

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

237165

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

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

And )

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

vs. )

**Docket No. NOR 42140**

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

**COMPLAINANTS' REPORT PURSUANT TO 49 C.F.R. §1111.10(a) AND  
MOTION FOR ESTABLISHMENT OF PROCEDURAL SCHEDULE**

Complainants hereby submit a report to the Surface Transportation Board ("Board") pursuant to 49 C.F.R. §1111.10(a), and for the reasons set forth below, request the Board to issue an order establishing a procedural schedule in this case. Complainants have included in this Motion a proposed schedule they ask the Board to adopt. In support of this Motion, Complainants state the following:

1. Complainants filed their Complaint in this proceeding on October 28, 2014. Service of the Complaint was made on Defendant via email, given that Complainants accompanied the filing of the Complaint with a Motion for Emergency and Preliminary

Injunctive Relief. Counsel for the Defendant acknowledged service of the Complaint on October 28.

2. On October 31, 2014, the Board issued a decision that granted Complainants' Motion to the extent it asked for emergency relief, and accordingly ruled "V&S is enjoined from dismantling and removing any tracks or related assets on the Western Segment until the Board has ruled on the Colorado Interests' Motion for Preliminary Injunction." The Board took no other action in that Decision.

3. Under the Board's procedural rules, the time period for Defendant to timely file an answer to the Complaint ended on November 17, 2014. 49 C.F.R. §1111.4(c).

4. Defendant did not file an answer to the Complaint on November 17, 2014. Nevertheless, this date triggered the start of the 10-day period for the parties to meet and discuss procedural and discovery matters pursuant to 49 C.F.R. §1110.10.

5. In addition to not filing an answer to the Complaint,<sup>1</sup> Defendant has refused to comply with 49 C.F.R. §1110.10 and meet with Complainants to discuss procedural and discovery matters. This appears to be due to Defendant's plainly erroneous position that the Board, in its October 31, 2014 Decision, "entered a stay order," meaning it ruled that no actions whatsoever can be taken concerning the Complaint until the Board takes further action on the Motion. See correspondence attached as Exhibit 1. Defendant has also taken the untenable position that the parties are to do nothing because, "[u]ntil the Board renders its decision disposing of the stay order, it is uncertain whether it will entertain the Complaint . . . ." *Id.* This

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<sup>1</sup> The Reply of V and S Railway, LLC filed on October 30, 2014 was not an answer to the Complaint, and was not represented by Defendant as a substitute for an answer when it was filed. In fact, Defendant's counsel confirmed its filing was a reply filed under 49 C.F.R. §1104.13(a) in a letter to Cynthia Brown, filed on October 31, 2014 and placed in the docket of this proceeding.

latter statement is wrong not only because there is no "stay order" to dispose of, but also because there is no motion to dismiss the Complaint pending before the Board.<sup>2</sup> Finally, Defendant has informed Complainants in the attached correspondence that it will not respond to Complainants' discovery requests, a position Complainants will address in due course.

6. Defendant's positions are wrong and belied by the plain language of the October 31, 2014 Decision, which clearly did not "stay" this Complaint proceeding. They are also plainly contrary to the Board's procedural rules governing the processing of formal complaints. A defendant assumes the risk of deciding not to file an answer to a formal complaint,<sup>3</sup> but deciding to not file an answer does not stop a complaint case from being processed.

7. Under 49 C.F.R. §1111.10(a), a party may separately submit a proposed procedural schedule to govern future activities and deadlines in the case.

WHEREFORE, for all the reasons set forth herein, Complainants request that the Board issue an order that adopts the following procedural schedule for hearing the Complaint in this case (with "D" referring to the date of decision adopting the schedule):

D + 45 days	Due date for completion of discovery by both parties;
D + 75 days	Due date for opening submission by Complainants;
D + 105 days	Due date for reply submission by both Defendant;
D + 135 days	Due date for rebuttal submission by Complainant.

