

Edward J. Fishman
202-778-9456
Fax: 202-778-9100
ed.fishman@klgates.com

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Via Electronic Filing

Ms. Cynthia Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED

Office of Proceedings
August 13, 2012
Part of
Public Record

Re: V&S Railway, LLC, Petition for Reconsideration
STB Finance Docket No. 35459

Dear Ms. Brown:

In accordance with 49 C.F.R. § 1115.3, enclosed please find the Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc., and BNSF Railway Company's Reply to the V&S Railway, LLC's Petition for Reconsideration.

If you have any questions about the enclosed filing, please do not hesitate to contact the undersigned.

Sincerely,

/s/ Edward J. Fishman
Edward J. Fishman
K&L Gates LLP
1601 K Street N.W.
Washington, D.C. 20006
(202) 778-9456
ed.fishman@klgates.com

J. Bradford Currier
K&L Gates LLP
1601 K Street N.W.
Washington, D.C. 20006
(202) 778-9885

brad.currier@klgates.com

Terry Malone
Martin, Pringle, Oliver, Wallace & Bauer LLP
100 N. Broadway
Suite 500
Wichita, KS 67202
(312) 265-9311
tlmalone@martinpringle.com

SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Finance Docket No. 35459

**HUTCHINSON SALT COMPANY, INC.,
HUTCHINSON TRANSPORTATION COMPANY, INC.,
AND BNSF RAILWAY COMPANY'S
REPLY TO V&S RAILWAY, LLC'S PETITION FOR RECONSIDERATION**

Respondents, Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc., (hereinafter "HTC/HSC" unless otherwise designated) and BNSF Railway Company (hereinafter "BNSF") (hereinafter collectively "Respondents" unless otherwise designated) submit this response to Petitioner V&S Railway, LLC's (hereinafter "V&S") Petition for Reconsideration. For the following reason, V&S's Reconsideration Petition should be denied in its entirety.

I. INTRODUCTION

V&S seeks reconsideration of the Board's July 12, 2012 decision in this proceeding ("STB Decision") on the basis of alleged material errors, but fails to cite any STB or ICC precedent that supports its claims and essentially seeks reconsideration merely because it disagrees with the outcome of the Board's detailed and well-reasoned decision. V&S repeats many of the same arguments it made in prior pleadings before the Board. To the extent V&S raises new arguments, they are immaterial, and accepting V&S's position on these points would not affect the conclusions reached in the STB Decision.

Moreover, in its Petition for Reconsideration, V&S largely ignores, and sometimes distorts, the pertinent facts of this case:

1. HTC/HSC contends, and has put forth evidence supporting its contention, that it owns not only most of the real property where the track in dispute is located, but also the track itself that is on the Salt Mine Property. (V&S, at p. 8 of its Petition for Reconsideration, distorts the record by referring to “the rail carrier’s track,” implying that V&S owns all of the track on which HTC/HSC moves its products.)
2. The remaining few hundred feet of track that is not on Salt Mine Property, and is not subject to HTC/HSC ownership, is “joint trackage” under an Operating Rights Agreement that gives HTC/HSC the contractual right to use that section of the rail line to move its own product. (The Petition for Reconsideration ignores the Operating Rights Agreement.)
3. While V&S has asserted that in 2006, the Board authorized V&S “to acquire” the subject rail line by acknowledging its notice of exemption filing, V&S has not proved in this proceeding that it actually did acquire the entire line by obtaining a property interest in or contractual access to the track located on the Salt Mine Property. As the Board noted, V&S could only acquire from HN in 2006 property that then belonged to HN. (Again, V&S’s Petition for Reconsideration simply assumes that V&S somehow acquired sufficient rights to the track on the Salt Mine Property.)

Under these specific circumstances, the Board properly concluded that the parties’ respective rights regarding the rail line were matters of state law, and that these questions should be determined by the District Court. The Board also properly concluded that the ICC Termination Act (as amended) does not preclude HTC/HSC from using the track located on the Salt Mine Property (and the “joint trackage”) to move its own product as long as there is no

unreasonable interference with the common carrier obligations of V&S (which the Board noted would not be possible here under the circumstances).

