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SURFACE TRANSPORTATION BOARD

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Docket No. NOR 42140

COLORADO WHEAT ADMINISTRATIVE COMMITTEE,  
COLORADO ASSOCIATION OF WHEAT GROWERS,  
COLORADO WHEAT RESEARCH FOUNDATION  
AND KCVN, LLC

v.

VAND S RAILWAY, LLC

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REPLY  
OF  
V AND S RAILWAY, LLC

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Dated: October 30, 2014

SURFACE TRANSPORTATION BOARD

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REPLY  
OF  
V AND S RAILWAY, LLC

V and S Railway, LLC (“V&S”), pursuant to 49 C.F.R. § 1104.13(a), replies to the Complaint and Motion for Emergency and Preliminary Injunctive Relief filed October 28, 2014, by the Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation<sup>1</sup> and KCVN, LLC, as follows:

KCVN, LLC<sup>2</sup> having been denied injunctive relief by the U.S. District Court for the District of Colorado last week<sup>3</sup>, now seeks a stay from the Board pursuant to 49

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<sup>1</sup> Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers and Colorado Wheat Research Foundation (hereinafter referred to as “the wheat interests”) purport to be represented by Mr. Terry Whiteside, claiming to be a registered STB practitioner. He is not a lawyer, and his Vitae fails to indicate that he ever was admitted to practice before the Board, pursuant to 49 C.F.R. § 1103.3

<sup>2</sup> The wheat interests were parties in neither the case brought by KCVN, LLC before the District Court, Crowley County, Colorado nor in the removed case before the U.S. District Court for the District of Colorado.

<sup>3</sup> Relevant portions of the transcript of the hearing before the U.S. District Court for the District of Colorado are attached as Exhibit 1.

U.S.C. § 721(b)(4). Plaintiffs do not cite – and cannot cite – a single Board proceeding in which the Board granted a stay to prevent irreparable harm arising from an alleged unauthorized railroad line abandonment or an alleged failure by a rail carrier to provide transportation or service on reasonable request.

In Docket No. FD 35496, Denver & Rio Grande Railway Historical Foundation – Petition for Declaratory Order (STB, served September 12, 2014, slip op. p. 2), the Board held, “A party seeking a stay must establish (1) there is likelihood that it will prevail on the merits of any challenge to the action sought to be stayed, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed, and (4) the public interest supports the granting of the stay [citations omitted].” Accord, Docket No. FD 35465, Autauga Northern Railroad, L.L.C.—Lease and Operation Exemption—Norfolk Southern Railway Company (STB, served March 18, 2011, slip op. pp. 2-3); Docket No. NOR 42104, Entergy Arkansas Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, et al. (STB, served April 25, 2011, slip. op. p. 2.) Complainants fail to make the required showing for a stay.

The Towner Line, extending generally between Towner, Colo., near the Kansas border, and NA Junction, near Pueblo, Colo., was constructed late in the 19<sup>th</sup> century by the Missouri Pacific Railroad Company (“MoPac”). The Union Pacific Railroad Company (“UP”) acquired control of the MoPac pursuant to the authorization of the Interstate Commerce Commission (“ICC”) in Union Pacific—Control—Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982). The UP abandoned the MoPac’s Towner Line following the Board’s authorization in Docket No. AB-3 (Sub-No. 130), Missouri Pacific

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Railroad Company—Abandonment—Towner—NA Junction Line in Kiowa, Crowley and Pueblo Counties, CO, one of the transactions included in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996). Following its abandonment, UP sold the Towner Line to the State of Colorado Department of Transportation (“CDOT”). CDOT sought to find a buyer, and neither KCVN, LLC nor the wheat interests contacted CDOT to offer to buy the Towner Line. Finding no buyer for the Towner Line, CDOT agreed to lease it with option to purchase to a short line rail carrier. Docket No. FD 33587, Colorado, Kansas & Pacific Railway Company—Lease, Operation, and Future Purchase Exemption—Colorado Department of Transportation (STB, served April 7, 2000). Within five years’ time CDOT had had enough of the Colorado, Kansas & Pacific Railway Company, and sought to find another operator for the Towner Line. Again, neither KCVN, LLC nor the wheat interests indicated that one or the other might be interested in buying the Towner Line from CDOT.

It took V&S to succeed the Colorado, Kansas & Pacific as the operator of the Towner Line pursuant to the Board authorization. Docket No. FD 34779, V & S Railway, Inc.—Acquisition and Operation Exemption—Rail Line of Colorado, Kansas & Pacific (STB, served December 30, 2005). Neither KCVN, LLC nor the wheat interests participated in the proceeding to protest V&S’ assumption of operations of the Towner Line. V&S in fact had purchased the Towner Line from CDOT, an acquisition approved by the Board in Docket No. FD 35664, V&S Railway Line—Acquisition and Operation Exemption—Colorado Department of Transportation (STB, served November 13, 2012). Again, neither KCVN, LLC nor the wheat interests participate in the proceeding to object to V&S’ ownership of the Towner Line.

