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Public Record

**EXPEDITED CONSIDERATION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

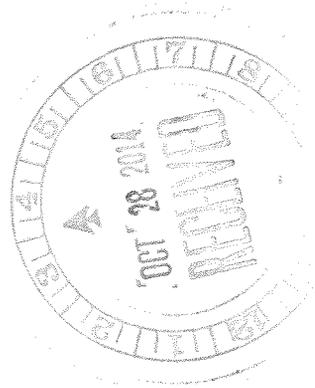
And )

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

vs. )

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

**Docket No. NOR 42140**



**MOTION FOR EMERGENCY AND PRELIMINARY INJUNCTIVE RELIEF**

Come now, Colorado Wheat Association Committee (“CWAC”), the Colorado Association of Wheat Growers (“CAWG”), the Colorado Wheat Research Foundation (“CWRP”), and KCVN, LLC (“KCVN”) (the Complainants in this proceeding) and request the Surface Transportation Board (“Board” or “STB”) to exercise its authority under 49 U.S.C. §721(b)(4) and immediately issue an order, on an emergency basis before 5:00 EST on October 31, 2014, enjoining V&S Railway LLC (“V&S”) from dismantling and removing the tracks and

related assets of the line of railroad that is the subject of the Complaint in this proceeding until the Board reviews and rules on Complainants' request for a Preliminary Injunction. Complainant's request for a Preliminary Injunction asks the Board to enjoin V&S from dismantling and removing the tracks and related assets of the line of railroad that is the subject of the Complaint in this proceeding until V&S receives formal abandonment authority from the Board under 49 U.S.C. §10903.

As explained further below, the track at issue is denominated the "Western Segment" of a 121.9 mile line of currently unused railroad known as the "Towner Line," located in Colorado. The Complaint filed by CAWG and KCVN in this docket pursuant to 49 U.S.C. §11701(b) alleges that V&S's removal and sale of the rail track and associated assets of the Western Segment starting on or around August 11, 2014 without first seeking and receiving abandonment authority from this Board violates 49 U.S.C. §10903 and §11101. *See* Complaint ¶¶ 32-40. The track removal and sale was temporarily halted on August 28, 2014, when KCVN obtained a Temporary Restraining Order ("TRO") from a Colorado state court. The state court proceeding was removed to the U.S. District Court for the District of Colorado on September 3, 2014.<sup>1</sup> On October 24, 2014, the U.S. Magistrate Judge, sitting by consent as judge of the entire proceeding, ordered the TRO dissolved, effective October 31, 2014. The court delayed the effectiveness of the dissolution for five business days to allow KCVN to bring this matter before the Board and seek a preliminary injunction here. See Attachment 1 (Courtroom Minutes/Minute Order).<sup>2</sup>

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<sup>1</sup> V&S removed the TRO proceeding to federal district as of right under 28 U.S.C. §§ 1441(a) and 1446.

<sup>2</sup> The other Complainants were not parties to the Colorado court proceedings. However, the court's order did not refer any specific issue to the Board, but rather enabled KCVN to present this entire matter to the Board, including this request for injunctive relief. This order

Complainants believe that if the Board does not grant the requested injunctive before the dissolution of the TRO by the federal court becomes effective, V&S will immediately recommence the dismantling of the Western Segment, resulting in irreparable harm to them and other parties.

The emergency injunctive relief and preliminary injunction from this Board are necessary because Complainants believe V&S fully intends to resume removing and selling the track assets of the Western Segment upon dissolution of the TRO without first obtaining authority to abandon it. It intends to resume dismantling the railroad without such authority despite telling the Board as early as August 2012 it would seek that authority "in the near future." It also intends to resume dismantling the Western Segment despite the fact that on July 28, 2014 KCVN, with the support of CWAC, CAWG, CWRP, numerous affected shippers along the Towner Line, and other local and state entities, made a good faith cash offer to buy the entire Towner Line and reactivate it for interstate railroad service. Complaint ¶¶ 23-30. As summarized in the Complaint, V&S responded to KCVN's offer by first, intentionally misleading KCVN, and then entering into a contract on August 11, 2014 to immediately remove and sell the tracks and associated equipment making up the Western Segment. Complaint ¶¶ 23-27.

