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ENTERED
Office of Proceedings
October 28, 2014
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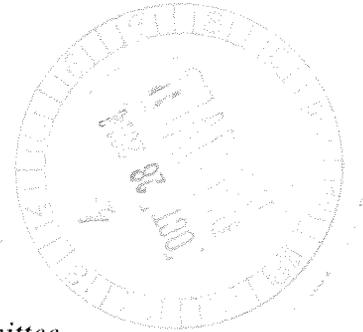
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October 28, 2014

VIA HAND DELIVERY

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



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 filing in the captioned docket are the original and 10 copies of (1) a Complaint Alleging Violations of 49 U.S.C. §10903 and §11101; and (2) a Motion for Emergency and Preliminary Injunctive Relief, submitted by the Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation, and KCVN, LLC, collectively the Complainants in this action.

Please note that the included motion asks for an order granting emergency injunctive relief **on or before 5:00 PM EST on October 31, 2014** pursuant to 49 U.S.C. §721(b)(4), for the reasons set forth therein, namely to prevent irreparable harm caused by the anticipated removal of 60 miles of railroad tracks by the Defendant in this action upon the expiration of a court order issued on October 24, 2014. Please note also that an attachment to the motion contains color images.

FILED
October 28, 2014
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
October 28, 2014
SURFACE
TRANSPORTATION BOARD

GKG Law, P.C.

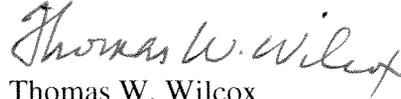
Ms. Cynthia T. Brown

October 28, 2014

Page Two

A check in the amount of \$350 is enclosed to cover the appropriate filing fee. Please do not hesitate to contact the undersigned should you have any questions about this material.

Sincerely,



Thomas W. Wilcox

Attorney for KCVN, LLC

Enclosures

cc: Rachel D. Campbell, Esq.
(via email and hand delivery)
Doug Davis, Esq
William S. Osborn, Esq
Mr. Terry Whiteside
(all via email and overnight mail)

**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)

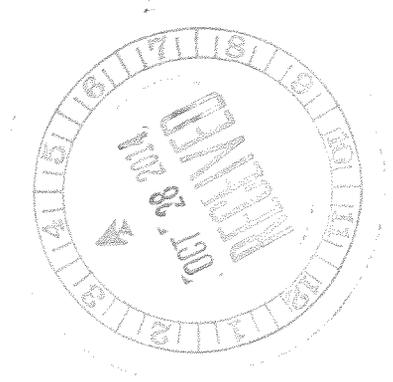
And)

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



COMPLAINT ALLEGING VIOLATIONS OF 49 U.S.C §10903 and §11101

This Complaint is filed by the Colorado Wheat Administrative Committee ("CWAC"), Colorado Association of Wheat Growers ("CAWG"), Colorado Wheat Research Foundation ("CWRF") and KCVN, LLC ("KCVN")(together "Complainants") alleging that V & S Railway, LLC ("V&S" or "Defendant") has violated 49 U.S.C. §10903 and §11101 by beginning to dismantle, remove, and sell railroad track assets of an approximately 121.9 mile line of railroad V&S owns in Colorado known as the "Towner Line" without first seeking abandonment authority from this Board. As explained in more detail below, Complainants allege that in August, 2014, before it was stopped by the issuance of a Temporary Restraining Order ("TRO")

by a Colorado state court,¹ V&S unlawfully began tearing up and selling for scrap the tracks and other track assets that comprise the 60.2 mile "Western Segment" of the Towner Line (as defined below), despite (1) formally expressing its intent to abandon the Western Segment and the rest of Towner Line to the Board in numerous filings in Docket Nos. FD 35664 and AB 603 (Sub-Nos. 2X, 3X and 4X); (2) receiving a good faith, *bona fide* cash offer from KCVN on July 28, 2014 to purchase the entire Towner Line and take steps to reactivate the line and restore common carrier service over it; and (3) the objections of CWAC, CAWG, CWRP, rail shippers along the line, local counties, and other entities who support KCVN's efforts to reactivate the Towner Line and restore common carrier rail service over it. Complainants ask the Board rule that V&S's actions regarding the Western Segment were unlawful, and order V&S to restore the Western Segment to its condition prior to the date KCVN presented its offer, and grant other such other relief the Board determines to be appropriate.

In support of this Complaint, Complainants assert the following:

IDENTITY OF THE PARTIES

1. CWAC is a marketing order of wheat producers and other companies in Colorado dedicated to the education, research and promotion programs to increase the consumption and utilization of Colorado produced wheat. CWAC's principal office is located at 4026 South Timberline Road, Fort Collins, Colorado 80525.

2. CAWG is a voluntary membership association comprised of wheat farming entities in Colorado that represents its members at the state legislature and before Congress. CAWG's principal office is located at 4026 South Timberline Road, Fort Collins, Colorado 80525.

¹ The Colorado court proceedings are discussed in paragraphs 29 and 30, *infra*.

3. CWAC has producers and CAWG has members that are located adjacent to the Towner Line that is the subject of this Complaint, and have utilized rail service over the Towner Line in the past.

4. The Colorado Wheat Research Foundation (CWRP) is a non-profit organization formed to provide educational and scientific programs related to wheat, acquire ownership of new wheat varieties developed by Colorado State University (CSU), and collect royalties to provide additional funding support to wheat related research at CSU. CWRP's principal office is located at 4026 South Timberline Road, Fort Collins, Colorado 80525. The CWRP Board of Directors is comprised of the Executive Committees of CWAC and CAWG. The CWRP has granted an exclusive license for a revolutionary hard white wheat variety named "Snowmass" to Ardent Mills, the largest flour milling company in North America. The CWRP Ardent Mills Ultragrain Premium Program is growing and accumulating Snowmass wheat in the area around the Towner Line.

5. KCVN is a Delaware limited liability company with its principal office located at 515 Congress Avenue, Suite 2450, Austin, Texas, 78701.