In the fourteen and a half years that V&S has operated the Towner Line it did not receive a single carload of fertilizer or other freight consigned to KCVN, LLC or any one of the 500 farmers that Mr. Darrell L. Hanavan on behalf of the wheat interests maintains have an interest in service on the Towner Line. In the fourteen and a half years that V&S has operated the Towner Line not a single carload of wheat or other grain was tendered to V&S for transportation on the Towner Line by KCVN, LLC or any one of the 500 farmers cited by Mr. Hanavan.<sup>4</sup>

In the meantime, V&S sought and obtained the Board's authorization to discontinue rendering service between Milepost 808.3 near Haswell and Milepost 868.5 near NA Junction, sometimes referred to as the Western Segment of the Towner Line.<sup>5</sup> Docket No. AB 603 (Sub-No. 2X), V & S Railway, LLC—Discontinuance of Service Exemption—in Pueblo, Crowley and Kiowa Counties, Colo. (STB, served June 28, 2012). Once more neither KCVN, LLC nor the wheat interests participated in the proceeding to try to persuade the Board to disallow the proposed discontinuance of service. Neither KCVN, LLC nor the wheat interest, pursuant to 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27, made an offer of financial assistance to postpone the discontinuance of service on the railroad line.

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<sup>4</sup> In his Declaration, attached as Exhibit 2, V&S Assistant Vice President Aaron Parsons states that there has been no freight shipment on the Western Segment of the Towner Line since he began working for V&S in May 2007.

<sup>5</sup> At page 5 of their Complaint, Complainants allege that in the acquisition proceeding V&S said that in the discontinuance proceeding it had “sought the Board’s authorization to discontinue service on the western portion of the Towner Line, between NA Junction and Haswell”. In fact, the Notice of Exempt Discontinuance had correctly stated that the discontinuance was being sought between Milepost 808.3 near Haswell and Milepost 868.5 near NA Junction.

It was shortly thereafter that the affiliate of V&S, A&K Railroad Material, Inc., negotiated with an old client OmniTRAX, Inc., to provide much needed rail to its subsidiary, Great Western Railway of Colorado, LLC, and to fulfill its contractual obligation of July 16, 2014, V&S began removing the rail and track materials from the railroad line over which V&S had been authorized by the Board to discontinue rendering service. At page 2 of their Complaint, Complainant falsely state that V&S was “tearing up and selling for scrap the tracks and other track assets” of the discontinued line. To the contrary, it began removing the rail and track materials to rehabilitate and improve the railroad lines of another rail carrier serving shippers in Colorado.

At page 2 of their Complaint, Complainants maintain that on July 28, 2014, KCVN, LLC offered to purchase the entire Towner Line for \$10 million. They, however, fail to mention that V&S subsequently made a counter offer to KCVN, LLC to sell the Towner Line for its appraised value, almost three times greater than what KCVN, LLC had offered to pay, and costs incurred, a counter offer promptly rejected by KCVN, LLC.

At page 8 of their Complaint, Complainants allege, “V&S has made no attempt in the past three years to reactivate rail service over the entire Towner Line despite the fact that there is a demand for rail service from farmers along the line.” V&S is mindful of its obligation as a rail carrier to render transportation or service in response to a reasonable request. No one, however, including KCVN, LLC and the wheat interests, at any time filed a complaint with the Board that V&S was failing to satisfy the requirements of 49 U.S.C. § 11101(a). Complainants continue with the assertion “that V&S has responded to recent requests for rail service from wheat producers by establishing rates at prohibitively high levels in order to discourage rail service being reinstated over the

Towner Line.” V&S is mindful as well of its obligation as a rail carrier to maintain reasonable common carrier rates on nonexempt commodities. Once again however, no one, including KCVN, LLC and the wheat interests, at any time lodged a complaint with the Board that V&S was assessing rates greater than is permissible pursuant to 49 U.S.C. §§ 10701 & 10702.

Even today, if Complainants really believed that V&S were rendering inadequate service to shippers on the Towner Line, they are free to file an application under the feeder line provisions of 49 U.S.C. § 10907 and 49 C.F.R. § 1151.1, et seq. Obviously, they have not done so.

The essence of Complainants’ grievance is that V&S removal of the rail and track materials from the railroad line on which service had been discontinued constituted an unauthorized abandonment, in violation of 49 U.S.C. § 10903(a).

KCVN, LLC chose to bring an action before the District Court, Crowley County, Colorado, alleging in its Complaint, among other things, “Despite not having abandonment or exemption approval from the Board, [V&S] began dismantling the Towner Line by removing spikes, tieplates, and other material. This is an act of abandonment, and illegal because a railroad subject to the jurisdiction of the Board cannot abandon a railroad without securing abandonment authorization from the Board.” In response, the court entered an *ex parte* temporary restraining order.

That KCVN, LLC should have gone to a state court to seek relief from an alleged violation of 49 U.S.C. § 10903(a) is absolutely astonishing and reprehensible. Congress by the Transportation Act of 1920 vested the ICC with the authority to authorize the abandonment of a railroad’s lines. In Chicago & N.W.Tr.Co. v. Kalo Brick & Tile, 450

U.S. 311, 319-321 (1981), the Supreme Court declared in unequivocal terms that the regulatory agency's authority over the abandonment of rail lines is exclusive and plenary. See, Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10<sup>th</sup> Cir. 1996), cert. den., 521 U.S. 1104 (1997). Obviously, that jurisdiction, pursuant to 49 U.S.C. § 10501(b), now is vested exclusively in the Board.