II. ARGUMENT

A. Standard for Reconsideration

Petitions for reconsideration are not an invitation for parties to reargue points that were raised and decided earlier by the Board. *See Kansas City So. Ry. Co.—Trackage Rights Exemption—Gateway W. R. R. Co.*, STB Fin. Docket No. 33780 (served June 5, 2000) (denying petition for reconsideration that “for the most part merely repeat[s] arguments addressed in the prior decision”); *Victoria Terminal Enters., Inc.—Transportation of Fertilizer Within Texas—Pet. for Declaratory Order*, ICC No. MC-C-30002 (served Apr. 19, 1988) (rejecting petitions to reopen that “largely repeat arguments previously made and fully considered and discussed in our prior decision”).

Rather, a petition for reconsideration will be granted only if it identifies “new evidence,” “changed circumstances” or a “material error” in the Board’s prior decision. 49 C.F.R. § 1115.3(b); *see also, e.g., Union Pac. Corp.—Control & Merger—Southern Pac. Rail Corp.*, STB Fin. Docket No. 32760 (Sub-No. 42) (served Aug. 14, 2006). V&S does not even attempt to demonstrate new evidence or changed circumstances. While it asserts in a conclusory fashion that the Board “materially erred” in several particulars, V&S offers no persuasive reason why the Board’s evaluation of the evidence was unreasonable, nor does V&S demonstrate that the Board’s decision is in any respect inconsistent with governing law or prior agency precedent. It is not enough for a party seeking reconsideration simply to assert that it believes the Board was wrong. If the standard of § 1115.3(b) is to have any meaning, a party must meet the heightened standard of proving both that the Board erred, and that the error was material. As fully set forth

below, V&S's Petition for Reconsideration fails to establish that the STB Decision contains any material error.

B. The STB's Conclusion With Respect to the Permissibility of HTC/HSC's Private Operations Are Well Founded and Supported by Precedent

The Board concluded that HTC/HSC can use the tracks located on the Salt Mine Property to move their own property without the consent of V&S, (1) as long as there is no unreasonable interference with any common carrier obligations of V&S on that track and (2) provided that the federal district court determines that HTC/HSC have sufficient rights under state law to use such tracks.¹ V&S has failed to demonstrate that the Board's decision was not correct.

In Section B of its Petition for Reconsideration, V&S claims the Board made four specific "material errors" with respect to these core elements of the Board's decision. *First*, V&S claims that it never asserted "its use of the Line was exclusive" (Petition at 4). This contention is flatly contradicted by numerous assertions V&S made in the federal district court case and in its Petition for Declaratory Order with the Board. For example, V&S asserted in its Petition for Declaratory Order that "V&S alone can operate on the Line." (p. 4) and that "The Line is V&S's alone to operate in fulfilling its obligations as a common carrier." (p. 5) Moreover, the Board correctly recognized that V&S seemed to modify its position on exclusivity, but only after the

¹ The Board further concluded that, under the circumstances of this case, it would not be possible for HTC/HSC to unreasonably interfere because V&S is not providing common carrier service over the relevant track, as HTC/HSC, the only potential customer on the line, is not requesting service from V&S. In its Petition for Declaratory Order, V&S attempted to argue that HTC/HSC "interferes" with V&S's service by failing to request it. The Board properly rejected that argument, and on reconsideration, V&S does not quarrel with the Board's decision on that point.

Respondents filed their initial Reply to the Petition for Declaratory Order.² V&S has not presented any evidence to support its claim that the Board’s description of its position on exclusivity was incorrect. Moreover, even if the Board’s description was incorrect, that could not be a material error, because V&S agrees with the Board’s conclusion that V&S does not have “exclusive use.”