V&S clearly has no intention of ever reinstating rail service over the Towner Line. It's resumption of the removal and sale of the Western Segment track assets is in violation of the Board's abandonment rules and V&S's obligations as a common carrier under 49 U.S.C. §11101, and will cause irreparable harm to KCVN because it will almost certainly render the restoration

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therefore did not preclude the addition of other complainants who have the same legal arguments and will be similarly irreparably harmed by V&S's actions.

and reinstatement of rail service over the complete Towner Line prohibitively expensive. This will also irreparably harm CWAC's producers and CAWG's members, CWRP, local municipalities, and other rail shippers currently located along the line who have broadly supported KCVN's efforts to buy the line and reactivate service over it, and have actively opposed V&S's efforts to abandon and dismantle it.<sup>3</sup> Issuing the requested injunction would therefore clearly be in the public interest.

As grounds for preliminary injunctive relief, KCVN states as follows:

### **THE BOARD'S INJUNCTION AUTHORITY**

The Board has jurisdiction over this matter pursuant to 49 U.S.C. §721(b)(4). Under Section 721(b)(4), where necessary to prevent irreparable harm, the Board has authority to issue an appropriate order, including "unilateral emergency injunctive orders" and a preliminary injunction. STB Ex Parte No. 582, *Public Views on Major Rail Consolidation*, 2000 WL 361896, at 6 (STB served April 7, 2000) (legislative history of §721(b)(4) intended for Board to issue unilateral injunctive orders to prevent irreparable harm).<sup>4</sup>

The Board generally applies the *Holiday Tours* test to decide whether or not a request for injunctive relief should be granted. Under the *Holiday Tours* test, the party seeking a preliminary injunction must demonstrate that: (1) there is a likelihood that it will prevail on the merits of its claim; (2) it will suffer irreparable harm in the absence of an injunction; (3) other

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<sup>3</sup> Numerous letters opposing the attempts of V&S to dismantle the Towner Line have been submitted in Docket AB 603 (Sub- No. 3X).

<sup>4</sup> The Board also has authority under 49 U.S.C. §11702 to bring a civil action to enjoin a rail carrier from violating 49 U.S.C. §10901 through §10906. However, the Board has considered similar motions for injunction concerning the removal of tracks under §721(b)(4) upon the request of an affected party. *Ballard Terminal Railroad Company, LLC - Acquisition and Operation Exemption - Woodinville Subdivision*, Finance Docket No. 35731 (Served August 1, 2013).

interested parties will not be substantially harmed by an injunction; and (4) the public interest supports the granting of the injunction.<sup>5</sup> All four of these prongs are met in this instance, including the requirement of irreparable harm necessary to obtain emergency injunctive relief.

### **RELEVANT FACTS**

#### A. The Parties

The identity and interests of the parties to this Complaint proceeding are generally described in the Complaint. As additional factual support for this Motion, Complainants have attached Verified Statements prepared by Mr. William S. Osborn, Attorney-in-Fact for KCVN, LLC, (Attachment 2); and Mr. Darrell L. Hanavan, Executive Director of CWAC, CAWG, and CWRP (Attachment 3). Mr. Osborn provides additional information on KCVN's status as a financially responsible party and its reasons for wanting to purchase the Towner Line put it back into service. KCVN clearly has the financial wherewithal to accomplish this goal, and has been exploring this possibility with representatives of Kiowa, Otero, and Crowley counties, the other Complainants, the State of Colorado, and rail shippers along the line who used it in the past before V&S took the line out of service. KCVN has also engaged in discussions with WATCO, Inc., as a potential operator of the line. Osborn V.S. at 2-4. KCVN also owns approximately 25,000 acres of land located in close proximity to the Towner Line, on which, among other things, it grows wheat. It is, thus, a potential shipper on the line as well as interested purchaser. *Id.* Mr. Hanavan's Verified Statement provides additional information about the importance of the potential reactivation of the Towner Line to CWAC's producer and CAWG's members,

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<sup>5</sup> See *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F. 2d 841,843 (D.C. Cir. 1977). See also, *American Chemistry council, The Chlorine Institute, Inc., The Fertilizer Institute and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*, STB Docket No. 42129 (STB Served May 4, 2012); *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, 1998 WL 205998 at Fn7 (STB Served April 27, 1998).

especially growers of "Snowmass" wheat, and to CWRP. Hanavan V.S. at 3-4, 6. It also provides additional factual information about the V&S's efforts to abandon the Western Segment and the Towner Line. *Id.* at 4-6.