6. V&S is a Nevada limited liability company with its principal place of business and its corporate headquarters located at 1505 South Redwood Road, Salt Lake City, Utah, 84014. V&S is a subsidiary or affiliate of A&K Railroad Materials, Inc., which is engaged in, among other things, selling scrap or salvage railroad tracks, spikes, tie plates, and other associated materials.

STANDING AND JURISDICTION

7. Complainants have standing to file this Complaint under 49 U.S.C. § 11701(b).

8. The Board has jurisdiction over this Complaint and the matters stated herein under 49 U.S.C. § 10501(b)(2).

FACTUAL BACKGROUND

9. The Towner Line is a Class III railway located in eastern Colorado and running through Kiowa, Otero and Crowley Counties. It extends 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. On information and belief, rail service has not been provided over the Towner Line since 2012.

10. The Towner Line has a relatively long history, and was formerly owned by the Missouri Pacific Railroad Company ("MPRR"). Shippers located along the line have historically been grain shippers that used the line to transport wheat. When MPRR's successor in interest Union Pacific Railroad Company sought to abandon the Towner Line in 1996, the line was instead sold to the State of Colorado, which made the purchase in an effort to prevent the abandonment of the line.

11. On December 1, 2005, V&S entered into an agreement with the State of Colorado to buy and operate the entire Towner Line for a total purchase price of \$10,356,000. Under this agreement, V&S agreed to operate the line for at least six years in compliance with state and federal regulations. On December 30, 2005, V&S obtained authorization from the Board to lease and operate the railway under the terms of the purchase agreement, allegedly mistakenly interpreting it to be a lease.

12. V&S conducted some rail operations on the Towner Line after acquiring it, but in

2012 it began to take steps to abandon it. Its first step was taken on June 8, 2012, when V&S filed a Notice of Exempt Discontinuance of service on 60.2 miles of the line between MP 868.5 and MP 808.3 near Haswell, Colorado in Docket AB 603 (Sub-No.2X), V&S Railway, LLC—*Discontinuance of Service Exemption*—in Pueblo, Crowley and Kiowa Counties, Colorado. (*Discontinuance Notice*). The *Discontinuance Notice* did not disclose that the 60.2 mile "railroad line" for which discontinuance authority was being sought was part of the 121.9 mile Towner Line V&S had acquired from the State of Colorado. Nor did the *Discontinuance Notice* disclose that it excluded the .9 miles of track from MP 868.5 to MP 869.4, the western terminus of the Towner Line at NA Junction. Discontinuance authority was granted for the 60.2 mile segment effective July 28, 2012. In granting discontinuance authority, the Board specifically noted that this was discontinuance authority and not abandonment authority.

13. On August 15, 2012, in a filing made in STB Docket No. FD 35664,² V&S sought Board authorization to purchase the Towner Line and to have approval of the purchase made retroactive to December 29, 2005, due to V&S's asserted prior "mistake" in thinking it had only leased the line from the State of Colorado in 2005.

14. In the *Acquisition Petition* V&S stated it had "sought the Board's authorization to discontinue service on the western portion of the Towner Line, between NA Junction and Haswell" in its *Discontinuance Petition*. *Acquisition Petition* at 4. This statement was incorrect, since the *Discontinuance Petition* did not include the last .9 mile of track between MP 868.5 and MP 869.4. V&S further informed the Board in Docket No. FD 35664 that V&S "expects in the near future to file with the Board its Verified Notice of Abandonment Exemption

² See Docket FD 35664, *V&S Railway, LLC—Acquisition and Operation Exemption—Colorado Department of Transportation, Verified Petition for Exemption of V&S Railway, LLC* at 8-9 (*Acquisition Petition*).

to abandon the western segment of the Towner Line, between NA Junction and Haswell, on which there has been no traffic for two years' time." *Acquisition Petition* at 8-9. In addition, as part of its justification for acquisition authorization retroactive to December, 2005, V&S stated it "does not want to be portrayed as acquiring the ownership of the Towner Line only to turn around and seek the Board's authorization to abandon the western half of it." *Id.* at 9. The *Acquisition Petition* did not state whether "the western segment" or the "western half" of the Towner Line it intended to abandon included the last .9 miles of the track between MP 868.5 and MP 869.4.

15. In a decision served November 13, 2012, the Board authorized V&S's purchase of the Towner Line, but refused to make it retroactive to December 29, 2005. It instead established December 13, 2012 as the effective date. However, in authorizing the purchase, the Board on its own motion agreed that V&S could use the 49 C.F.R. § 1152.50 abandonment exemption procedures for the "western segment" if V&S indeed wished to obtain formal abandonment authority as V&S had represented. In its decision, the Board referred to the western segment as the 60.2 miles of railroad line covered by the *Discontinuance Petition*. In order to facilitate this action, the Board waived the requirement in 49 C.F.R. § 1152.50(b) that V&S must have had Board-authorized ownership of the Western Segment for at least two years.

16. Despite receiving the foregoing waiver for the "Western Segment," and despite its statements that it would abandon "the western half" of the Towner Line "in the near future," V&S has never sought formal authority to abandon the Western Segment, or the western half of the Towner Line.

17. V&S's efforts to divest itself of the rest of the Towner Line started on May 14, 2014, when V&S filed a Notice of Exempt Abandonment covering the 38-mile segment of the

Towner Line between MP 749.5 and 787.5 (designated the Eastern Segment by V&S). On June 16, 2014, the Director of the Board's Office of Proceedings rejected V&S's Notice because it did not comply with the two year ownership requirement of 49 C.F.R. §1152.50(b), and since the Board had only granted a waiver of this requirement for the 60.2 mile segment on the west end for which V&S had obtained discontinuance authority. The Director also stated the notice did not address portions of the Towner Line on which V&S would still have a common carrier obligation. These included the 20.8 miles of track between MP 808.3 and 787.5 (the "Middle Segment") which would be isolated between the Western and Eastern Segments and the 2 miles of track between MP 749.5 and the eastern terminus of the Towner Line at MP 747.5.³

18. V&S appealed the rejection to the Board, and on October 23, 2014 the Board denied that appeal. As a result, while V&S has evidenced a clear intent to abandon the Eastern Segment, there is no valid request for abandonment authority for the Eastern Segment pending before the Board.