Moreover, Complainants are dead wrong in maintaining that the removal of rail and track materials from a railroad line on which service has been authorized by the Board to be discontinued constitutes an abandonment in violation of 49 U.S.C. §10903(a) in the absence of Board abandonment authorization. The ICC and Board's decisions are to the contrary. In Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 790 (1992), aff. sub. nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994), the ICC said, “[W]e recently addressed the status of a rail line unused for 15 years. In holding that the track's use as part of a line haul rail operation prior to the unauthorized cessation of service made it a railroad line subject to our abandonment regulations, we stressed the well established principle that a carrier cannot escape our abandonment jurisdiction simply by terminating service or removing track [citation omitted].” In Docket AB 1081X, San Pedro Railroad Operating Company, LLC—Abandonment Exemption—in Cochise County, AZ (STB, served April 13, 2006, slip op., p. 4), the Board stated, “The fact that some tracks were taken up and portions of the line was salvaged is immaterial. Merely removing track materials does not constitute an abandonment [citations omitted].” In Docket FD 34869, Honey Creek Railroad, Inc.—Petition for Declaratory Order (STB, served June 4, 2008, slip op. p. 6), the Board said, “We disagree that [petitioner's] line of railroad should be abandoned because of the

removal of some track. It is well-settled that a line of railroad can be abandoned only pursuant to Board authority. A rail carrier cannot bypass this requirement by unilaterally removing track [footnote omitted].”

Complainants have not cited – and cannot cite – a single Board decision to the contrary.

Complainants now seek from the Board what KCVN, LLC unsuccessfully tried to secure by forum shopping tribunals, first the District Court, Crowley County, Colorado, and upon removal, the U.S. District Court for the District of Colorado, namely to secure an order for V&S to stop removing rails and track materials from the discontinued Western Segment of the Towner Line, between Milepost 808.3 near Haswell and Milepost 868.5 near NA Junction.<sup>6</sup> But as the Colorado federal judge said last week, Complainants “must now live with” the conscious decision not to participate in the Board procedures previously available to them. Transcript, p.63, line 10, citing Village of Logan (10 Cir. 20140. Rejecting the contention that V&S cannot remove track on the discontinued portion of the Western Segment, the judge said, “[T]hat’s not, sir, in fact consistent with the law. They can. They can, in fact, take action affecting rail property . . . [I]t’s a misstatement to suggest that while a railroads is operating [with] discontinuance authority they can’t remove track. They can.” Transcript, p. 19, lines 6-10, 12-14. As the federal judge noted, “It would be incorrect to say that removing spikes, tieplates, and other materials in and of itself constitutes an abandonment. That is not supported by the law.” Transcript, p. 55, lines 3-6.

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<sup>6</sup> No abandonment authority is being sought by V&S for any segment of the Towner Line, and the only rail and track materials that have been removed by V&S are from the segment of the Towner Line on which V&S discontinued operating pursuant to the Board’s authorization.

Complainants have failed to establish that they are entitled to a stay pursuant to 49 U.S.C. § 721(b)(4). The decision of the U.S. District Court for the District of Colorado and the uniform Board decisions render it evident that Complainants cannot prevail on the merits of their contention that removal of the rail and track materials from the discontinued segment of the Towner Line constitutes an unauthorized abandonment in violation of 49 U.S.C. § 10903(a). Nor can they prevail that they will suffer harm in the absence of a stay for at no time within the past fourteen and a half years have they been denied service by V&S in response to a reasonable request for service, in violation of 49 U.S.C. § 11101(a). As the Colorado federal judge held, it “*strains simple logic*” that (A) now more than two years after the Board’s discontinuance authorization, (B) having failed to participate in any of the Board’s proceedings involving V&S, and (C) after losing in federal court, Complainants seek “emergency” relief claiming “imminent” and “irreparable” harm. Transcript, p. 59, lines 13-23:

First of all . . . it’s undisputed that no shipper in the counties has used the railroad for the last four years. So this notion that they’ll be deprived the discontinuance of something they haven’t been using at all *strains simple logic* as well as fact on the ground. Similarly, the notion in the Complaint that [KCVN< LLC] wishes to purchase the Towner Line to continue railway operations for itself, again, the use of the word “continue” I think is a bit of a strain given the current facts

Complainants chose or failed to participate in any of the Board proceedings involving the V&S, the most relevant one for purposes their pleadings being the 2012 discontinuance authorization. The alleged unlawful removal of the rails and track materials of the segment of the Towner Line on which V&S no longer is operating pursuant to the authorization of the Board is, in actuality, KCVN, LLC’s effort to play “hardball” in negotiating to buy the Towner Line. Complainants’ refer to KCVN, LLC’s

\$10 million offer but in the “emergency” haste they neglect to mention that (A) the appraised net liquidation value of the Towner Line is \$26,951,300.00 and (B) V&S offered to sell the Towner Line to KCVN, LLC last week for \$29,731,300.00. KCVN, LLC’s response was, “This is singularly unconstructive. The offer is rejected.”

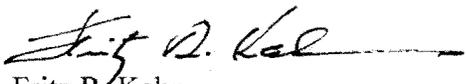
WHEREFORE, V and S Railway, LLC respectfully ask the Board to dismiss the Complaint of Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation and KCVN, LLC and to deny their Motion for Emergency and Preliminary Injunctive Relief.

Respectfully submitted,

V AND S RAILWAY, LLC

By their attorneys,

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Dated: October 30, 2014

**EXHIBIT 1**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Case No. 14-cv-02450-CBS

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KCVN, LLC,  
Plaintiff,  
vs.  
V&S RAILWAY, LLC  
Defendant.

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Proceedings before CRAIG B. SHAFFER, United States  
Magistrate Judge, United States District Court for the  
District of Colorado, commencing at 1:29 p.m., October 24,  
2014, in the United States Courthouse, Denver, Colorado.

