

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

240906

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Finance Docket No. 36005

**KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC – FEEDER LINE
APPLICATION – LINE OF V AND S RAILWAY, LLC, LOCATED IN CROWLEY,
PUEBLO, OTERO, AND KIOWA COUNTIES, COLORADO**

REPLY TO MOTION FOR ISSUANCE OF THIRD-PARTY SUBPOENAS

KCVN, LLC (“KCVN”) and the Colorado Pacific Railroad, LLC (“CPRR”)(together “Applicants”) hereby file this Reply in opposition to the “Motion for Issuance of Third-Party Subpoenas” (“Motion”) filed by V and S Railway, LLC (“V&S”) on May 25, 2016. The Motion asks the Board to exercise its authority under 49 U.S.C. §721(c) and issue subpoenas on several non-parties who submitted verified statements in support of the Feeder Line Application filed by Applicants pursuant to 49 U.S.C. §10907 and 49 C.F.R. Part 1151 (“Application”). The Application was accepted by the Board on April 18, 2016 and supplemented at the Board’s suggestion on April 29, 2016. For the reasons set forth below, the Motion should be denied, as there is no justification or need for discovery of additional information from the non-parties for V&S to adequately respond to the Application or for the Board to evaluate it. Moreover, the requests included in the proposed subpoenas seek information from the non-party representatives of rail shippers located in the vicinity of the Towner Line that V&S should already have in its possession by virtue of it being the owner of the line.

I. Background

This proceeding involves an attempt by KCVN and CPRR to acquire a line of railroad from the V&S pursuant to the Board's authority under 49 U.S.C. §10907, which governs the sale of rail lines subject to the Board's jurisdiction to a third party when required by the public convenience and necessity, or when the owner has designated the rail line for abandonment. The rail line in question is a 121.9 mile railroad main line and related track facilities located in southeastern Colorado and commonly known as the Towner Line, which V&S purchased from the State of Colorado in 2005. The Towner Line had a long history of serving wheat farmers and other shippers located along it. Several years after purchasing it, the V&S stopped providing any service over the Towner Line or maintaining it, and in 2012 began a systematic scheme to abandon and sell the line's assets. This scheme was halted in 2014 through legal action by KCVN, who, through its wholly owned subsidiary CPRR, seeks to restore common carrier rail service over the Towner Line to the local Colorado wheat farmers, KCVN, and other rail shippers. *See* Application at 1-4, and 19-30.

Pursuant to the Board's regulations governing feeder line proceedings, the Application contains a discussion about a proposed operating plan that (1) identifies the Kansas & Oklahoma Railroad ("K&O") as the proposed operator of the Towner Line; (2) describes in detail the service the K&O intends to provide once the Towner Line is rehabilitated and put back into service; and (3) demonstrates that the K&O is capable of providing adequate service over the line for at least 3 years from the date of the acquisition. 49 C.F.R. §1115.3(a)(7).¹ The Application also contains an extensive discussion supporting KCVN and CPRR's assertion that

¹ "(7) An operating plan that identifies the proposed operator; attaches any contract that the applicant may have with the proposed operator; describes in detail the service that is to be provided over the line, including all interline connections; and demonstrates that adequate transportation will be provided over the line for at least 3 years from the date of acquisition."

the sale of the Towner Line to them is justified by both requirements of §10907: (1) that the line has been designated for abandonment by V&S; and (2) that the public convenience and necessity permit or require their acquisition of the Towner Line. *Id.* at 1115.3(a)(11). The Board's regulations require that these showings must be supported by verified statements of witnesses. *Id.* at 1151.3(a). Thus, the Application's discussion of the operating plan is supported by the Verified Statement of Mr. Doug Story, Vice President of Agricultural Marketing, Watco Transportation Services. The K&O is one of the short line railroads owned by Watco. Verified statements of existing and potential rail shippers along the line discussing their interest in receiving rail service are also typical in feeder line application proceedings. *See*, STB Finance Docket No. 35160, *Oregon International Port of Coos Bay – Feeder Line Application – Coosbay Line of the Central-Oregon & Pacific Railroad, Inc.*, (served October 21, 2008)(“*Coos Bay*”). Accordingly, verified statements of five representatives of wheat farmer interests located in the vicinity of the line are also included in the Application.

