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April 19, 2011

VIA ELECTRONIC FILING

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

ENTERED  
Office of Proceedings

APR 20 2011

Part of  
Public Record

Dear Ms. Brown:

Attached for filing in STB Finance Docket No. 35459, V&S Railway, LLC--  
Petition for Declaratory Order--Railroad Operations in Hutchinson, Kansas, is the Reply  
of V&S Railway, LLC to the Respondents' Motion, filed April 12, 2011.

If you have a question concerning this filing or I otherwise can be of assistance,  
please let me know.

Sincerely yours,

  
Fritz R. Kahn

cc: Edwin J. Fishman, Esq.  
Robert T. Opal, Esq.

**SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Finance Docket No. 35459**

**V&S RAILWAY, LLC  
-- PETITION FOR DECLARATORY ORDER --  
RAILROAD OPERATIONS IN HUTCHINSON, KANSAS**

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**REPLY  
OF  
V&S RAILWAY, LLC**

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**V&S RAILWAY, LLC**

**Dated: April 19, 2011**

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SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

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STB Finance Docket No. 35459

V&S RAILWAY, LLC  
-- PETITION FOR DECLARATORY ORDER --  
RAILROAD OPERATIONS IN HUTCHINSON, KANSAS

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REPLY  
OF  
V&S RAILWAY, LLC

Petitioner, V&S Railway, LLC ("V&S"), pursuant to 49 C.F.R. §1104.13(a), replies to the Respondents' Motion, filed April 12, 2011, for leave to file a tendered Response to V&S' Rebuttal.

The tendered Response is largely repetitive of the arguments which the Respondents made in their Reply, filed March 9, 2011, refuted by V&S in its Rebuttal, filed March 29, 2011. The Board's regulations, 49 C.F.R. §1104.13(c), do not permit the filing of a reply to a reply, such as Respondents' tendered Response. STB Finance Docket No. 34425, City of Lincoln--Petition for Declaratory Order, served August 12, 2004, slip, p. 3; STB Finance Docket No. 34319, Consolidated Rail Corporation--Declaratory Order Proceeding, served October 10, 2003, slip, p. 7; STB Finance Docket No. 33905, Lackawanna County Railroad Authority--Acquisition Exemption--F&L Realty, Inc., served October 22, 2001, slip, p. 2. To be sure, Board may waive the prohibition of 49 U.S.C. §1104.13(c) if the offered evidence or argument will contribute to attaining a more complete record. STB Docket No. WCC-102, Ocean Logistics Management, Inc. v. NPR, Inc. and Hold Cargo Systems, Inc., served January 20, 2000,

slip, p. 3; STB Docket No. AB-33 (Sub-No. 140), Union Pacific Railroad Company--  
Abandonment--in Lancaster and Gage Counties, NE, and Marshall County, KS, served  
December 17, 1999, slip, p. 2. Respondents, however, failed to make a credible showing  
that their tendered Response will aid materially in resolving the dispute between the  
parties or, more importantly, assist the Board in answering the three questions which the  
United States District Court for the District of Kansas had posed and had asked V&S  
expeditiously to have answered by the Board.

At page 2 of their tendered Response, Respondents maintain that they operated  
their trains on the 5.14-mile line of railroad which in STB Finance Docket No. 34875,  
V&S Railway, LLC--Acquisition and Operation Exemption--The Hutchinson and  
Northern Railway Company, served May 31, 2006, 71 Fed. Reg. 30978, May 31, 2006,  
the Board had authorized V&S to acquire and operate, "[d]ue to poor service from V&S."  
Respondents already had complained of the alleged "historical poor service by the V&S"  
at page 3 of their Reply, of V&S' "poor and untimely service" at page 13 and that V&S'  
"services were unsatisfactory when used" at page 26 of their Reply.

At page 2 of their tendered Response, Respondents contend that the operation of  
HSC/HTC's trains on V&S' track "does not interfere with V&S rights or obligations as a  
common carrier" and again at page 6 that "at no time has HSC/HTC's use interfered with  
the V&S's operations." Respondents had said as much in their Reply. At page 20 of their  
Reply, Respondents argued that the operation of HSC/HTC's trains "does not result in  
any material interference with the V&S", and again at page 23 of their Reply,  
Respondents contended, "HSC/HTC has not interfered with Petitioner's service; they

simply declined to use Petitioner's service which HSC/HTC consider to be poor, untimely and substandard."

Respondents in their tendered Response argue as they had in their Reply, that, since HSC owns a portion of the real property underlying V&S' 5.14-mile railroad line and claims ownership of some of the tracks and improvements on the railroad line, HSC/HTC may operate their trains on V&S' line of railroad without V&S' consent. At page 4 of the tendered Response, Respondents maintain, "[A]s its owner [HSC/HTC] have every right to use their trackage located on the Salt Mine Real Estate." That, of course, was what Respondents had claimed in their Reply, when, on page 2, they said "HSC/HTC is moving its own property predominantly over trackage that it owns and that is located on its salt mine property."