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WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS  
ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

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APPEARANCES

LAWRENCE TREECE and HANNAH MISNER, Attorneys at  
Law, appearing for the plaintiff.

GREGORY GOLDBERG and SEAN HANLON, Attorneys at  
Law, appearing for the defendant.

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MOTION HEARING

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1 THE COURT: But that's all you've -- but that's  
2 all you've got.

3 MR. TREECE: No. We've got intent to abandon here  
4 coupled with what they're doing that is demonstrated by the  
5 -- the petitions to --

6 THE COURT: But they haven't -- but they haven't  
7 been approved yet and the problem --

8 MR. TREECE: Well --

9 THE COURT: -- the problem you've got, Mr. Treece,  
10 is right now you're essentially saying -- and this is one of  
11 my problems, too. But -- but in essence you're arguing  
12 because V&S has removed rails -- and it's not completely  
13 clear how much they've removed based on the record that  
14 you've created. Because they've removed some rails that  
15 somehow that equates to de facto abandonment. And the  
16 Surface Transportation Board doesn't stand for that prop --  
17 that -- they have not reached that conclusion. Right now all  
18 I've got is a segment, the Western Segment that is currently  
19 under discontinuation, and the Surface Transportation Board  
20 and the Courts recognize that while discontinuance is in  
21 effect rails can be removed. That's the -- that's the clear  
22 unassailable legal standards I've got here, folks.

23 MR. TREECE: But then when -- but then when you  
24 read those cases they say that removing rails with the intent  
25 not to resume service --

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1 surreply?

2 MR. TREECE: I'm not sure. Let -- let me while  
3 I've got it tell you what it says and then I'll try to find  
4 it.

5 THE COURT: Okay. I think you're looking at Page  
6 10. It's at the bottom of that second paragraph. It says a  
7 railroad cannot take actions affecting rail property without  
8 first seeking abandonment. That's not, sir, in fact,  
9 consistent with the law. They can. They can, in fact, take  
10 actions affecting rail property. Now, it says -- the bottom  
11 line is, you're right. Intent to abandon can be manifested  
12 through discontinuing, but it's a misstatement to suggest  
13 that while a railroad is operating on a discontinuance  
14 authority they can't remove track. They can.

15 MR. TREECE: Sometimes and sometimes not.

16 THE COURT: But, sir -- but --

17 MR. TREECE: Can I -- can I read further with you  
18 on Page 10 --

19 THE COURT: Sure.

20 MR. TREECE: -- and what the -- and what the Board  
21 says because what the Board says directly points out the  
22 problem we have here. In that case -- and it's on 10 and on  
23 11. It says what you said the Birt case says. Intent to  
24 abandon can be manifested through discontinuance of  
25 operations, salvage of the line, removing rails and other

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**EXHIBIT 1**

1 MR. TREECE: -- that they don't -- they don't ever  
2 deny that they're ripping up the line or that they intend to  
3 rip it up the line or that they would have kept ripping it up  
4 if the injunction hadn't -- they never denied that.

5 THE COURT: Sir, I'm -- what I'm saying is is what  
6 was represented to the state court judge is not factually  
7 supported by the record that accompanied this motion. It's  
8 not.

9 MR. TREECE: Well, that one paragraph, maybe not  
10 in terms of volumes.

11 THE COURT: I know. But -- but, sir, you can't  
12 get injunctive relief based solely on hyperbole.

13 MR. TREECE: Well, there's more than just that one  
14 paragraph and there's --

15 THE COURT: Not -- see, the funny thing is not  
16 really. Once I get past that introductory paragraph and  
17 start reading the factual allegations in the motion, and more  
18 importantly, when I go back and read the Complaint and the  
19 factual allegations in the Complaint the hyperbole in that  
20 first paragraph is striking. It is truly striking.

21 MR. TREECE: Well, on the record we presented --

22 THE COURT: What record?

23 MR. TREECE: -- and this -- before this -- well --

24 THE COURT: I'm talking about the record that this  
25 state court judge used because the reason --

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1 heard that before from anybody, including the defendant,  
2 so --

3 THE COURT: I understand, guys, but whether the  
4 defendant raises it or not, I -- I have an independent  
5 obligation to construe the rules.

6 MR. TREECE: Well, no, I get that. You know I get  
7 that.

8 THE COURT: So the -- so the difficulty that I  
9 have is -- don't misunderstand me, Mr. Treece. I would be  
10 the first one because I've read a whole stack of cases that  
11 talk about abandonment. I've read a whole stack of cases  
12 that discuss discontinuance. I understand absolutely  
13 unequivocally the distinction. The problem is is that every  
14 case that I have been able to get my hands on suggest that  
15 whether or not a railroad is abandoning is a multifactor  
16 analysis that ultimately is governed by the intent. Now,  
17 that raises an interesting question that I'm certainly not  
18 prepared to decide today. It raises an interesting question  
19 that might be fleshed out by discovery. But given the weight  
20 of the law, given the information that has been presented to  
21 me I cannot find that there's a substantial likelihood of  
22 success on the merits as this record currently exists.

23 MR. TREECE: Let me take one more try and then  
24 I'll --

25 THE COURT: Sure.

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1 that came out on August 25, 2014. It's found at 214 -- or  
2 2014 Westlaw 4178306, again, a Tenth Circuit decision,  
3 August 25, 2014. In the Village of Logan the Tenth Circuit  
4 wrote in order to receive a preliminary injunction the moving  
5 party must establish that it will suffer irreparable harm  
6 without the preliminary injunction, that is, in failing to  
7 grant the injunction -- that failing to grant the injunction  
8 will cause plaintiff to suffer an injury that is not merely  
9 serious or substantial, but certain, great, actual and not  
10 theoretical.