19. On June 4, 2014, V&S notified the Board and various other interested parties pursuant to the Board's abandonment regulations that "on or about July 5, 2014, V and S Railway, LLC will file with the Surface Transportation Board its Verified Notice of Exemption to secure the agency's authorization to" abandon the Middle Segment. However, no such filing has ever been made.

20. On October 6, 2014, V&S counsel informed a magistrate judge of the U.S. District Court of the District of Colorado that V&S would again seek exemption abandonment authority under 49 C.F.R. §1152.50 for the Middle and Eastern Segments on or around

³ These same concerns would presumably apply to the final .9 of a mile of track on the Western Terminus of the Towner Line, where V&S has sought neither discontinuance nor abandonment authority.

December 13, 2014, when the two year period for ownership of the line established by the Board in the November 12, 2012 decision referenced in paragraph 11 of this Complaint expires. See Exhibit 1.⁴

21. On information and belief, Complainants assert that V&S has made no attempts 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 wheat farmers located along the line. It is Complainants' further understanding 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.

22. V&S has thus for several years demonstrated a clear intention to abandon and divest itself of the assets of the Towner Line, and it has demonstrated no interest in reactivating rail service over the line. The actions giving rise to this Complaint set forth below in paragraphs 23-30 must be interpreted in light of that expressed intention.

23. On July 28, 2014, after receiving news of V&S's June 4 notice of intention to abandon the Middle Segment, KCVN prepared and submitted, through its counsel, an offer to V&S's president to purchase the entire Towner Line for \$10,000,000 cash.⁵ (Exhibit 2). Among the elements of this offer, KCVN deposited \$1,000,000 into a trust account as earnest money for the sale, which funds remain on deposit today. In addition, KCVN informed V&S that KCVN

⁴ Transcript of proceedings before the Honorable Craig B. Shaffer, United States Magistrate Judge, United States District Court for the District of Colorado, in Civil Action No. 14-cv-02450-CBS, October 6, 2014 at pages 70-76.

⁵ A copy of this letter was sent to the Chief, Section of Administration, of the STB's Office of Proceedings, and it was eventually placed in Docket AB-603 by the Board and posted on the Board's website.

was "open to a discussion about valuation," and invited V&S representatives to come to Denver and discuss the offer and terms of a potential sale. KCVN's counsel also informed V&S that:

[o]ur client plans to retain a short-line contract operator to keep the line open, also investing such amount as necessary to retain shipper access from all points on the line to either end thereof. By preservation and enhancement of the line, it could hopefully be preserved in its entirety for future shippers, to the benefit of both private and public interests at the county and state levels.

24. KCVN owns approximately 25,000 acres of agricultural land near the Towner Line where it grows wheat. As such, it is a potential user of railroad services over the Towner Line. Rather than see the railway torn up and sold for scrap, KCVN desires to purchase it and reactivate rail operations over it by a railroad operator that would serve KCVN, CAWG and CWAC members, transport "Snowmass" wheat grown for Ardent Mills, and provide rail service to other shippers along the line needing to transport wheat and other crops and materials critical to the region and for the benefit of the communities served by the railway.

25. KCVN's efforts to purchase and reactivate the Towner Line have received the support of Kiowa and Crowley counties, CWAC, CAWG, CWRF, and individual shippers located along the line.⁶

26. When KCVN made its offer on July 28, 2014 the Towner Line was fully intact. Three days later, on July 31, 2014, counsel for V&S informed counsel for KCVN by email that "[d]ue to other commitments, [V&S] will not be in a position to consider any offers to purchase our Towner [L]ine until, at the earliest, the end of August. Please feel free to check back with me at that time" (Exhibit 3).

⁶ 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."

27. According to statements made by V&S in the Colorado court proceedings referred to in paragraphs 29 and 30, upon receiving KCVN's offer, V&S sold the track assets of the Western Segment to its affiliate A& K Railroad Materials, who, on August 11, 2014, entered into a contract to sell the tracks and other track assets of the Western Segment. V&S began the dismantling and removal of the Western Segment shortly thereafter, by no later than August 13, 18 days before V&S said it would be available to discuss KCVN's offer. Complainants were not informed of these contracts or the track removal, and learned of it only by the happenstance observance of Mr. Tobe Allumbaugh, Chairman of the County Commissioners for Crowley County, Colorado.

28. On August 22, 2014, Kiowa County, Colorado, through counsel, sent a letter to counsel for V&S, by which Kiowa County "confirmed that V& S Railway has removed spikes and tieplates from rails in Kiowa County at or near Arlington, Colorado, and is continuing to do so." (Exhibit 4). The county also formally requested [V&S] to cease and desist forthwith from such unlawful activity, and to replace all track materials that have been removed." V&S did not comply with the county's request.

29. The dismantling and removal were halted by the issuance of the TRO obtained by KCVN on August 28, 2014 from the District Court, Crowley County, Colorado (Case No. 14CV30012). The action was subsequently removed by V&S to the U.S. District Court for the District of Colorado (Civil Action No. 1:14-cv-02450-CBS). After briefing and hearings, including the October 6, 2014 hearing reference in paragraph 20, the U.S. District Court magistrate judge on October 24, 2014, dissolved the TRO, effective October 31, 2014 at 5:00 PM MDT. The Court delayed the effectiveness of the dissolution to enable KCVN to bring this dispute before the Board, including the issue of preliminary injunctive relief. (Exhibit 5).

30. On information and belief, the Western Segment has not been restored to the state it was in when KCVN made its offer on July 28, 2014. Also on information and belief, Complainants believe that immediately upon expiration of the TRO in federal court, V&S will resume dismantling of the Towner Line unless enjoined by the Board.