Second, V&S accuses the Board of misrepresenting the significance of the *State of Maine* line of cases, but V&S’s position is based on a misunderstanding of the Board’s ruling. Specifically, V&S claims the Board’s decision suggests that commuter rail operators (and other non-rail carriers) can in all cases use freight rail carrier tracks without the freight rail carrier’s consent. The Board’s decision makes no such suggestion. V&S’ claim of material error is based on a suggestion of its own creation.

Instead, the Board correctly noted that the *State of Maine* cases generally involve situations where the freight operator and passenger rail operator negotiate terms of access over rail corridors owned and operated by the freight operator, to ensure there is no unreasonable interference with common carrier freight operations. As the Board knows, in the typical *State of Maine* situation, the passenger rail operator acquires ownership of track or right-of-way on an active freight rail corridor from the freight railroad, and such access terms are part of the acquisition negotiation. The *State of Maine* cases demonstrate that it is not unusual for freight rail carriers to share track with non-carriers in certain circumstances. (STB Decision at p. 10, fn. 14).

² This change in V&S’s position is largely a matter of semantics. V&S still claims that it has the “exclusive” right to determine whether and on what terms HTC/HSC can conduct private rail operations on its own property.

Third, V&S repeats its argument that HTC/HSC cannot conduct private rail operations on track over which a common carrier has been authorized to operate.³ However, the Board previously rejected this same argument, and it correctly found STB and ICC precedent for private rail operations occurring on common carrier trackage. *The Boeing Company – Acquisition and Operation Exemption – Chehalis Western Railway Company*, ICC Fin. Docket. No. 31916 (served Oct. 24, 1991); *S.D. Warren Company d/b/a Sappi Fine Paper North America – Acquisition and Operation Exemption – Maine Central Railroad Company and the Springfield Terminal Railway Company*, STB Fin. Docket. No. 34133 (served Sept. 30, 2002); *Brotherhood of Locomotive Engineers v. Interstate Railroad Company, Virginia and Southwestern Railway Company, Norfolk and Western Railway Company, Southern Railway Company, and Westmorland Coal Company*, ICC Fin. Docket No. 21078 (served Nov. 20, 1987).

V&S once again fails to cite any precedent to the contrary. Falling back on a technique commonly used by those lacking support for their legal arguments, V&S argues that the Board’s ruling will up-end the entire railroad system by allowing a multitude of shippers (such as Kia, Alcoa and Paramount Coal) to operate unit trains of their products over the lines of Class I railroads CSX, UP and NS. V&S fails to explain the relevance of or factual basis for its prediction. As the Board recognizes, it is not unprecedented for shippers to move their own goods over both private track (which the shippers typically own) and over common carrier track (which the railroads typically own). In this case, HTC/HSC is well within its rights to move its

³ V&S also argues that “the Board committed material error in failing to acknowledge that HN at no time was private track.” (Petition for Reconsideration at p. 10) But nothing in the Board’s decision suggests that the Board found the disputed line was private track. Rather, the Board recognized that to the extent “at least some portions of the Line extend onto Parcel 1 and/or Parcel 10, then those sections cannot be private track because once track becomes a line of railroad subject to the Board’s jurisdiction,” it does not become private track until there is an abandonment. (STB Decision at p. 9)

own goods over track that it owns and that traverses and dead ends on its own property. The predictions made by V&S are both speculative and irrelevant to the particulars of this proceeding.