The individuals who submitted verified statements are not parties to this proceeding. Consequently, V&S's Motion seeks an order from the Board issuing subpoenas seeking discovery of a broad range of information from both the K&O, and all of the shipper representatives who submitted verified statements.

II. The Applicable Standard

The Board's authority to subpoena witnesses and documents has been exercised only a handful of times since the Board's creation in 1996. This authority derives from 49 U.S.C. §721(c), which permits the Board to “subpoena witnesses and records related to a proceeding of the Board from any place in the United States, to the designated place of the proceeding.” 49 U.S.C. §721(c)(1). If a witness disobeys a subpoena, the Board or a party to a proceeding before

the Board, may petition a district court of the United States to enforce the subpoena. *Id.* Following the language of §721(c), the Board's regulations refer to petitions for subpoenas in 49 C.F.R. Part §1113, which governs Oral Hearings.

Despite section 721(c)'s and 49 C.F.R. §1113.2's respective textual limitations to oral hearings, the Board has held that its authority to issue subpoenas is not limited to oral hearings. STB Docket No. 42051, *Wisconsin Power & Light Co. v. Union Pacific Railroad Co.* (STB served June 21, 2000)(holding the Board may draw on its general authority to grant relief not otherwise specifically provided for in its rules, citing 49 C.F.R. §1117.1). To date, the STB has only exercised this authority in a few proceedings. *See, e.g.*, STB FD 35731, *Ballard Terminal Railroad Co. LLC – Acquisition and Operation Exemption – Woodinville Subdivision* (served May 17, 2013)(“*Ballard Terminal*”)(acquisition exemption proceeding pursuant to 49 U.S.C. §10502(b)); STB Docket FD 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions* (Served February 27, 2012)(“*Coal Dust*”)(declaratory order proceeding); and *see Coal Dust*, decision served June 25, 2012 (“*Coal Dust Appeal*”) at note 6 (listing several stand-alone cost rate cases).

While the Board permits discovery in feeder line proceedings, such discovery typically occurs between the incumbent railroad and the applicant or competing applicant. The Board has very rarely used its subpoena powers in feeder line cases. *See*, Finance Docket No. 34890, *PYCO Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, (served October 5, 2006)(where the Board ordered non-party parent company of applicant to respond to discovery requests related to the applicant's financial responsibility). V&S's Motion does not cite to any previous instance where the Board has issued subpoenas in a feeder line proceeding directed to non-parties who submitted verified statements supporting the details of an

operating plan, or non-party shipper interests who testified as to the need for rail transportation along the line.

In deciding whether to issue a subpoena directing a nonparty to produce information and documents, the Board has developed a balancing test that examines “whether the subpoenas could cause undue burden on third parties, especially those with a limited connection to the matter before the Board.” *Coal Dust* at 2; and see *Coal Dust Appeal* at 4 (holding that “where the information is sought from a nonparty, greater weight should be given to burden and thus a stronger showing of relevance is required.”). In *Coal Dust*, the Board determined that where non-party association members have a “clear interest in the proceeding and will obviously be affected by its outcome,” then subpoenas are an appropriate means for obtaining “legitimate discovery.” *Id.* In *Coal Dust*, the requisite level of interest was found to be defined as each utility association member being directly impacted by the operating tariff that was being challenged by the association as the party to the case.

In *Ballard Terminal*, the Board applied the general test from *Coal Dust* to a request for issuance of a subpoena on a non-party that had submitted a letter in support of a petition to reinstitute service over a line that had been “rail banked” and converted to trail use pursuant to 49 U.S.C. §1247. In the letter, the non-party had asserted that his company had a demand for rail service over the line. This unverified² assertion was relevant to a central legal issue in the case: whether the need for rail service triggered the requirements for a “banked” line to be reactivated as a common carrier line of railroad. The Board concluded that obtaining the non-party’s testimony was relevant to that “central issue,” and ruled that the subpoena should be granted.