GROUND FOR RELIEF

31. Paragraphs 1-30 are hereby incorporated by reference.

32. V&S is a common carrier railroad, and the Towner Line is a rail line imbued with a common carrier obligation. On information and belief, a portion of its right-of-way was conveyed by federal land grant in the 1870's in aid of construction. V&S accordingly has a statutory obligation under §11101 and other statutes to conduct itself, and to own and manage its rail lines, in the public interest. This obligation includes the obligation to comply with 49 U.S.C. §10903 when abandoning its tracks, and the obligation to ensure that tracks on which rail service has been discontinued are returned to common carrier service when the opportunity to do so arises.

33. V&S's actions in contracting for the sale and removal of tracks and related assets making up the Towner Line, and the commencement of that removal, violated §10903 because they demonstrated an intent to permanently abandon the Western Segment without first obtaining authority from the Board to do so. A rail carrier is prohibited from abandoning any part of a common carrier rail line subject to the Board's jurisdiction without prior and complete abandonment authorization from the Board. 49 U.S.C. §10903(d).

34. By V&S's own admission, it represented to the Board in 2012 that it expected to seek authority to abandon the Western Segment, or the entire "western half" of the Towner Line, "in the near future." It received a specific waiver of the requirement in 49 C.F.R. §1152.50(b)

that required V&S to have had Board-authorized ownership of the line for at least two years before it could utilize the exempt abandonment procedures under Part 1152. But instead of following through on its statements, and the path created by the Board to expeditiously obtain formal abandonment authority, V&S intentionally circumvented §10903 and endeavored to unilaterally tear up and remove the tracks on the Western Segment for its personal profit.

35. V&S's subsequent initial attempts to abandon the Eastern and Middle Segments of the Towner Line, coupled with its counsel's representation to the U.S. Magistrate Judge in Case No. 1:14-cv-02450-CBS that V&S would renew its attempts to abandon those segments in December of this year demonstrate that V&S has no intention of restoring service over the Towner Line.

36. V&S's violation of §10903 is made more egregious by the fact that the removal of the track occurred after V&S received the offer to purchase from KCVN, and in fact appears to have been in response to receiving that offer. It is also made more egregious because the track removal went forward despite the objections of CWAC, CAWG, CWRF, local shippers and affected counties and other entities which support KCVN's efforts.

37. V&S's obligations under §11101 as the owner of track for which discontinuance authority has been granted include the duty to explore opportunities to put the Towner Line back into common carrier service, whether from a request for service from a rail shipper along the line, or from a financially responsible party who desires to invest the capital to rehabilitate the line and reinstitute rail service over it, with a longer term plan in mind.

38. V&S's obligation under §11101 in accordance with its duty to act in the public interest was to explore in good faith KCVN's proposal to purchase and reactivate the Towner Line and keep it in common carrier service. V&S's obligations under §11101 certainly did not

include first, intentionally misleading KCVN by stating that V&S was not entertaining offers to sell the Towner Line, and second, almost immediately thereafter executing a contract with a salvage company to dismantle and remove the Western Segment for V&S's personal financial gain. These actions were a violation of §11101.

39. The July 28, 2014 cash offer submitted by KCVN was substantial, *bona fide*, and submitted by a financially responsible party. The offer was not made on a "take it or leave it basis." The offer also explicitly stated that KCVN's intention is to invest in the line as necessary to put it back into common carrier service and to contract with a short line to provide such service. While not an official Offer of Financial Assistance under 49 U.S.C. §10904 and Board regulations (because no valid request for abandonment authority had been filed by V&S and noticed by the Board pursuant to 49 CFR §1152.27(a)(2)(ii)), the offer contains many of the same elements required by the Board's regulations implementing §10904, and therefore, at a minimum, put V&S on notice of a duty to preserve the line pending commercial discussions with KCVN, or future STB proceedings.

40. If permitted to continue, the removal of the rails from the Western Segment of the Towner Line would render the entire 121.9 miles of the Towner Line a railroad to nowhere and utterly useless, despite a growing desire and need for rail service by grain shippers in the region. This would be contrary to the letter and spirit of §10903, §11101, and other statutes and regulations administered by the Board that implement a policy of retaining common carrier lines of rail in service where feasible. It would also harm Complainants by eliminating the potential for rail service to be restored over the Western Segment and the rest of the Towner Line.

41. KCVN has a real and substantial interest in purchasing the entire Towner Line and reactivating common carrier service over it. CWAC's producers, CAWG members, and

CWRF have a real and substantial interest in the Western Segment remaining in place and the Towner Line being reactivated for common carrier service. V&S's actions to sell and remove the Western Segment track, and, in effect, abandon that line of rail without first obtaining abandonment authority from the Board, have substantially diminished the value of the Towner Line, and increased the cost KCVN will have to incur to put the line back into service.

REQUEST FOR RELIEF

A. Complainants request the Board to begin an investigation of the allegations in this Complaint, and enter an order finding that Defendant V&S, by arranging for and removing some of the tracks and track assets of the Western Segment of the Towner Line under the facts and circumstances outlined in this Complaint, has violated 49 U.S.C. §10903 and §11101 for the reasons set forth above.

B. Complainants further request that the Board either (1) order V&S to fully restore the Western Segment to its condition that existed prior to the submission of Complainant's offer of July 28, 2014, or (2) award other appropriate relief in the Board's discretion, which could include providing an accounting to KCVN and the Board of the value of the tracks and related assets that were removed, so that this accounting may be used in any commercial discussions between them for the sale of the line, and/or included in any subsequent proceeding before this Board concerning the transfer of ownership of the Towner Line to KCVN or other parties under §10904 or §10707, and the Board's regulations implementing those provisions.

C. Complaints further assert that the allegations and requests for relief set forth in this Complaint shall cover any additional removal of the tracks and associated assets of the Western Segment of the Towner Line by V&S subsequent to the filing of this Complaint and prior to V&S seeking formal authority from the Board to abandon the Western Segment.

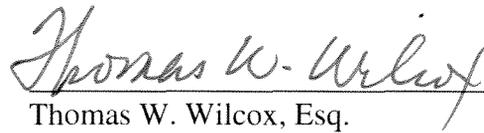
D. Complainants further request the Board to take other action and award other relief it determines is appropriate and just in the circumstances.