Fourth, V&S argues that the Board erred in “failing to acknowledge that a shipper may not move trainloads of its freight *on a rail carrier’s line* without the rail carrier’s consent.” (Petition for Reconsideration at p. 6) (emphasis added) In a similar vein, V&S argues that the Board committed material error “in holding that V&S may not block HSC/HTC from operating its trains in private carriage [on the Line] unless those private freight operations would unreasonably interfere with the ability of V&S to satisfy its common carrier obligation.” Again, V&S’s argument rests on the unproven assumption that the entire line is V&S property. V&S overlooks that the Respondents have argued and presented evidence that HSC/HTC actually owns most of the track in dispute (not merely the underlying real property, but the track itself) and that HSC/HTC has a contractual right to operate on the remaining portion of track at issue pursuant to an Operating Rights Agreement. The Board properly regarded this as a disputed factual issue and correctly concluded that HSC/HTC’s property and contract rights with respect to the subject track are questions of state law to be determined by the Court. (STB Decision at p. 7; *see also Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY*, 1988 WL 225779, ICC Docket No. AB-167, *3 (served Feb. 11, 1988) (“Only a court of competent jurisdiction can resolve a dispute requiring an interpretation of local property law,” including in that instance a determination whether the easements underlying the rail line preclude its use for public transportation)). HTC/HSC’s right to use the track depends on the parties’ respective property and contractual rights. V&S has not pointed to any decision of this Board establishing that a common carrier has an absolute right to exclude the owner of track on which

the carrier is authorized to operate, where the owner's use of the track does not unreasonably interfere with the common carrier's operations.

Fifth and finally, V&S claims that it (and not the STB) alleviated ARM/TRAIN's concerns about V&S's "paraphrasing" of the Board's holding in *Devens Recycling*. HTC/HSC agree with the Board that the V&S "paraphrasing" of *Devens Recycling* distorted the significance of that decision with its selective and misleading quotation. But more importantly, even if V&S should have been credited with correcting the problem that it created with ARM/TRAIN, V&S does not explain how that possibly could affect the outcome of this case. In other words, even if the Board's finding on this point was in error (which it was not), it was not a material error.

C. V&S' Denials About Its Possible Lack of Common Carrier Status on the Salt Mine Property Are Unsupported or Irrelevant

The Board also concluded that it is not clear whether V&S actually has common carrier rights over the entirety of the trackage located on the Salt Mine Property, because even though the 2006 notice of exemption filed by V&S refers to a line of railroad between milepost 0.0 and milepost 5.14, the Board could not determine whether V&S obtained acquisition rights under state law with respect to the track on the Salt Mine Property. Thus, the Board ruled that the federal district court would have to decide whether V&S acquired sufficient property rights, which are predicate to its claim of common carrier authority over the trackage on the Salt Mine Property. *See, e.g., San Francisco Bay Railroad – Mare Island – Operation Exemption – California Northern Railroad*, STB Finance Docket No. 35303 (served Dec. 6, 2010). V&S fails to cite any precedent or make any valid arguments for its claim to the contrary in Section A of its Petition.

First, V&S claims that it perfected its common carrier acquisition and operating rights by beginning to operate on the Salt Mine Property, arguing that it “did indeed exercise the authority granted by the Board by becoming a rail carrier on the entire 5.14-mile railroad line.” (Petition for Reconsideration at p. 2) However, this claim is based on circular reasoning. The Board has raised a valid issue about whether V&S has any property or other rights under state law to the track on the Salt Mine Property. That V&S operated on the line for a brief period of time does not establish that V&S had acquired the necessary state-law interests, which was the necessary step to “exercising the authority granted by the Board.” The Board did not find that V&S never operated over the property, and therefore V&S’s claims with respect to its commencement of operations are beside the point.

V&S challenges the Board’s conclusion that to exercise a grant of acquisition authority by the Board, a rail carrier “must complete the acquisition by obtaining all the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line.” (STB Decision at p. 6) In order to “complete the acquisition,” V&S would not only need authority from the Board, but would also need to acquire an interest in the line, whether fee title, an easement, or some other interest. (STB Decision at pp. 6-7) V&S argues that it “acquired the 5.15-mile line of railroad pursuant to the Board’s authorization and became a rail carrier on its entirety without there being any suggestion that the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line issues first needed to be acquired.” (Petition for Reconsideration at pp. 3-4) V&S’s argument that it “acquired” the entire line of railroad referenced in its 2006 notice of exemption simply begs the question.⁴ The

⁴ V&S’s own Petition for Reconsideration seems to recognize that through its 2006 notice of exemption filing, “V&S secured the authorization to acquire” the Line. (Petition for

Board correctly concluded (1) that V&S did not establish that it acquired any rights in the portion of the track on the Salt Mine Property and (2) that the nature and extent of V&S's property or contractual rights in the portion of the track on the Salt Mine Property are questions of state law to be determined by the District Court. *Middletown & New Jersey and General Railway*, decisions cited by V&S, are consistent with the Board's decision that a party becomes a rail carrier over particular trackage by securing authorization from the Board **and** acquiring all necessary rights to use and access the trackage.