² Under 49 C.F.R. §1104.5, factual statements in Board proceedings are made under penalty of perjury via a verification in lieu of an oath required by 18 U.S.C. §1621. Thus, verified statements of non-parties carry considerably more weight than a letter of support that has not been verified pursuant to 49 C.F.R. §1104.5.

Even if the nonparty is shown to have the sufficient level of interest in the outcome of the proceeding that a subpoena is appropriate, the discovery sought must still be “legitimate,” meaning it must seek information that is relevant to the subject matter in the proceeding and appears to be reasonably calculated to lead to the discovery of admissible evidence. *Coal Dust* at 3. The discovery sought must also be reasonable in scope and not be unduly burdensome. *See Id.*, and *Coal Dust Appeal* at 7, where the Board determined that even though the non-parties had a sufficient interest in the proceeding, it concluded that BNSF’s proposed discovery directed to the non-parties “was overly broad and burdensome” and declined to issue the subpoenas as proposed by BNSF.

III. There is No Need for Discovery from the Non-Parties Who Submitted Verified Statements in Support of the Application

The Board has determined that “whether the issuance of a particular subpoena is appropriate requires a case-by-case examination.” *Wisconsin Power & Light, supra*, at 3. In this proceeding, V&S has proposed to engage in discovery of all the non-parties who submitted verified statements on the questions of (1) Applicants’ assertions that there is a need for service to grain shippers along the Towner Line; and (2) V&S’s failure to provide rail service over the line. Motion at 5. There are numerous reasons why the subpoenas V&S has proposed should not be allowed.

A. The Additional Discovery Sought from the K&O is Improper and Unnecessary

V&S has requested the Board to issue a proposed subpoena to the K&O asking for an extensive amount of information related to K&O’s potential operation of the Towner Line. This discovery of a non-party should not be allowed because (1) the application acceptance process of the STB under Part 1151 provided the proper means for V&S to seek additional details on the

Applicants proposed operating plan, and (2) despite Applicants' belief that V&S should have directed any requests for more information on the operating plan to the Board for it to determine whether such information was necessary, Applicants on June 6 provided V&S with additional information on the operating plan in response to discovery served on Applicants by V&S.

On the first point, as stated previously, the Applicants fully complied with the requirements of §1151.3(a)(7) governing the acceptable level of detail for a proposed operating plan, as evidenced by the Board's acceptance of the Application as substantially complete. At the suggestion of the Board, on April 29, 2016 the Applicants submitted additional details on the proposed operating plan. V&S did not question the completeness of the operating plan information either in the original Application, after was accepted as substantially complete, or after the supplemental information was provided. To the extent that V&S believed that additional information was necessary for the Board to evaluate the Application and V&S to prepare comments in response to it, the proper course was for V&S to ask the Board to direct Applicants to provide it. Had it done so, V&S would have had to justify the relevance and probity of the additional detailed information it now seeks through a subpoena. In its Motion, V&S provides no justification or reason why the operating plan information in the Application is insufficient or needs to be further supplemented, other than merely asserting that Mr. Story and the K&O have an interest in the outcome of the proceeding. Motion at 3-4. V&S's attempt to circumvent the Board's feeder line process should be denied.

As to the second point, the proposed discovery directed to Mr. Story and K&O is also not necessary because V&S obtained additional information about the operating plan and K&O's plans for the line through discovery V&S served on Applicants on May 20, 2016. *See Id.* at 2. The discovery requests propounded by V&S included questions about the lease agreement being

negotiated by Applicants and K&O, the business projections of K&O included in the supplemental material filed with the Board on April 29, 2016, and communications between KCVN and the K&O about its potentially being the operator of the line. While Applicants maintain that their Application as supplemented includes the appropriate level of detail on their proposed operating plan, they nevertheless on June 6, 2016 provided information and documents to V&S that are responsive to these and the other discovery requests propounded by V&S. There is therefore no need to obtain still more information from Mr. Story and the K&O through the issuance of a subpoena on a non-party.

