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December 17, 2014

VIA ELECTRONIC FILING

237252

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
December 17, 2014
Part of
Public Record

Re: Docket No. NOR 42140, Colorado Wheat Administrative Committee,
Colorado Association of Wheat Growers, Colorado Wheat Research
Foundation and KCVN, LLC

Dear Ms. Brown:

Attached for filing in the subject proceeding is the Reply of V and S Railway, LLC to the Complainants' Report Pursuant to 49 C.F.R. §1111.10(a) and Motion for Establishment of Procedural Schedule, filed December 5, 2014.

Copies of this letter and its attachment this day are being served by me upon the parties of record, either via email or prepaid first-class mail.

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

Best wishes for a joyous holiday season and a happy and healthy 2015.

Sincerely yours,


Fritz R. Kahn

Att.

Cc: Thomas W. Wilcox, Esq.
Mr. Terry Whiteside

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42140

COLORADO WHEAT ADMINSTRATIVE COMMITTEE,
COLORADO ASSOCIATION OF WHEAT GROWER,
COLORADO WHEAT RESEARCH FOUNDATION
AND KCVN, LLC

v.

V AND S RAILWAY, LLC

REPLY
OF
V AND S RAILWAY, LLC

Fritz R. Kahn
Fritz R. Kahn, P.C.
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Attorney for

V AND S RAILWAY, LLC

Dated: December 17, 2014

SURFACE TRANSPORTATION BOARD

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COLORADO WHEAT ADMINISTRATIVE COMMITTEE,
COLORADO ASSOCIATION OF WHEAT GROWER,
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REPLY
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V and S Railway, LLC (“V&S”), pursuant to 49 C.F.R. § 1104.13(a), replies to the Report and Motion filed by the “Complainants” on December 5, 2014, as follows:

Endeavoring to give their action before the Board a characteristic that it in fact lacks, the “Complainants”, instead of filing a Petition for Declaratory Order, pursuant to 49 C.F.R. § 1112.1, et seq., as most litigants would have done when seeking what essentially are answers by the Board to questions of law,¹ chose instead to invoke the

¹ See Docket No. FD 35843, Wisconsin River Transit Commission—Petition for Declaratory Order—in Dane, Green & Rock Countys., Wis. (STB, served November 18, 2014); Docket No. FD 35792, Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually—Petition for Declaratory Order (STB, served October 31, 2014); Docket No. FD 35745, New Jersey Association of Railroad Passengers and National Association of Railroad Passengers—Petition for Declaratory Order—Princeton Branch (STB, served July 25, 2014); Docket No. FD 35788, 14500 Limited LLC—Petition for Declaratory Order (STB, served June 5, 2014).

Board's formal complaint procedures of 49 C.F.R. § 1111.1, et seq., employed primarily for the adjudication of rate disputes.²

In their Complaint Alleging Violations of 49 U.S.C. §10903 and §11101, filed October 28, 2014, "Complainants" submitted their case in chief in support of their contention that the alleged removal by V&S of rail and track materials from the Western Section of the Towner Line, service on which had been discontinued in response to the Board's authorization³, constituted an impermissible abandonment in violation of 49 U.S.C. § 10903(a). The alleged removal of rail and track materials, the "Complainants" maintained, rendered it impossible for V&S to provide transportation or service on reasonable request, in violation of 49 U.S.C. § 11101(a).

V&S timely responded. In footnote 1 on page 2 of their Report, "Complainants" seek to make an issue of V&S' having filed a Reply, pursuant to 49 C.F.R. § 1104.13(a), rather than an Answer, pursuant to 49 C.F.R. § 1111.4(a). Both, however, were due in 20 days' time, on or before November 17, 2014, but V&S' Reply was filed in two days' time, on October 30, 2014. It is the "Complainants" who are not observing the times called for under the provisions of the Board they have chosen to invoke. According to 49 C.F.R. § 1111.10(a), the parties were to confer about procedural matters and discovery, within 12 day after V&S' responsive pleading was filed on October 30, 2014, but as

² See Docket No. NOR 42125, E.I. Dupont de Nemours and Company v. Norfolk Southern Railway Company (STB, served March 14, 2014); Docket No. NOR 42121, Total Petrochemicals & Refining, USA, Inc. v. CSX Transportation, Inc. (STB, served May 31, 2013; Docket No. NOR 42123, M&G Polymers USA, LLC v. CSX Transportation, Inc. (STB, served September 27, 2012).

³ Docket No. AB 603 (Sub-No. 2X), V & S Railway, LLC—Discontinuance of Service Exemption—in Pueblo, Crowley and Kiowa Counties, Colo. (STB, served June 28, 2012).

“Complainants” acknowledge in the attached letter, their counsel did not send his emails to V&S’ counsel until the week of November 17, 2014. “Complainants” Report was due 19 days after V&S filed its Reply or by November 19, 2014, but “Complainants” did not file it until December 5, 2014.