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*



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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

October 28, 2014

Exhibit 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO
3 Civil Action No. 14-cv-02450-CBS

4 KCVN, LLC,
5 Plaintiff,
6 vs.

7 V&S RAILWAY, LLC,
8 Defendant.

9 -----
10 Proceedings before Craig B. Shaffer, United States
11 Magistrate Judge, United States District Court for the
12 District of Colorado, commencing at 3:30 p.m., October 6,
13 2014, in the United States Courthouse, Denver, Colorado.

14 -----
15 WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
16 ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

17 -----
18 APPEARANCES

19 LAWRENCE TREECE and HANNAH MISNER, Attorneys at
20 Law, appearing for the Plaintiff.

21 GREGORY GOLDBERG and SEAN HANLOM, Attorneys at
22 Law, appearing for the Defendant.

23 -----
24 MOTION HEARING

1 Where do you stand with respect to the middle
2 segment and the eastern segment? Can somebody --

3 MR. HANLON: Can I have Doug Davis answer?

4 THE COURT: Sure. Absolutely. Absolutely.
5 Mr. Davis? No, no, you can sit. You're going to tell me
6 the same thing whether you're sitting or standing, so
7 make yourself comfortable.

8 MR. DAVIS: The STB has ruled that we had two
9 years from our -- from when we obtained acquisition
10 authority, it was in December of 2012, and we'll go back
11 and refile. So --

12 THE COURT: You're going to refile what?

13 MR. DAVIS: Refile to seek the two year out of
14 service exemption.

15 THE COURT: For?

16 MR. DAVIS: To abandon both the middle segment
17 and the eastern segment.

18 THE COURT: And when are you going to refile
19 those?

20 MR. DAVIS: In December.

21 THE COURT: In December of this year?

22 MR. DAVIS: December of this year.

23 THE COURT: Okay. And so --

24 MR. DAVIS: The STB ruled previously just because
25 of a mix-up we acquired the line from the state of
 AVERY/WOODS REPORTING SERVICE, INC. (303) 825-6119

1 Colorado.

2 THE COURT: I saw that.

3 MR. DAVIS: And we didn't -- we didn't
4 technically seek acquisition authority, and they said
5 that we -- that authority wasn't granted until December
6 of 2012, so they weren't going to hear us until December
7 of '14.

8 THE COURT: Okay. So if I understand correctly,
9 you're going to go back -- and maybe I've got this all
10 wrong, but am I correct that you're going to go back to
11 the STB in December of this year and you're going to ask
12 for new authority to discontinue?

13 MR. DAVIS: To abandon.

14 THE COURT: To abandon.

15 MR. DAVIS: Based -- both the middle segment and
16 the eastern segment.

17 THE COURT: Okay. So --

18 MR. DAVIS: Because there's been no service.
19 They have been two years out of service.

20 THE COURT: So your goal is going to be -- and
21 I've got to make sure I have this correct. The western
22 segment is, as Mr. Treece has told me on more than one
23 occasion, the end of the line, right?

24 MR. DAVIS: No. There's two ends of the line.
25 That's one end of the line.

1 THE COURT: Well, the only end of the line that I
2 have any authority over is in Colorado. So you're going
3 to discontinue the western end of the line, and then
4 you're going to abandon the middle and the eastern end of
5 the line. So when the smoke clears, you're still going
6 to have the western end of the line with nothing on it.

7 MR. DAVIS: That's correct.

8 THE COURT: Okay. Now, Mr. Treece, if -- if the
9 STB -- well, let me ask you this: Because it's my
10 understanding that the STB could grant permission to
11 abandon, but could impose conditions as part of that.

12 MR. TREECE: Certainly.

13 THE COURT: Okay. And then you would have --
14 then ultimately, you would do a certification of
15 abandonment or something.

16 MR. DAVIS: Correct.

17 THE COURT: And when you do that, that's when
18 officially the STB --

19 MR. DAVIS: No longer has any jurisdiction.

20 THE COURT: Right. Once you do a completion of
21 abandonment, or whatever the appropriate term is. So in
22 December of 2014, you're going to go back and seek
23 permission to abandon the middle and the eastern
24 segments, and there is still going to be the western
25 segment where you're only discontinuing theoretically

1 because you may have an intent to reactivate that, but it
2 would be at that point a very short line. Since the --
3 potentially the middle segment and the eastern segment
4 would be gone, it would be -- it wouldn't even be the
5 western segment; it would be the only segment. So we'd
6 have to rename that, I suppose.

7 Now, if -- it would seem to me that if the --
8 help me to understand. Could the STB say as a condition
9 that you have to offer for somebody to buy the middle and
10 eastern segment?

11 MR. DAVIS: It's up to them to file a petition.
12 They certainly would have the opportunity to, the time
13 that we filed a two-year out of service exemption.

14 THE COURT: They could offer to buy those two
15 segments?

16 MR. DAVIS: Correct.

17 THE COURT: Now, would you expect the price to be
18 higher if they could also buy the western segment?

19 MR. DAVIS: I would expect it would be.

20 THE COURT: Okay.

21 MR. DAVIS: Certainly, the offer that was made
22 was not anywhere near what the lines were, and really
23 didn't even justify a response, it was so low.

24 THE COURT: But if you petition for abandonment
25 of the middle segment and the eastern segment, they can

1 come in and try to attach conditions to that?

2 MR. DAVIS: Absolutely.

3 THE COURT: And Mr. Treece, am I correct that the
4 middle and eastern segments are the segments closest to
5 the portions that your client currently owns or the
6 property your client currently owns?