Second, V&S misinterprets the cases that it cited in support of its claim. The issue in *Middletown & New Jersey (M&NJ)*, STB Fin. Docket No. 35412 (served Sept. 23, 2011), was not whether M&NJ had acquired the necessary property rights to the line of railroad with respect to which it had filed an earlier notice of exemption for acquisition and operating authority. Instead, the issue was whether M&NJ had commenced operating as a Class III rail carrier after initially acquiring the rail line and before filing a second notice of exemption under a regulatory provision reserved for existing Class III rail carriers. *Id.* at pp. 3-4. The labor union challenging M&NJ's second notice claimed that M&NJ had not operated any common carrier service before it filed its second notice. The Board concluded that M&NJ had in fact commenced operations well before filing the second notice, based on the evidence before it, and therefore the labor union's claim was factually incorrect. *Id.* at p. 4; *Middletown & New Jersey (M&NJ)*, STB Fin. Docket No. 35412 (served May 2, 2012) (denying reconsideration). Again, that case did not involve any claim that M&NJ had not acquired the necessary property rights to operate as a common carrier over particular trackage.

Reconsideration at p. 1) The Board did not, and could not, grant V&S title or other necessary property rights to the track in dispute, but merely authorized the acquisition from a federal regulatory perspective.

V&S also cites *General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – in Osceola and Dickinson Counties, IA*, STB Fin. Docket No. 34867 (served June 15, 2007), but it likewise does not support V&S’s position here. In fact, *General Railway* makes abundantly clear that disputes over ownership of rail property are generally subject to disposition under state law. Moreover, contrary to V&S’ implication in its Petition for Reconsideration, *General Railway* did not address whether the “initiation of operations” (see Petition for Reconsideration at p. 3) pursuant to a grant of authority by the Board needed to be postponed until the resolution of all property and contract law issues under state law. In fact, the decision did not concern the “initiation of operations” at all because *General Railway* had begun operating for several years before the petitioner challenged its authority. *Id.*

D. The Other Miscellaneous Arguments Made by V&S Fail to Support Its Material Error Claims

In Section C of its Petition, V&S both repeats arguments that it has already made in this proceeding and makes some additional claims about supposed industry practices and safety regulations, none of which are material to the Board’s Decision.

First, V&S again makes irrelevant analogies to other scenarios purportedly involving common carrier track owned by non-carriers. (See Petition for Reconsideration at 12). It is not clear how any of these scenarios support the V&S position here on material error. In fact, we believe it is not unusual in these types of arrangements described by V&S for the non-carrier

owner to perform some private switching on its own trackage even if a common carrier is authorized to operate on that trackage.⁵

Second, the V&S assertion about trackage rights is not relevant here because HTC/HSC has never sought Board authority for trackage rights under 49 USC 11323 or 11324. HTC/HSC has consistently contended that its private rail operations are not subject to Board jurisdiction, and the Board's decision acknowledges as much. (STB Decision at p. 5)

Third, V&S fails to explain how any of the FRA regulatory questions that it raises at the end of its Petition for Reconsideration have any relevance to the issues before the Board or its claim of material error. The STB does not have jurisdiction to determine whether any private operations on the track at issue are being conducted in accordance with applicable FRA regulations (if any). V&S did not submit any evidence in connection with its Petition for Declaratory Order on the FRA status of the track or the various other FRA safety questions mentioned for the first time in its Petition for Reconsideration.⁶ Moreover, V&S is not operating on that track and has not operated on that track for more than 4 years, and HN never raised any of these FRA regulatory questions when it gave HTC/HSC rights to operate on HN's track outside of the Salt Mine Property. Thus, for all of the above reasons, V&S has failed to show that