B. The Proposed Discovery from the Shipper Representatives Should Also not be Permitted

There is also no need for non-party discovery from the shipper representatives who submitted verified statements in support of the Application. In the first place, any rail shipper along a rail line subject to a feeder line application has an interest in the outcome of the proceeding. This is particularly true in cases like this one where the incumbent railroad stopped providing service over the line four years ago and has clearly manifested a desire to remove the track assets and sell them. Thus, the mere fact that a shipper submits a verified statement in support of a feeder line application should not trigger the issuance of a subpoena authorizing intrusive and burdensome discovery on that shipper. It is telling that V&S can cite to no other instances where the Board took this action in a feeder line proceeding. V&S's attempt to equate the shipper non-parties in this case to the shipper in *Ballard Terminal* is misplaced. As explained above, the shipper in that proceeding submitted an unverified letter asserting facts on a critical issue in that proceeding, which arguably heightened the need to explore his claims through the extraordinary step of a subpoena on a non-party. Here, the shipper representatives have submitted verified statement testimony on their general need and desire for the restoration

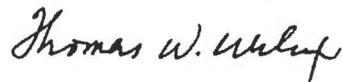
of common carrier service over the Towner Line, and their interactions with V&S that led to the cessation of rail service. While this is necessary evidence that there is a need for rail transportation over the Towner Line that contributes to the reasons it should be sold to Applicants, none of the witnesses testified that they have had conversations with KCVN, CPRR, or the K&O concerning specific “requests for service, requests for rates, and estimates or commitments for the volume to be shipped,” which V&S seeks discovery of through its subpoenas. Nor is information this specific a necessary prerequisite to Applicants demonstrating that the public convenience and necessity require the sale of the Towner Line to them. *See Coos Bay, supra*, at 5 (necessary showing made by demonstrating desire and need for restoration of rail service, and railroad (1) not refuting shipper’s claims of inadequate service, (2) not presenting any evidence to suggest it made necessary efforts to provide adequate service; and (3) filing for abandonment of the line, which was evidence that the railroad did not intend to make the repairs necessary to restore service over a section of track that had been embargoed).

V&S’s proposed subpoenas to the shipper non-parties should also be denied because they seek information V&S either already has in its possession, or could easily obtain without the intrusion and burden of a subpoena on a non-party. Specifically, for Mssrs Tallman, Stum, and Britton, V&S asks for the location of each shipper’s property and the location of rail sidings or grain elevators that serve their property. This is clearly information that V&S should either know as the owner of the Towner Line, or could easily obtain through public sources or observation. Additionally, V&S’s proposed discovery would require the shippers to produce communications and correspondence between them and V&S concerning “requests for service, requests for rates, and estimates or commitments for amounts to be shipped.” However, each of the individuals V&S seeks to subpoena has already submitted verified testimony that clearly

describes their (unsatisfactory) interactions with V&S concerning rates and service over the relevant time frame. Any correspondence or communications between them and V&S that V&S might attempt to use to rebut these statements would most likely reside in the files of V&S. There is no need to engage in non-party discovery for information that already is or should be in V&S's possession.

WHEREFORE, for all the reasons set forth hereinabove, the Motion of V&S Railway LLC for Issuance of Third Party Subpoenas should be denied in its entirety. If the Board is inclined to grant any of the subpoenas, it should take this action only after a technical conference to narrow the scope of the proposed requests to ensure they are reasonably tailored to minimize the burden on the affected non-party.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on this 14th day of June, 2016, I have served a copy of the foregoing Reply to Motion of V AND S Railway, LLC for Issuance of Third-Party Subpoenas by email and first class mail on the following persons or entities:

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