7 MR. TREECE: I don't know whether I can explain
8 that segment by segment. They're about 10 miles from the
9 line, and --

10 THE COURT: Which segment of line, do you know?

11 MR. TREECE: I'm not sure. Western section,
12 10 miles.

13 THE COURT: They're 10 miles from the western
14 segment?

15 MR. TREECE: And, you know, their view is it's a
16 whole line.

17 THE COURT: Well, that may be --

18 MR. TREECE: And selling off pieces of salami
19 doesn't make much sense, and the value of the line as a
20 whole --

21 THE COURT: Depends on how much salami you want
22 to eat. If you don't want the entire salami --

23 MR. TREECE: They want the whole --

24 THE COURT: -- taking off pieces would make
25 perfect sense.

1 MR. TREECE: They want the whole line. If all
2 you have is the western --

3 THE COURT: One song you didn't quote me was the
4 song that says you can't always get what you want.

5 MR. TREECE: I have quoted that before, but I was
6 on the other side.

7 THE COURT: There's no railroad connection to
8 that one. That one, I would have had to make a leap of
9 faith.

10 MR. TREECE: But if you had the western -- if you
11 had only the western segment left after the middle and
12 eastern were abandoned, then you'd have a railroad to
13 nowhere east with nothing coming into it from the east to
14 go west, and so you got nothing. You got nothing.

15 THE COURT: Okay. Well, I'll give you gentlemen
16 the last word. Anything anybody else wants to throw in
17 the mix? Otherwise, I'll expect your surreply by Friday.

18 MR. TREECE: Nothing from us, Your Honor. Thank
19 you for that opportunity.

20 THE COURT: All right. Thank you all.

21 MR. TREECE: I was going to sing that song, but
22 I'm too tired right now.

23 THE COURT: No, I hear you.

24 We'll be in recess. Thank you all.

25 THE CLERK: All rise.

1 (Whereupon, at 5:14 p.m. the proceedings were
2 concluded.)

3 I certify that the foregoing is a correct
4 transcript, to the best of my knowledge and belief, from
5 the record of proceedings in the above-entitled matter.

6

7 /s/ Holly M. Faddis
8 Signature of Transcriber

 October 10, 2014
 Date

9

10

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22

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24

25

Exhibit 2

OSBORN, GRIFFITH & HARGROVE

ATTORNEYS AT LAW
515 CONGRESS AVENUE, SUITE 2450
AUSTIN, TEXAS 78701

WILLIAM S. OSBORN
ANA MARIA MARSLAND-GRIFFITH
ROBERT G. HARGROVE

512/476-3529
FACSIMILE:
512/476-8310

ELMER F. PATMAN
(1907-1987)
PHILIP F. PATMAN
(1937-2005)

236404
AB 603 Sub 3

July 28, 2014

By Federal Express
Airbill 8053 0671 7943

ENTERED
Office of Proceedings
August 5, 2014
Part of
Public Record

Kern Schumacher, Chairman
V&S Railway Co.
1505 South Redwood Road
Salt Lake City, Utah 84104

Dear Mr. Schumacher,

For many years our firm has represented KCVN, LLC, a Delaware Limited Liability Company, which owns about 25,000 acres of farm ground in Kiowa County, Colorado.

V&S owns a railway line extending about 120 miles west from Towner Junction, Colorado to NA Junction, Colorado, which is a connection point with the BNSF Railway line running south from Pueblo, Colorado. V&S purchased this line from the State of Colorado in 2011 for \$9,356,000. By filing dated June 4, 2014, copy enclosed, counsel for V&S gave notice of its intent to seek federal authority for abandonment and scrapping of a segment about 20 miles long in the middle of the line, roughly between Eads and Haswell. Our client's land ownership is highly concentrated in this immediate area. In order to prevent even greater isolation by severance of a rail link to terminal grain markets to the east and the west, KCVN, LLC offers to purchase the entire 120 +/- rail line from Towner Junction to NA Junction from V&S Railway Co. for \$10,000,000 cash.

Regarding its financial ability to consummate the purchase, KCVN offers as a reference the name of its primary banker for that territory, Gail Harvey at Farm Credit Bank in Lamar, (719) 336-7474. As further evidence of its ability, KCVN has today submitted to Kim Richards of Kiowa County Abstract Company in Eads, Colorado, a wire transfer in the amount of \$1,000,000.00 for deposit to its trust account, as earnest money for a purchase and sale contract, subject to negotiation of a mutually satisfactory agreement between the parties. KCVN will retain Denver counsel for representation in these negotiations with your company, if you are willing to favorably consider the proposition.

This offer is contingent upon receipt of an inspection report from a recognized rail consultant within 45 days of execution of a purchase and sale contract, such inspection report indicating no conditions regarding the trackage and bridges which are unacceptable to KCVN. We have in mind retaining for this purpose a company such as R. L. Banks & Assoc., Shelby Railroad Service, Railworks Company, or another of their caliber for this purpose. KCVN would bear the cost of this inspection and report, and share with your firm a copy of the final report.

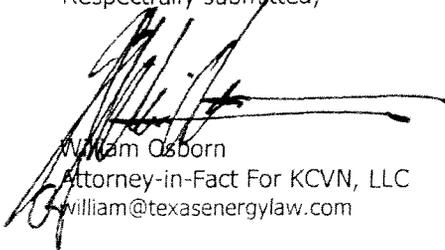
Our client plans to retain a short-line contract operator to keep the line open, also investing such amount as is necessary to retain shipper access from all points on the line to either end thereof. By preservation and enhancement of the line, it could hopefully be preserved in its entirety for future shippers, to the benefit of both private and public interests at the county and state levels. Although Kiowa County is on the

Mr. Kern Schumacher
July 28, 2014
Page 2

very western edge of the Midwestern dryland grain belt, there are some encouraging advances on the horizon for wheat varieties which have been bred for adaptation to low moisture environments.

It is our experience that no transaction of this magnitude gains initial traction except by meeting face to face. I ask if you will come or send a representative(s) to Denver to meet with me and Colorado counsel to discuss the proposition. We are mindful that your company may consider the line more valuable than our initial offer. We are open to a discussion about valuation, within reasonable limits, and contingent upon review of the inspection report contemplated above.