At page 5 of their tendered Response, Respondents cite the decisions in STB Finance Docket No. 34133, S.D. Warren Company d/b/a Sappi Fine Paper North America--Acquisition and Operation Exemption--Maine Central Railroad Company and the Springfield Terminal Rail Company, served September 30, 2002; Finance Docket No. 31916, The Boeing Company--Acquisition and Operation Exemption--Chehalis Western Railway Company, served October 10, 1991, and Finance Docket No. 31078, Brotherhood of Locomotive Engineers v. Interstate Railroad Company, et al., served November 20, 1987, as supporting the right of HSC/HTC to operate their trains on V&S' railroad line. At pages 2 and 20 of their Reply, Respondents cited the very same decisions ascribing to them the recognition by the Board and ICC before it "that private rail operations (such as those of HSC/HTC) can be conducted on tracks over which a common carrier also may have operating authority."

Advancing such repetitive arguments fails to meet the Board's requirements for overcoming the restriction of 49 C.F.R. §1104.13(c) that a reply to a reply will not be permitted. Respondents, accordingly, should not be granted leave to file their tendered Response.

Indeed, the only new thing which Respondents rely on in urging Board approval of their Motion is their disagreement with V&S' reading of a single provision of the 1998 Operating Rights Agreement between The Hutchinson and Northern Railway Company and the Hutchinson Salt Company, relating to a 500-foot segment of V&S' 5.14-mile line of railroad, copy of which has been appended to Respondents' Reply. At pages 5-6 of its Rebuttal, V&S had noted that Article 16 of the General Conditions of the Agreement disallowed assignment of the Agreement by one party without the written consent of the other party. V&S added that no such consent ever was given, and accordingly the Operating Rights Agreement had not been assigned by HN to V&S. It follows that HSC/HTC may not operate on the 500-foot segment of V&S' 5.14-mile line of railroad in reliance on the Agreement.

In their tendered Response, Respondents do not dispute that there was no express written consent given by HSC of an assignment by HN to V&S. At page 3 of their tendered Response, Respondents maintain that Article 16 simply allowed HSC/HTC to object to HN's assignment. "HSC/HTC has not exercised its right under Article 16 to object to the assignment, and in fact has ratified the assignment by not objecting and continuing to use the 500 feet of V&S track (from time to time) since 2006." If it had been the intent of the parties to allow HN to assign its rights under the Agreement unless HSC objected, they easily could have worded Article 16 to so state. That, however, is not

how Article 16 reads. The unambiguous language of Article 16 permits no doubt that there was no assignment of the Agreement by HN to V&S, because HSC had failed to give its written consent.

At page 2 of their Motion, Respondents argue, among other things, that V&S' reading of Article 16 is inconsistent with Kansas contract and property law. That is an argument better advanced in a Kansas court of law, for it is well settled that the Board will not get into state contract and property law. STB Finance Docket No. 34867, General Railway Corporation, d/b/a Iowa Northwestern Railroad--Exemption for Acquisition of Railroad Line--in Osceola and Dickinson Counties, IA, served June 17, 2007, slip, p. 4; STB Finance Docket No. 34645, The Burlington Northern and Santa Fe Railway Company--Acquisition and Operation Exemption--State of South Dakota, served January 14, 2005, slip, p. 3; STB Docket No. AB-406 (Sub-No. 6X), Central Kansas Railway, Limited Liability Company--Abandonment Exemption--in Marion and McPherson Counties, KS, served December 18, 1998, slip, p. 5.

In any event, the Board has recognized that a party should be allowed some leeway in how it responds to a matter first raised in the opposing party's reply. In STB Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc., served November 24, 1997, slip, p. 2, the Board observed, "[O]n rebuttal, the proponent may respond to the defenses and criticisms raised [by the opponent] by introducing evidence to bolster its initial assumptions."

If, notwithstanding the foregoing, the Board nevertheless were to approve Respondents' Motion and to grant leave for Respondents to file their tendered Response, V&S Railway, LLC respectfully requests that it be allowed to file a reply. STB Finance

Docket No. 34483, SMS Rail Service, Inc.–Petition for Declaratory Order, served January 24, 2005, slip, p. 3; STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company--Abandonment Exemption--in Rio Grande and Mineral Counties, CO, served June 22, 2004, slip., p. 3. Among other things, V&S would want the opportunity to show how HSC's/HTC's failure to pay V&S the rental for the use of the 500-foot track, to advise V&S of the operations they rendered thereon and to provide V&S with copies of the insurance policies they needed to maintain undermine Respondents' contention that HSC/HTC dealt with V&S as the assignee of the Agreement.

Respectfully submitted,

V&S RAILWAY, LLC

By its attorneys,

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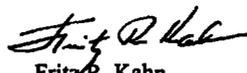
  
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Dated: April 19, 2011

CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing Rebuttal on Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc. and BNSF Railway Company by e-mailing a copy to their counsel, Edward J. Fishman, Esq. at [ed.fishman@klgates.com](mailto:ed.fishman@klgates.com), and on 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](mailto:RobertTOpal@aol.com).

Dated at Washington, DC, this 19th day of April, 2011.

  
Fritz R. Kahn