B. The Towner Line and V&S's Plans to Abandon It

The Towner Line extends approximately 121.9 miles between milepost 747.5 near Towner, Colorado on its eastern terminus, and milepost 869.4 near NA Junction and an interchange with BNSF Railway near Pueblo, Colorado on its western terminus. The Towner Line was previously owned by the Missouri Pacific Railroad Company ("MPRR") and then by Union Pacific Railroad Company ("UP"). After UP sought to abandon it in 1996, the line was sold to the State of Colorado. On December 1, 2005, V&S entered into a purchase agreement with the State of Colorado to buy and operate the entire Towner Line. Although it had purchased the line, V&S sought only authorization from the Board to lease and operate the railway in 2005, apparently in the mistaken belief that it had only leased the line.

After conducting some rail operations over it, V&S began taking steps to rid itself of the Towner Line in 2012. The first step in this plan was to obtain authority to discontinue service over the Western Segment, which runs 60.8 miles from milepost 808.3 near Haswell west to milepost 868.5, which is approximately .9 miles from the railway's western terminus at milepost 869.4 near NA Junction. V&S obtained this authority effective July 28, 2012.

On August 15, 2012, V&S sought Board authorization to purchase the Towner Line and to have approval of the purchase made retroactive to December 29, 2005 due to V&S's asserted

prior "mistake" in thinking it had only leased the line from the State of Colorado in 2005.<sup>6</sup> In its *Acquisition Petition*, V&S told the Board V&S "expects in the near future to file with the Board its Verified Notice of Abandonment Exemption to abandon the western segment of the Towner Line, between NA Junction and Haswell, on which there has been no traffic for two years' time." *Acquisition Petition* at 8-9.<sup>7</sup> The Board denied V&S's request for retroactive approval of its acquisition of the Towner Line, but in order to facilitate abandonment of the Western Segment the Board, on its own motion, waived the requirement in 49 C.F.R. §1152.50(b) that V&S must have had Board-authorized ownership of the Western Segment for at least two years. Despite multiple statements that it would seek authority to abandon the Western Segment (and "western half") of the Towner Line, and the Board's waiver to facilitate that action, V&S has never sought abandonment authority for the Western Segment.

In May and June of 2014, respectively, V&S unsuccessfully attempted to use the exempt abandonment regulations under 49 C.F.R. §1152.50 to abandon the Towner Line east of milepost

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<sup>6</sup> STB Docket No. FD 35664 *V&S Railway, LLC—Acquisition and Operation Exemption—Colorado Department of Transportation, Verified Petition for Exemption of V&S Railway, LLC (Acquisition Petition)*.

<sup>7</sup> Docket AB 603 (Sub-No.2X), *V&S Railway, LLC—Discontinuance of Service Exemption—in Pueblo, Crowley and Kiowa Counties, Colorado*, filed June 8, 2012. (*Discontinuance Notice*). The nature and scope of the track making up the "Western Segment" has not been fully and consistently described by V&S to the Board. For example, the *Discontinuance Notice* did not disclose that the 60.2 mile "railroad line" for which discontinuance authority was being sought was a segment of the 121.9 mile Towner Line. Nor did the *Discontinuance Notice* disclose that V&S had excluded the last .9 mile of track from MP 868.5 to MP 869.4. In the *Acquisition Petition* V&S stated it had "sought the Board's authorization to discontinue service on the western portion of the Towner Line, *between NA Junction and Haswell*." *Acquisition Petition* at 4 (emphasis supplied). This statement was erroneous, since such authority had not been sought for the last .9 mile. V&S further stated that it was seeking retroactive authority in part because it intended "in the near future" to abandon "*the western half of*" the Towner Line, which also incorrectly implied that the "Western Segment" included the final .9 mile. *Id.* at 9 (emphasis supplied).

808.3.<sup>8</sup> These attempts were discontinued when the Office of Proceedings, supported by the Board, ruled that the waiver granted for the Western Segment in 2012 only applied to that part of the Towner Line.<sup>9</sup> However, during a hearing on V&S's motion to dissolve the TRO held on October 6, 2014 before the U.S. Magistrate of the District Court, Colorado, counsel for V&S informed the magistrate that V&S would again seek exemption authority to abandon the Towner Line east of milepost 808.3 when the two-year ownership requirement is met in December of this year. *See* Complaint ¶¶ 20; 35; and Complaint Exhibit 1.

V&S's statements and actions concerning the Towner Line are consistent with its responses to rail shipping located along the line. As summarized in the Verified statement of Mr. Hanavan, V&S has shown no interest in reactivating the Towner Line for rail service, and has in fact actively discouraged it by responding to requests for service with rates set at levels that ensure no traffic will move. *Hanavan V.S.* at 4-5.