Respectfully submitted,



William Osborn
Attorney-in-Fact For KCVN, LLC
william@texasenergyllc.com

WSO/kp

cc: Hon. John W. Hickenlooper
Governor, State of Colorado
136 State Capitol
Denver, Colorado 80203

Hon. Senator Michael F. Bennet
458 Russell Senate Office Building
Washington, D. C. 20510

Hon. Senator Mark Udall
730 Hart Senate Office Building
Washington, D.C. 20510

Hon. Representative Cory Gardner
213 Cannon HOB
Washington, DC 20515

Hon. Representative Max Tyler, Chair TLRC
State Capitol
Denver, Colorado 80203

Hon. Senator Rollie Heath, Vice-Chair TLRC
State Capitol
Denver, Colorado 80203

Mr. Kern Schumacher
July 28, 2014
Page 3

Donald Hunt
Executive Director
Colorado Department of Transportation
4201 East Arkansas Avenue
Denver, Colorado 80222

Richard Scott, Chairman
Kiowa County Board of Commissioners
1305 Goff Street
Eads, Colorado 81036

Fritz R. Kahn, P.C.
Attorney at Law
1919 M Street NW (7th Floor)
Washington, D.C. 20036

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

Roger D. Nelson, President
Professional Land Surveyors of Colorado, Inc.
Post Office Box 460022
Glendale, Colorado 80246

Darrell L. Hanavan
Executive Director
Colorado Association of Wheat Growers
4026 S. Timberline Rd. Suite 100
Fort Collins, Colorado 80525

Gail Harvey
Farm Credit Bank of Southern Colorado
201 South 5th Street
Lamar, Colorado 81052

Kim Richards
Kiowa County Abstract Company
Post Office Box 128
Eads, Colorado 81036

Outgoing FED Message

Printed: 7/28/2014 1:54:17PM

Requested By: RS8491

VERSION: 0

MESSAGE INFORMATION

Amount:	\$1,000,000.00	Message ID:	140728115012RS00	Source:	
Currency:	USD	Latest Version:	0	Priority:	
Value Date:	7/28/14	Time:	12:41:41	URC:	
Bank ID:	220	Department:	WIR	Status:	COMPLETE
Message Type:	10	Branch:	220BR6105	Template:	
Message Subtype:	00	Charge:			
Fee:	0.00	Service:	FAX	Country Code :	US
Ref. No.:	0093	External Ref.:			

MESSAGE TEXT

Sender ABA:	114021933	Sender Name:	BROADWAY BANK	Ref. No.:	0093
Receiver ABA:	101104805	Receiver Name:	BANKERS BK OF KS	Prod. Code:	CTR
Ref. IMAD:				Local Instrument Code:	
IMAD:	20140728K4B7501C000045	Prop. Code:			
OMAD:	20140728JMQFMP0200013907281342FT03	Ref. for Bnf.:			
As of Reason:	As of Date:	Disposition:			
Acc Off:	220	Account:	4100047769	Acc. Type:	DDA
Cr Acc Off:		Cr Acc No:		Initiator ID:	
Db Advice:		Db Fee:	0.00	Cr Advice:	
Cr Fee:				Cr Fee:	
Drawdown Credit Account:					
Originator:		Beneficiary:			
4100047769		1200696201			
OSBORN AND GRIFFITH IOLTA		CUSTOMER KIOWA COUNTY ABSTRACT			
515 CONGRESS AVE STE 2450		ESCROW			
AUSTIN, TX 78701-					
Originator Bank:	Originator Option F:	N	Beneficiary Bank:		
			GIRARD NATIONAL BANK		
			KIOWA COUNTY NATIONAL BANK BRANCH		
			ABA: 101112842		

Originator Bank Info: REF: EARNEST MONEY, PURCHASE RAILLINE WEST OF TOWNER COLORADO
Free Text:

FRITZ R. KAHN, P.C.
1919 M STREET, NW. (7TH FL.)
WASHINGTON, DC 20036
Tel.: (202) 263-4152 Fax: (202) 331-8330
e-mail: xicccg@gmail.com

Chairman, Kiowa County Commissioners
P. O. Box 100
Eads, CO 81036

Dear Sir/Madam:

June 4, 2014
236152
ENTERED
Office of Proceedings
June 4, 2014
Part of
Public Record

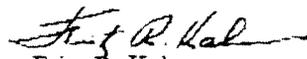
Please be advised that on or about July 5, 2014, V and S Railway, I.I.C. will file with the Surface Transportation Board its Verified Notice of Exemption to secure the agency's authorization to abandon a segment of the Towner Line, between Milepost 808.3 near Haswell 81045 and Milepost 787.5 near Eads, CO 81036, a distance of approximately twenty miles in Kiowa County, Colorado. No local or overhead traffic has been carried on the railroad line in more than two years' time. The Notice will bear Docket No. AB 603 (Sub-No. 4X).

The line traverses U.S. Postal Service Zip Codes 81045 and 81036, the former being the Zip Code for the one station on the line, namely, Galatea.

Based on information in the possession of V and S Railway, Inc., the line of railroad includes federally granted rights-of-way. Any documentation in the possession of the railroad will be made available promptly to those requesting it.

If you have any question concerning the foregoing, please get back to me.

Sincerely yours,


Fritz R. Kahn

cc: Ms. Cynthia T. Brown

Exhibit 3

From: Doug Davis [<mailto:ddavis@akrailroad.com>]
Sent: Thursday, July 31, 2014 10:12 AM
To: William Osborn
Cc: Rhonda Nicoloff; Jeff Galyean; George Ross; Kern Schumacher
Subject: RE: Purchase Offer Letter

Dear Mr. Osborn

I spoke with Mr. Schumacher regarding your client's purchase offer. Due to other commitments, Mr. Schumacher will not be in a position to consider any offers to purchase our Towner line until, at the earliest, the end of August. Please feel free to check back with me at that time.

Thanks

Doug Davis | General Counsel
Tel: 801.977.6547 | Cell: 801.911.1111
Fax: 801.478.1411
PO Box 30076, Salt Lake City, UT 84130
ddavis@akrailroad.com | www.akrailroad.com

Connect with us: 



This email, including any transmitted files, is confidential and intended for the addressee(s) only, and may contain attorney-client privileged information. If you are not an addressee, any disclosure, copying or other use of the information in this e-mail is unauthorized and may be unlawful. Please notify the sender immediately by e-mail if you are not an intended recipient and permanently delete this e-mail from your system.