⁵ V&S also claims in footnote 7 that the STB's decision is "internally inconsistent", but fails to provide any basis for this claim. The notion that V&S "would be the rail carrier authorized by the Board to operate over the entire Line ... without undue interference" is consistent with the conclusion that HTC/HSC, which is not a common carrier, could nevertheless move its own products over the Line if (1) HTC/HSC had sufficient property or contractual rights in the track and (2) its activities do not "unreasonably interfere" with V&S's carrier services.

⁶ Since V&S is not seeking reconsideration based on new evidence or changed circumstances, the Board's review is limited to the evidence before it prior to issuing the July 2012 decision *See Middletown & New Jersey (M&NJ)*, STB Fin. Docket No. 35412 (served May 2, 2012).

the Board was required to evaluate FRA regulatory questions in its initial decision, and that the failure to do so somehow constituted material error.

Fourth and finally, relying on a decision issued by the ICC more than 100 years ago that V&S claims is “still good law” subject to exceptions, V&S extracts a quote from the ICC’s 1912 Supplemental Report in the *Tap Line Case*, 23 ICC 549, 550 (1912), without explaining how it relates to any claimed material error in this proceeding. The Supplemental Report from the *Tap Line Case* specifically noted that its findings and conclusion were limited to the specific facts and surrounding conditions under investigation by the ICC in 1912, 23 ICC at 550, which related to certain arrangements between lumber companies and their plant railroad subsidiaries. The focus of the investigation was on unlawful discrimination and preference rules that largely do not exist today, given the significant changes in the regulatory framework over the last 100 years. Moreover, the quote V&S extracts from the Supplemental Report and cites as “good law” (which quote implies shippers cannot operate over common carrier trackage) is flatly contradicted by more recent STB and ICC precedent *see Boeing*, ICC Fin. Docket. No. 31916 (served Oct. 24, 1991); *S.D. Warren Company*, STB Fin. Docket. No. 34133 (served Sept. 30, 2002); *Brotherhood of Locomotive Engineers*, ICC Fin. Docket No. 21078 (served Nov. 20, 1987), and by the position V&S asserts on pages 6-7 of its Petition for Reconsideration that shippers can operate over common carrier trackage, but only with the consent of the common carrier (which position was rightfully rejected by the Board) . Thus, the extracted quote from the Supplemental Report in the *Tap Line Case* provides no support for the material error claims lodged here by V&S.

III. CONCLUSION.

V&S has not met its burden on reconsideration to show that the Board's decision contains any material error. Accordingly, the Board should deny the Petition for Reconsideration and affirm the findings and conclusions in its July 12, 2012 decision in this proceeding.

Respectfully submitted,

K&L GATES

By: /s/ Edward J. Fishman

Edward J. Fishman
1601 K Street N.W.
Washington, DC 20006
Telephone: (202) 778-9456
ed.fishman@klgates.com

Terry L. Malone
Martin, Pringle, Oliver, Wallace & Bauer, LLP
100 North Broadway, Suite 500
Wichita, KS 67202
Telephone: (316) 265-9311
tmalone@martinpringle.com

*Attorneys for Defendants Hutchinson Salt
Company, Inc., Hutchinson Transportation
Company, Inc. and BNSF Railway Company*

CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing *Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc., and BNSF Railway Company's Reply to the V&S Railway, L.L.C.'s Petition for Reconsideration* by e-mailing a copy to its counsel Fritz R. Kahn, Esq., at xiccgc@verizon.net, and upon the Association of Railway Museums, Inc., and the Tourist Railroad Association, Inc., by e-mailing a copy to their counsel, Robert T. Opal, Esq., at RobertTOpal@aol.com.

Dated at Washington, DC, this 13th day of August, 2012.

/s/ J. Bradford Currier