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<sup>2</sup> In an email to counsel for KCVN dated November 12, 2014, counsel for Defendant stated "Although the Reply asked for the dismissal of the Complaint, it could just as well have asked for its denial. It was not intended to be and is not a motion to dismiss."

<sup>3</sup> See 49 C.F.R §1111.4(e), *Failure to answer complaint* ("Averments in a complaint are deemed admitted when not denied in an answer to the complaint.").

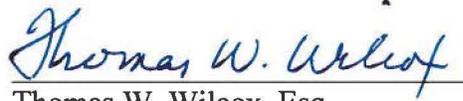


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*Representative for CWAC, CAWG  
and CWRP*

December 5, 2014

Respectfully submitted,



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November 21, 2014

**By E-mail and Hand Delivery**

Fritz R. Kahn, Esquire  
Law Offices of Fritz R. Kahn, P.C.  
1919 M Street, NW (7th Floor)  
Washington, DC 20036

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 Fritz:

This letter follows up two emails I sent you this week. Complainants filed their Complaint and Motion for Emergency and Injunctive Relief on October 28, 2014 and served them both on V&S Railway LLC's general counsel by email the same day. Under the Board's procedural rules, an answer to the complaint was due on November 17, 2014. V&S Railway did not file an answer on that date, nor any other day this week. Since you have not responded to my emails inquiring about this matter, we have concluded that V&S' failure to file an answer was not an oversight. Be that as it may, in our view, the November 17, 2014 date that the answer was due still triggered the 12 day period for the parties to meet and confer on procedural matters pursuant to 49 C.F.R. §1111.10. I am therefore writing to inquire about your availability for such a meeting between now and December 1.

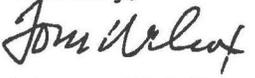
Given the intervening Thanksgiving Holiday week, the Complainants' propose that we schedule the meeting for December 1. We can discuss whether the meeting should be in person or by conference call, depending on who on either side wants to participate.

**GKG Law, P.C.**

Fritz Kahn, Esq.  
November 21, 2014  
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Also accompanying this letter are Complainants' First Discovery Requests to V&S.

Please do not hesitate to call me if you have any questions.

Sincerely,  
  
Thomas W. Wilcox

Enclosures

Cc: Gregory E. Goldberg  
(Via first class mail, w/encl.)

Terry Whiteside  
William Osborn  
(Via email, w/encl.)

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November 25, 2014

Thomas W. Wilcox, Esq.  
GKG Law  
1054 31<sup>st</sup> Street NW  
Washington, DC 20007

Dear Tom:

As you know, pending before the Board are the Complaint Alleging Violations of 49 U.S.C. §10903, the alleged removal of rail and track materials from the discontinued Western Segment of the Towner Line without having secured the Board's abandonment authorization, and §11101, the alleged failure to provide service or transportation upon reasonable request, and Motion for Emergency and Preliminary Injunctive Relief, filed by the Complainant on October 28, 2014, and, since in its view the two filings were based on the identical contended violations of the law, V and S Railway, LLC, filed its Reply to both on October 30, 2014.

Having had insufficient time to consider the merits of the pleadings, the Board on October 31, 2014, entered a stay order.

Until the Board renders its decision disposing of the stay order, it is uncertain whether it will entertain the Complaint and, if so, what issues it will want to be addressed by the parties. Accordingly, V and S Railway, LLC deems the Complainants' First Discovery Requests to be premature and will not respond to them at this time.

Sincerely yours,

  
Fritz R. Kahn

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 5th day of December, 2014, I have served a copy of the foregoing Complainants' Report Pursuant to 49 C.F.R. §1111.10(a) and Motion for Establishment of Procedural Schedule on counsel for Defendant by first class mail to:

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

and by email and hand-delivery to:

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1919 M Street, NW (7th fl.)  
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Thomas W. Wilcox