There is accordingly no doubt that since 2012 V&S has desired and intended to abandon the Western Segment and the rest of the Towner Line, and that it has no intention of reinstating rail service over the Western Segment and the rest of the Towner Line even though there are rail shippers located along the line who would utilize rail service if it were available on reasonable terms. However, instead of following the Board's abandonment procedures for the Western Segment prior to tearing up and removing the track, V&S has chosen to blatantly circumvent them and remove the track on its own and sell the assets for profit.

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<sup>8</sup> The relevant facts concerning the "Eastern" and "Middle Segments" of the Towner Line are summarized in the Complaint ¶¶ 17-20, 20, fn.4; 35, and in the various filings and decisions issued in Docket AB 603 (Sub No. 3X).

<sup>9</sup> *See* Docket AB 603 (Sub No. 3X), *V and S Railway, Abandonment Exemption- In Kiowa County, Colorado*, Decision served October 23, 2014.

C. KCVN's Offer to Purchase the Towner Line and V&S's Response

When KCVN learned of V&S's intention to abandon the Middle Segment, it prepared an offer to V&S to purchase the entire Towner Line for \$10,000,000 cash and submitted this offer to V&S's president on July 28, 2014.<sup>10</sup> Complaint Exhibit 2. To demonstrate that the offer was *bona fide* and that it is a ready, willing and able purchaser, KCVN deposited \$1,000,000 into a trust account as earnest money for the sale. In addition, KCVN informed V&S that KCVN was "open to a discussion about valuation," and invited V&S representatives to come to Denver and discuss the offer and terms of a potential sale. Through its counsel, KVCN also informed V&S that it planned to retain a short-line contract operator to keep the line open, and to invest such amount as necessary to retain shipper access from all points on the line to either of its ends. KVCN also informed V&S that it had hoped to preserve the entire line for future shippers, to the benefit of both private and public interests at the county and state levels. *Id.* at 23.

On the date KCVN made its offer, the Towner Line was still fully intact. Three days later, on July 31, 2014, V&S's counsel informed KCVN's counsel by email that "[d]ue to other commitments, [V&S] will not be in a position to consider any offers to purchase our Towner [L]ine until, at the earliest, the end of August." Complaint Exhibit 3. The email also encouraged KCVN's counsel to check back with counsel for V&S at that time. As KCVN subsequently discovered in the TRO proceeding, less than two weeks after V&S received KCVN's offer, unbeknownst to KCVN, or anybody else, on August 11, 2014, V&S or its affiliate A&K purportedly entered into a contract to sell the tracks and other track assets of the Western

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<sup>10</sup> A copy of this letter was also sent the Chief, Section of Administration, of the STB's Office of Proceedings, and it was eventually placed in Docket AB-603 (Sub - No. 3X).

Segment of the Towner Line, and that the dismantling and removal of the Western Segment began shortly thereafter.

On August 22, 2014, a representative for Kiowa County, Colorado sent V&S counsel a letter putting "V&S on formal notice that such unauthorized removal of track materials is considered to constitute an unlawful abandonment of the Towner-NA Jct rail line as a through route in violation of 49 U.S.C. 10903." Complaint Exhibit 4. The letter further demanded that V&S immediately cease and desist its removal of track and replace all materials and rails that had already been removed. Referencing KCVN's offer to purchase, the letter rightly stated that continuing the track removal would threaten the acquisition of the line "for revitalized rail operation." *Id.*

Despite the *bona fide* purchase offer from KCVN, the letter from Kiowa County, and other protests lodged by parties in STB Docket No. AB-603 (Sub-No.3X), V&S did not stop the removal of the Western Segment until it was ordered to do so by the TRO issued on August 28, 2014. In its Motion to Dissolve Temporary Restraining Order, filed September 9, 2014 in the U.S. District Court for the District of Colorado, V&S informed the court that its affiliate A&K had "decided for the time being (until the state court TRO is dissolved) not to remove the Western Segment Track Materials originally intended to be sold and delivered to GWR, and instead, to furnish GWR with new rail . . . ." Thus, as of the date of this Motion for Emergency and Preliminary Injunctive Relief it appears that no additional tracks and related assets of the Western Segment have been removed and sold.

## ARGUMENT

### A. Complainants Are Likely to Prevail on the Merits

Complainants are likely to prevail on the merits of their claim that V&S, by contracting for the removal and sale of the tracks and track assets on the Western Segment of the Towner Line, and commencing that removal and sale between July 28<sup>th</sup> and August 28<sup>th</sup>, violated 49 U.S.C. §10903, §11101, and applicable precedent.