11 The Tenth Circuit has also said the party seeking  
12 injunctive relief must show that the injury complained is --  
13 is of such imminence that there is a clear and present need  
14 for equitable relief to prevent irreparable harm.

15 Now, if your client is growing wheat and if your  
16 client has been growing wheat, and if your client has been  
17 growing wheat without using the rail line to ship its wheat,  
18 and if your client has found alternative ways to get its  
19 wheat to market, then one can safely presume that it doesn't  
20 need the rail line. It does not need the rail line to ship  
21 its wheat. It might prefer to use the rail line. But we're  
22 talking about substantial and irreparable harm. I don't see  
23 how growing wheat and your client's desire to ship wheat  
24 creates imminent and irreparable harm. That's an economic  
25 issue.

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1 communicating by e-mail. He knew that --

2 MR. TREECE: Your Honor, he's the same guy.

3 THE COURT: No, it wasn't. It was not, sir. The  
4 lawyer in Washington --

5 MR. TREECE: Oh.

6 THE COURT: -- is not the lawyer who responded to  
7 the \$1,000, here's my earnest money. It was clear from the  
8 get-go that plaintiff or a lawyer for plaintiff knew exactly  
9 who the general counsel was in Salt Lake City, knew exactly  
10 how to reach that general counsel, knew -- should have known  
11 that there was no time gap between Colorado and Utah. It was  
12 absolutely possible to reach out to somebody closer than some  
13 lawyer in Washington, DC.

14 Now, I have concerns about the notice issue. I  
15 have concerns about the order issued by the state court judge  
16 and on that basis alone I would be inclined to grant the  
17 motion. But the bigger problem that I have with the TRO  
18 issued by the state court judge is this -- and I understand  
19 that this apparently was a date that he picked. But to -- to  
20 state that a temporary restraining order will expire on  
21 December 31, 2014, can't be squared with the rule at all, at  
22 all because the Rule 65 clearly says that a temporary  
23 restraining order is by definition a short-term remedy. It's  
24 limited by no more than 28 days. Now, as a practical matter  
25 the case law -- our research makes it clear that when a

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1       Transportation Board.

2                   It also appears to be undisputed in the spring of  
3       2014 V&S requested a legal opinion from its outside counsel  
4       as to whether it could remove the track and the rails from  
5       the Western Segment and its outside counsel, Mr. Krantz  
6       (phonetics), indicated in his opinion that V&S could. On  
7       August 27, 20 -- 2014, KCVN filed a lawsuit in the District  
8       Court for Crowley County, Colorado. That Verified Complaint  
9       alleges in pertinent part that plaintiff is a Delaware  
10      limited liability company with a principal office address in  
11      Austin, Texas. The Verified Complaint goes on to say,  
12      quote -- in paragraph 10, quote, "In 2014 defendant sought  
13      and obtained discontinuance, but not abandonment authority  
14      from the Board on the western portion of the Towner Line."  
15      As I said, it is undisputed that plaintiff did not  
16      participate in any way in the 2012 discontinuance proceeding,  
17      did not file a timely OFA, did not seek to intervene, did not  
18      file a timely challenge.

19                   The Verified Complaint goes on in paragraph 15.  
20      On July -- on June 4, 2014, defendant sent notices to the  
21      Board, the Surface Transportation Board and various other  
22      interested parties that it intended to file a notice of  
23      exemption for the segment of the Towner Line now known or  
24      we've referred to as the Middle Segment. The Verified  
25      Complaint goes on to say, quote -- in paragraph 17, quote,

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1 "Plaintiff owns approximately 25,000 acres of agricultural  
2 land near the Towner Line and desires to purchase the Towner  
3 Line to continue -- continue railway operations for itself  
4 and other similarly situated shippers." Now, it's an  
5 interesting turn of phrase to say that the plaintiff desires  
6 to, quote, "continue railway operations for itself and other  
7 shippers" because it's undisputed that for the last four  
8 years no one has shipped. It's also apparently undisputed  
9 that plaintiff has never shipped, so this phrase, "continue  
10 railway operations for itself", that may be a bit of a  
11 stretch.

12 The Complaint goes on to say on July 28, 2014,  
13 after receiving defendant's notice of June 4, 2014, plaintiff  
14 sent defendant a good faith offer to purchase the entire  
15 Towner Line for \$10,000 (sic) cash. This is from paragraph  
16 18 of the Verified Complaint. And that, in fact, is true.  
17 But as I indicated, plaintiff in its July 28 letter clearly  
18 acknowledged that this was going to be a negotiation because  
19 it conceded that the railway might consider the Towner Line  
20 more valuable than plaintiff's original \$10 million offer.  
21 And, in fact, in the same letter plaintiff indicated -- or  
22 plaintiff's counsel indicated that his client, quote, "is  
23 open to a discussion about valuation." So clearly it would  
24 seem to me on July 28 the question of purchase of the Towner  
25 Line was still very much an open question. I would submit it

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**EXHIBIT 1**

1 remained an open question thereafter because on July 31  
2 counsel for VS -- VC -- KCVN received an e-mail from the  
3 railroad's general counsel indicating that the CEO of the  
4 railway will not be in a position to consider any offer to  
5 purchase until at the earliest the end of August. But in the  
6 same e-mail the railway's general counsel invited plaintiff's  
7 counsel to, quote, "check back with me at that time." Now,  
8 again, I find that interesting because it is undisputed that  
9 the principals of KCVN have the financial wherewithal to I  
10 think bargain significantly. The Complaint -- Verified  
11 Complaint goes on to say plaintiff made an offer pursuant to  
12 an established administrative procedure set forth in 49  
13 United States Code Section 10904 which postpones any  
14 application for abandonment until the rail carrier and  
15 offerer agree upon a contract. So by plaintiff's own  
16 Verified Complaint it was still very much an open question as  
17 to whether or not the plaintiff would be able to purchase the  
18 line.