From: William Osborn [<mailto:william@texasenergylaw.com>]
Sent: Monday, July 28, 2014 2:57 PM
To: Kern Schumacher
Cc: Morris Kulmer; Rhonda Nicoloff; Jeff Galyean; George Ross; Doug Davis
Subject: Purchase Offer Letter

Sir,

Hard copy of this will reach your Salt Lake City office tomorrow.

- Wm Osborn

Exhibit 4

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

August 22, 2014

By email to xiccgc@verizon.net
with confirmation by mail

Fritz R. Kahn, Esq.
Fritz R. Kahn, P.C.
1919 M Street, N.W., 7th fl.
Washington, DC 20036

Re: V&S Railway, LLC, Towner-NA Jct., CO rail line

Dear Fritz:

This supplements my e-mail message to you of August 21 about the above rail line.

Kiowa County, Colorado (the County) has now confirmed that V&S Railway has removed spikes and tieplates from rails in Kiowa County at or near Arlington, CO, and is continuing to do so. V&S has not received authority or an exemption from the STB to remove rail or track materials from the Towner-NA Jct., CO rail line.

In behalf of the County, this is to put V&S on formal notice that such unauthorized removal of track materials is considered to constitute an unlawful abandonment of the Towner-NA Jct. rail line as a through route in violation of 49 U.S.C. § 10903. V&S is hereby formally requested to cease and desist forthwith from such unlawful activity, and to replace all track materials and rails that have been removed. Inasmuch as V&S is being formally requested to cease such activity, any such activity in the future is considered to subject V&S and its principals to civil penalties under 49 U.S.C. § 11901(a) and 49 U.S.C. § 11901(c), respectively, for knowingly violating the law and for permitting such violation.

By virtue of a letter from an attorney for KCVN, LLC to Mr. Kern Schumacher dated July 28, 2014, a copy of which is in the record of STB Docket No. AB-603 (Sub-No. 3X), V&S is aware of a good faith offer to acquire the entire Towner-NA Jct. rail line. Removal of track materials and rail would destroy the continuity of that rail line as a through route, threatening acquisition of that rail line for revitalized rail operation.

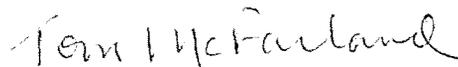
The general principle, that where the STB has authorized abandonment of a rail line and the STB decision is sought to be stayed, a financially capable rail carrier can lawfully remove track in that line if it agrees to relay such track if the STB decision is set aside, has no application to the situation at hand, where no part of the Towner-NA Jct. rail line has been authorized for abandonment; where it is problematical that V&S would have sufficient financial means to relay

THOMAS F. MCFARLAND

Fritz Kahn, Esq.
August 22, 2014
Page 2

the rail and track materials; and where there is a good faith offer to acquire the entire rail line for
reinstitution of rail service.

Very truly yours,

A handwritten signature in cursive script that reads "Tom McFarland".

Thomas F. McFarland

TMcF:kl:enc:\1647\lrfk1

cc: Hon. Richard Scott, *by email to rsscott@fairpoint.net*
William Osborn, Esq., *by email to william@texasenergylaw.com*
Mr. Gary Hunter, *by email to gvh@railroadindustries.com*

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Craig B. Shaffer

Civil Action: 14-cv-02450-CBS

Date: October 24, 2014

Courtroom Deputy: Amanda Montoya

FTR – Reporter Deck-Courtroom A402

Parties:

Counsel:

KCVN, LLC,

Lawrence Treece
Hannah Misner

Plaintiff,

v.

V&S RAILWAY, LLC

Gregory Goldberg
Sean Hanlon

Defendant.

COURTROOM MINUTES/MINUTE ORDER

HEARING: MOTION HEARING

Court in session: 01:29 p.m.

Court calls case. Appearances of counsel.

Defendant Doug Davis is present with counsel.

This hearing comes before the Court in regards to MOTION [13] to Dissolve Temporary Restraining Order. Counsel proceeds with oral arguments.

ORDERED: The Court intends to GRANT MOTION [13] to Dissolve Temporary Restraining Order for the reasons stated on the record. Due to the time that has passed since the Temporary Restraining Order has been in place, the Court is treating the Temporary Restraining Order as a Preliminary Injunction, which is to be dissolved. The Court will STAY the effectiveness of the order granting the Motion until October 31, 2014 at 5:00 p.m., to allow the Plaintiff to raise the issue with the Surface Transportation Board. Therefore, a formal Order from the Court granting the Motion will not be entered until October 31, 2014.

Plaintiff's MOTION [29] to Re-File Temporary Restraining Order Bond in This Court is **GRANTED** and the bond may be transferred into the Court's Registry.

A Telephonic Status Conference to discuss progress with the Surface Transportation Board is set for November 24, 2014 at 11:00 a.m. Parties participating in the conference call, shall first initiate a conference call amongst themselves, and then call the court at (303) 844-2117 at the scheduled time.

Discussion regarding increasing the bond.

HEARING CONCLUDED.

Court in recess: 03:35 p.m.

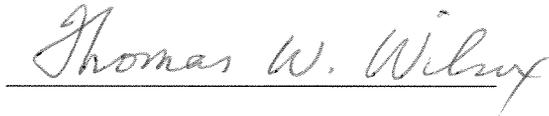
Total time in court: 02:06

To order transcripts of hearings with Magistrate Judge Shaffer, please contact Avery Woods Reporting at (303) 825-6119 or toll free at 1-800-962-3345.

CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of October, 2014, I have served a copy of the foregoing Complaint Alleging Violations of 49 U.S.C. §10903 and §11101 via e-mail and first class mail to the chief legal counsel for Defendant at the following address:

Doug Davis, Esquire
General Counsel
V&S Railway, LLC
P.O. Pox 30076
Salt Lake City, Utah 84130
Ddavis@akrailroad.com

A handwritten signature in cursive script that reads "Thomas W. Wilcox". The signature is written in black ink and is positioned above a horizontal line.

Thomas W. Wilcox