In its Reply of October 30, 2014, V&S had noted that the Board invariably has held that the removal of rail and track materials does not constitute an abandonment.⁴ Moreover, the Board consistently has held that a rail carrier’s obligation to render transportation or service is only in response to a reasonable request for service⁵, and in the nine years that V&S has operated the Towner Line⁶ it has not received a reasonable request for service, especially none from the “Complainants”. “Complainants” at no time have tendered a carload of grain or any other freight for transportation by V&S on the Towner Line, and at no time have they received a carload of fertilizer or any other freight for delivery by V&S via the Towner Line.

“Complainants”, without having obtained a waiver or exemption from the Board of the prohibition of 49 C.F.R. § 1104.13(c) that a reply to a reply is not permitted, on

⁴ See Docket No. FD 34869, Honey Creek Railroad, Inc.—Petition for Declaratory Order (STB, served June 4, 2008, slip op. p.6); docket No. AB 1081X, San Pedro Railroad Operating Company, LLC—Abandonment Exemption—in Cochise County, AZ (STB, served April 13, 2006, slip op. p. 4); Chelsea Property Owners—Aban—The Consol R. Corp., 8 I.C.C.2d 773, 779, affd. sub nom. Consolidated Rail Corp v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

⁵ See Docket No. FD 34337, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority d/b/a Northwest Pacific Railroad (STB, served January 31, 2007, slip. op. p. 4); Docket No. NOR 42086, Terminal Warehouse, Inc. v. CSX Transportation, Inc. (STB, served May 12, 2004, slip op. p. 5); Docket No. FD 34019, Montezuma Grain Company, LLP and Parke County Redevelopment Commission v. CSX Transportation, Inc. (STB, served May 12, 2004, slip op. p. 10).

⁶ Docket No. FD 34779, V & S Railway, Inc.—Acquisition and Operation Exemption—Rail Line of Colorado, Kansas & Pacific (STB, served December 30, 2005).

October 31, 2014, filed a Reply to the Reply that V&S had filed. In their Reply to the Reply, “Complainants” did not dispute V&S’ assertion that the removal of rail and track materials consistently has been held by the Board not to constitute an abandonment for which the Board’s authorization needed to be obtained. Complainants did not dispute that the Board uniformly has held that a rail carrier’s obligation to render transportation or service is only in response to a reasonable request for service, and that in the nine years that it has operated the Towner Line V&S has received no request for reasonable service and most certainly none from the “Complainants”.

In view of the foregoing, it was perfectly appropriate for V&S respectfully to request the Board to dismiss the Complaint Alleging Violations of 49 U.S.C. §10903 and §11101. That was no more out of line than respectfully asking the Board to deny the Complaint would have been⁷. It was sheer nonsense for the “Complainants” to have maintained, as they did in the last paragraph on page two of their Reply to V&S’ Reply, that “[r]uling on a request by defendant to dismiss the complaint in a reply filing, without Complainants having the ability to respond would be improper, highly prejudicial, and unwarranted in any event.” “Complainants” conveniently ignore that they in fact had responded to V&S’ Reply by filing their Reply to Reply.

The Complaint Alleging Violations of 49 U.S.C. §10903 and §11101 and Motion for Emergency and Preliminary Injunctive Relief are intimately related. Both are premised on the “Complainants”’ contention that V&S’ alleged removal of rail and track materials from the Western Segment of the Towner Line constituted the impermissible

⁷ In footnote 2 on page 3 of their Report, “Complainant” refer to their query of V&S’ counsel whether V&S didn’t intend to file a Motion to Dismiss, clearly looking for an opportunity in their opposition to offer evidence and arguments which they had failed to submit in their earlier filings.

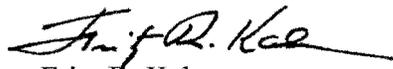
abandonment of a railroad line in violation of 49 U.S.C. § 10903(a) and that, in doing so, V&S foreclosed its ability to render transportation or service upon reasonable request in violation of 49 U.S.C. § 11101(a). The Board's decision relating to the stay it entered on October 31, 2014, very well may determine whether it will entertain the Complaint and, if so, what issues it will want addressed by the parties. Therefore, V&S believes that the procedural schedule that the "Complainants" have proposed in their Report, as well as Complainants' First Discovery Requests, served November 21, 2014, are premature, and V&S will neither offer its comments on the proposed procedural schedule nor respond to the discovery requests until the Board has rendered its decision on the stay order.

WHEREFORE, V and S Railway, LLC respectfully requests the Board to reject Complainants' Report Pursuant to 49 C.F.R. §1111.10(a) and Motion for Establishment of Procedural Schedule.

Respectfully submitted,

V AND S RAILWAY, LLC

By its attorney,



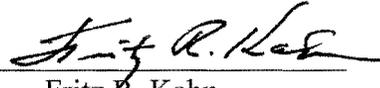
Fritz R. Kahn
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Dated: December 17, 2014

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 17th day of December, 2014.



Fritz R. Kahn