19 The Complaint then goes on to say despite not  
20 having abandonment or exemption approval from the Board,  
21 defendant began dismantling the Towner Line by removing  
22 spikes, tieplates, and other material. This is an act of  
23 abandonment, and illegal because a railroad subject to the  
24 jurisdiction of the Board cannot abandon a railroad without  
25 securing abandonment authority. It's sort of mixing apples

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1 and oranges in that allegation because it is a correct  
2 statement to say that a railroad company cannot abandon a  
3 line without STB approval. It would be incorrect to say that  
4 removing spikes, tieplates, and other materials in and of  
5 itself constitutes an abandonment. That is not supported by  
6 the law. The Complaint -- Verified Complaint goes on to say  
7 defendant has been physically observed removing spikes and  
8 rail anchors. Now, that's interesting because the Verified  
9 Complaint only says that there has been -- there have been  
10 spikes and rail anchors removed, but the motion for temporary  
11 restraining order suggested tons of line had been removed.  
12 So there's a disconnect between the motion for temporary  
13 restraining order and the Verified Complaint itself.

14 So then we get to the legal standard under Rule  
15 65. And for all intents and purposes the legal standard  
16 under Colorado's version of 65 is -- is identical as far as I  
17 can tell with the Federal Rule 65 case. It is absolutely  
18 clear that a preliminary injunction is an extraordinary and  
19 drastic remedy as the Tenth Circuit acknowledged in Village  
20 of Logan. It is designed to preserve the relative positions  
21 of the parties until a trial on the merits can be held. Here  
22 I'm citing Bray v. QFA Royalties, a decision by the District  
23 of Colorado in 2007. Under Rule 65 of the Federal Rules of  
24 Civil Procedure a temporary restraining order or a  
25 preliminary injunction may be granted only if it appears from

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1 specific facts shown by the affidavit or by the Verified  
2 Complaint that immediate and irreparable injury, loss or  
3 damage will result in the -- result to the applicant. And in  
4 order to get a preliminary injunction the moving party must  
5 demonstrate four factors, one, a substantial likelihood. And  
6 here I'm citing from Kikumura v. Hurley, a Tenth Circuit  
7 decision in 2001 found at 4 -- 242 F.3d 950. A party moving  
8 for preliminary injunctive relief must demonstrate a  
9 substantial likelihood that he will eventually prevail on the  
10 merits, show that he will suffer irreparable injury unless  
11 injunctive relief is provided, offer proof that the  
12 threatened injury to the movant outweighs whatever damage the  
13 proposed injunction may cause the opposing party, and show  
14 that the injunction it issued would not be adverse to the  
15 public interest. Because a preliminary injunction is an  
16 extraordinary remedy the right to relief must be clear and  
17 unequivocal. Here I'm citing from the District of Colorado's  
18 decision in Sotheby's v. Countrywide Home Loans, 2009 Westlaw  
19 3418212, a decision by the District of Colorado on  
20 October 20, 2009. As the Tenth Circuit noted in Village of  
21 Logan, a plaintiff's failure to prove any of the preliminary  
22 injunction factors renders its request for injunctive relief  
23 unwarranted.

24 One of the things that's also interesting that,  
25 frankly, I don't have to decide, but I find it somewhat

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1 interesting, the Tenth Circuit has recognized that there are  
2 three disfavored types of preliminary injunctions, one of  
3 which is a preliminary injunction that alters the status quo  
4 which is defined as the last uncontested status between the  
5 parties which preceded the controversy until the outcome of  
6 the final hearing. Now, when I look at the last uncontested  
7 status between the parties I don't think there's ever been a  
8 status of the parties. The plaintiff has never used this  
9 line in any way. The authority to discontinue the line  
10 granted by the Surface Transportation Board in July of 2012  
11 contemplates that some equipment can be removed. So the  
12 irony is is that the injunctive relief that the plaintiff is  
13 seeking would not maintain the status quo defined as the last  
14 uncontested status between the parties. The injunctive  
15 relief sought by the plaintiffs would effectively modify the  
16 decision made by the Surface Transportation Board, would do  
17 more than the Surface Transportation Board ever decided to do  
18 itself. So I think it's problematic, but as I say, I don't  
19 think I have to go that far.

20 As for the first factor, plaintiff must  
21 demonstrate a substantial likelihood of success on the  
22 merits, and I just do not find that. While I appreciate the  
23 -- the practical dilemma the plaintiff has described, and I  
24 think there is some logic to suggest that if the railroad is  
25 allowed to abandon the Middle Section and the Eastern

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1 Section, it sort of belies this notion of discontinuing the  
2 Western Segment because at that point you've got a 60-mile  
3 line going nowhere. But the fact of the matter is as I read  
4 the case law, as I read S -- Surface Transportation Board  
5 decisions you can -- a railroad company can remove equipment  
6 even under a discontinuance exemption, and that's what we  
7 have right now.

