any valuation prepared for the Towner Line and its Rail Track Material, including any valuation of the underlying land and track assets.

12. Please provide all documents relating to, discussing, referring to, or commenting on the "contractual obligation of July 16, 2014" between A&K Railroad Material, Inc. and OmniTRAX, Inc., referenced on page 5 of Defendants Reply filed in this proceeding on October 30, 2014, including but not limited to, all correspondence between A&K Railroad Material, Inc. and OmniTRAX, Inc. pertaining to the "contractual obligation," and a copy of the final document evidencing the obligation.

13. Please provide all documents relating to, discussing, referring to, or commenting on KCVN's July 28, 2014 offer to purchase the Towner Line, including but not limited to all documents that discuss Defendant's possible responses to that offer, and its final response.

14. Please provide all documents referring or relating to the August 11, 2014 agreement between A&K Railroad Material, Inc. and Great Western Railway, Inc. referenced at page 5 of Defendants Motion to Dissolve Temporary Restraining Order, filed in Civil Action No. 1:14-cv-02450-CBS in the U.S. District Court for the District of Colorado; including but not limited to the following:

- a. All drafts of the agreement and the final executed agreement;
- b. All documents that demonstrate how and when A&K Railroad Material, Inc. acquired ownership of, or a sufficient interest in, the "tracks and asso-

ciated equipment" of the Western Segment from Defendant such that A&K Railroad Material, Inc. could enter into a contract with a third party for their sale;

- c. All correspondence between Defendant and Great Western Railway, Inc., concerning the August 11, 2014 contract;
- d. All correspondence between A&K Railroad Material, Inc. and Great Western Railway, Inc., concerning the August 11, 2014 contract.

15. Please provide all documents, including but not limited to all email and other correspondence, between Defendant and Great Western Railway; and between A&K Railroad Material, Inc. and Great Western Railway discussing, referring to, or relating to:

- a. any segment of the Towner Line, and
- b. Defendant's plans concerning ownership and operation of any segment of the Towner Line

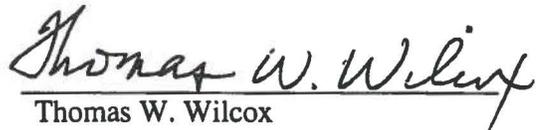
16. Please provide all documents supporting the answers provided to Written Interrogatories 1-11.

Respectfully submitted,



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Attorneys for KCVN

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of November, 2014, I have served a copy of the foregoing Complainants' First Discovery Requests 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
Tel.: (202) 263-4152


Thomas W. Wilcox

Thomas W. Wilcox

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