8 So it is an interesting question, but I cannot  
9 find based upon my review of the law and the facts as they  
10 are currently before me that plaintiff has demonstrated a  
11 substantial likelihood of success on the merits. But I think  
12 what's really problematic in this case is KCN -- KCVN must  
13 also show that it will suffer irreparable injury unless  
14 injunctive relief is provided. And, again, as I've  
15 indicated, the Tenth Circuit standard is quite clear. In  
16 order to receive a preliminary injunction the moving party  
17 must establish that it will suffer irreparable harm without  
18 the preliminary injunction, that is, that failing to grant  
19 the injunction will cause plaintiff to suffer an injury that  
20 is not merely serious or substantial, but certain, great,  
21 actual, and not theoretical. The purpose of a preliminary  
22 injunction is not to remedy past harm, but to protect  
23 plaintiffs from irreparable injury that will surely result  
24 without their issuance. While the moving party is not  
25 required to demonstrate the certainty of an injury occurring,

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1 a speculative injury or the mere possibility of harm will not  
2 suffice for the issuance of a preliminary injunction. Now,  
3 the problem that I've got in its original motion for TRO KCVN  
4 argued in the absence of injunctive relief it will be  
5 deprived of the opportunity to benefit from the Board's  
6 abandonment process and thereby be deprived of its  
7 opportunity to purchase an intact Towner Line through the OFA  
8 process, and also that counties will be deprived the benefit  
9 -- or denied the benefit of continuance of the railroad that  
10 result from this purchase. That's the irreparable harm cited  
11 in the original motion for TRO. In point of fact that's not  
12 consistent with the facts.

13 First of all, this notion that, quote, "counties  
14 will be denied the benefit of continuance of the railroad",  
15 it's undisputed that no shipper in the counties has used the  
16 railroad for the last four years. So this notion that  
17 they'll be deprived the continuance of something they haven't  
18 been using at all strains simple logic as well as facts on  
19 the ground. Similarly, this notion in the Complaint that  
20 plaintiff wishes to purchase the Towner Line to continue  
21 railway operations for itself, again, the use of the word  
22 continue I think is a bit of a strain given the current  
23 facts.

24 What I found interesting in that regard is the  
25 decision by the Tenth Circuit in Port City Properties v.

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1     Union Pacific Railroad Company. This is found at 518 F.3d  
2     1186, a Tenth Circuit decision in 2008. In that case the  
3     plaintiff moved for an order to enjoin the railroad from  
4     ceasing operations and an order directing the railroad to  
5     maintain and operate a line, and denied -- or upholding the  
6     denial of a preliminary injunction. The Tenth Circuit noted  
7     the absence of any evidence indicating that plaintiff would  
8     suffer irreparable harm. The Tenth Circuit specifically  
9     noted that the rail -- the rail cargo plaintiff received over  
10    the line was, quote, "a small part of his business, and that  
11    the loss of rail service was not going to put the plaintiff  
12    out of business." Well, here we've got a situation where  
13    this Western Segment of the line has never been used by the  
14    plaintiff, has never been a part of the plaintiff's business,  
15    and in point of fact Mr. Treece concedes that his client has  
16    had ample opportunity and the ability to get its product to  
17    market. So this notion that losing the Western Segment will  
18    put the plaintiff out of business is simply not consistent  
19    with the facts. I would also note that in granting  
20    discontinuance the Surface Transportation Board noted that,  
21    quote, "Any overhead traffic on the line can be rerouted over  
22    other lines." And that seems, in fact, to be the case, both  
23    in the abstract and with respect to the plaintiff.

24                   Plaintiff also suggested in the Verified Complaint  
25    and the exhibits attached to the Complaint that it wishes to

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1 purchase the Towner Line because, quote, "encouraging  
2 advances on the horizon for wheat varieties that have been  
3 bred for adaption to low-moisture environments may mean that  
4 future shippers in Kiowa will have product to send to  
5 markets." Yet it's absolutely clear under the case law that  
6 the Court cannot enter or impose injunctive relief based on  
7 speculation or conjecture. I am certainly not foreclosing  
8 the possibilities that future developments in wheat varieties  
9 may make portions of Kiowa County more attractive for wheat  
10 growers, but the fact that those developments are, quote, "on  
11 the horizon", isn't immediate. It's not an immediate harm.  
12 And as the Court noted -- as the District of Nevada noted on  
13 January 16, 2014, in Jay v. Jay, 2014 Westlaw 201615, quote,  
14 "an injunction will not issue the person or entity seeking  
15 injunctive relief shows a mere possibility of some remote  
16 future injury or a conjectural or hypothetical injury." I  
17 cannot grant the preliminary injunction based upon possible  
18 developments in the agricultural industry.

19 Plaintiff also argues in terms of irreparable harm  
20 that it would be deprived of the opportunity, quote, "to  
21 benefit from the Board's abandonment process", unquote, and  
22 thereby would be deprived, quote, "of its opportunity to  
23 purchase an intact Towner Line through the OFA process." The  
24 fact of the matter is is that as I understand, and having  
25 read the Federal Register Notice, the public was put on

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1 notice back in June of 2012 that an interested party could  
2 file an OFA. Now, the fact that plaintiff at that time  
3 wasn't interested in using the OFA process does not mean that  
4 the plaintiff was deprived of the opportunity. It simply  
5 means that plaintiff didn't have a reason to use the  
6 opportunity; that it was not deprived of the opportunity to  
7 submit an OFA with respect to the Western Segment. And as  
8 far as I can tell, given the current status of Surface  
9 Transportation Board proceedings in the Middle Segment, in  
10 the Eastern Segment, the plaintiff hasn't been deprived of an  
11 opportunity to use the OFA process there either. And, in  
12 fact, ironically I suppose one could argue that to the extent  
13 that the Western Segment -- or equipment in the Western  
14 Segment is removed the value of that portion of the line may  
15 be diminished so the OFA price could potentially go down.  
16 But, again, I can't speculate on what I don't -- can't  
17 control and what I don't know. But it is absolutely true  
18 that as the matter currently stands the plaintiff is not  
19 being denied an opportunity to pursue the OFA process with  
20 respect to the Middle and Eastern Segments. So in that  
21 respect plaintiff's argument is simply not consistent with  
22 the facts on the ground.

23 Now, what's interesting is, again, looking at the  
24 prevailing case law as to the Western Segment the facts in  
25 this case are not too dissimilar from Village of Logan. In

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1 that case the plaintiff was seeking a preliminary injunction  
2 trying to enjoin a water project. Plaintiff wished to stop  
3 work on a water diversion project until an environmental  
4 impact statement was prepared. And upholdings in (inaudible)  
5 of the preliminary injunction in Village of Logan, the Tenth  
6 Circuit noted that the plaintiff had not been prevented from  
7 participating in agency process. Indeed, in the Village of  
8 Logan the Court found that plaintiff had not submitted any  
9 comments or objections during the administrative process.  
10 The Tenth Circuit went on to write, however, having  
11 consciously made that choice plaintiff must now live with it.

12 I also note the Second Circuit decision in Tough  
13 Traveler Limited v. Outbound Products found at 60 F.3d 964,  
14 the Second Circuit decision in 1995. There the Court held  
15 that plaintiff's delay in bringing an action in seeking a  
16 preliminary injunction negated the plaintiff's claim of  
17 irreparable harm.

18 Similarly, in Pharmacia Corporation v. Alcon  
19 Laboratories, Inc. found at 201 F. Supp 2d 335, the District  
20 Court for the District of New Jersey in 2002 noted, quote,  
21 "Any claim for irreparable injury is undercut by plaintiff's  
22 lengthy and inexcusable delay in bringing this action." Now,  
23 I readily concede that plaintiff brought the action. The  
24 record shows that somebody went on August 16 and noticed that  
25 spikes had been removed. And it is unassailable that the

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1 plaintiff brought this lawsuit shortly thereafter. So  
2 relative to that event I don't believe that there's been  
3 undue delay. But the notion that somehow the plaintiff has  
4 been denied an opportunity to file an OFA with respect to the  
5 Western Segment, that I think is attributable to delay on the  
6 part of the plaintiff. The plaintiff simply chose at that  
7 time not to use the OFA process, but it was not denied that  
8 opportunity. To the extent, again, the KCVN wishes to  
9 purchase the Western Segment or any portion of the Towner  
10 Line plaintiff's own record indicates that plaintiff and its  
11 principals have the financial wherewithal to negotiate  
12 seriously a purchase of the line. Now, I readily acknowledge  
13 that if I were buying a railroad line I'd want to buy a  
14 railroad line using the OFA process, too. It gives the  
15 purchaser a decided advantage. No question about that. But  
16 I think it is simply incorrect to say that because the  
17 plaintiff can't use the OFA process it's left with no other  
18 recourse. It is incorrect to say that because the plaintiff  
19 can't use the OFA process it can't purchase the Towner Line  
20 because it absolutely can. And, you know, at the risk of  
21 sounding facetious I suspect that most things, including  
22 railroads, have a price, and I don't know what that price  
23 might be. It's apparently more than \$10,000 (sic). But  
24 plaintiffs have --

25 MR. TREECE: Millions, millions.

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**EXHIBIT 2**

**DECLARATION OF AARON PARSONS**

I am Aaron Parsons, Assistant Vice President of V&S Railway, Inc. ("V&S"), the defendant in the litigation now on file in the United States District Court in Denver. As the individual at V&S who schedules traffic movements, and manages all operations on V&S's railroad line located between NA Junction, CO and Towner, CO ("Towner Line"), I am also shown as the contact person, to receive requests for service on the Towner Line, in the widely distributed rail industry publication *The Official Railway Guide*.

During the prior two years, I have received no calls, written communications, or other requests by shippers of any kind for rail service to be provided by V&S on the segment of the Towner Line between NA Junction, CO and Haswell, CO ("Western Segment"). More specifically, as it pertains to the litigation now on file in the United States District Court in Denver, CO, there have been no freight shipments on the Western Segment since I commenced my employment in May of 2007.

Finally, I am not aware of anyone connected with KCVN, LLC having contacted me to inquire about either the operations of the Towner Line, or its possible availability for sale.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'Aaron Parsons', written over a horizontal line.

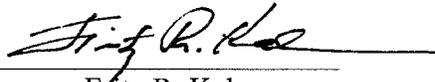
Aaron Parsons

Executed on September 10, 2014.

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Reply upon KCVN, LLC by emailing a copy to its counsel at [twilcox@gkgglaw.com](mailto:twilcox@gkgglaw.com) and upon the Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers and Colorado Wheat Research Foundation by mailing a copy by prepaid first class mail to Mr. Terry Whiteside.

Dated at Washington, DC, this 30<sup>th</sup> day of October, 2014.

  
Fritz R. Kahn