#### 1. V&S's Actions Violated 49 U.S.C. §10903

It is indisputable that a month after obtaining discontinuance authority for the Western Segment in July of 2012, V&S made it abundantly clear to the Board that it had no intention of ever re-activating common carrier service over it, and that V&S unequivocally would seek authority to abandon the track "in the near future." This statement was followed by V&S's subsequent filings evidencing its intent to abandon the Middle and Eastern Segments, and its counsel's October 6, 2014 representation to the Colorado federal district court Magistrate Judge that V&S would re-file to abandon those segments in December, 2014 when the two year ownership requirement of 49 C.F.R. §1152.50 is met.

Under 49 U.S.C.A. § 10903 (a)(1) "A rail carrier who *intends to-- . . . (A) abandon any part of its railroad lines . . .* must file an application relating thereto with the Board. *An abandonment or discontinuance may be carried out only as authorized under this chapter.*" 49 U.S.C.A. § 10903(a) (emphasis supplied). A railroad seeking to abandon a rail line must file either an abandonment application pursuant to 49 U.S.C. § 10903, or seek an exemption under 49 U.S.C. § 10502. In either case, the Board will authorize an abandonment or discontinuance under §10903 "only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. §10903(d). Simply put,

“Congress has provided a detailed procedure which must be followed before operations over any part of an interstate rail carrier’s lines may be abandoned or discontinued.” *Louisiana & Arkansas Ry. Co. v. Bickham*, 602 F. Supp. 383, 384 (D.C. La. 1985) (citing 49 U.S.C. § 10901, et. seq.).

Given V&S's expressed intention to abandon the Western Segment, its subsequent attempt to remove and sell the track making up the Western Segment without first seeking formal abandonment authority was an unlawful attempt to circumvent the requirements of §10903 and the Board's regulations. *See Consummation of Rail Line Abandonments that Are Subject to Historical Preservation and Other Environmental Conditions*, STB EP No. 678 (STB served April 23, 2008), (noting that “in some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs in inactive lines, we generally do not consider these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.”).

V&S's actions have also foreclosed the ability of KCVN or other responsible parties to acquire the Western Segment through the OFA process, by which the appropriate price for the Western Segment could be established by the parties through negotiation or by the Board through its OFA procedures.<sup>11</sup>

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<sup>11</sup> Complainants are aware that, should V&S continue to refuse to seek authority to abandon the Western Segment, and should V&S renege on its statements to the Colorado court about refiling to abandon the remainder of the Towner Line, the purchase of Western Segment and the remainder of the Towner Line could potentially be accomplished through the processes available under 49 U.S.C. §10907 and the Board's regulations implementing that provision. Complainants submit that this potential alternative means of reactivating the Towner Line for interstate rail service provides additional justification for the injunctive relief sought by this Motion.

2. V&S's Actions Violated 49 U.S.C. §11101

In support of its Motion to Dissolve the TRO in federal court, V&S heavily relied on the general rule, which Complainants do not dispute, that in some cases a railroad may remove the tracks of a line of rail it owns when the railroad has received authority from the Board to discontinue common carrier operations over it, but has not yet sought formal abandonment authority. *See, e.g. Presault v. U.S.*, 27 Fed. Cl. 69, at 77 (1992) *aff'd in part, vacated in part*, 66 F.3d 1167 (Fed. Cir. 1995) *reh'g en banc granted, judgment vacated*, 66 F.3d 1190 (Fed. Cir. 1995) and *on reh'g en banc*, 100 F.3d 1525 (Fed. Cir. 1996) and *rev'd on other grounds*, 100 F.3d 1525 (Fed. Cir. 1996)(emphasis added)(citing *Presault v. ICC*, 494 U.S. 1,5-6 n. 3 (1990)). However, discontinuance authority does not carry with it the permission to permanently dismantle the line and sell the track and track assets, as V&S intends. On the contrary, by definition, "the [STB's] discontinuance authority permits a railroad to cease operations of a line for an indefinite period, while retaining the property under [STB] jurisdiction and preserving the rail corridor for the possible reactivation of service in the future." *Presault v. U.S.*, *supra*, 27 Fed. Cl. at 77. *Manufacturers Ry. Co. v. Surface Transportation Board*, 676 F.3d 1094, 1095, Note 2 (D.C. Cir 2012). Moreover, "*under its common carrier obligation, a railroad's primary responsibility is to restore safe and adequate service within a reasonable period of time over any line as to which it has not applied for abandonment authority.*" STB Docket No. 41230, *GS Roofing Products Co., Inc. et al, v. Arkansas Midland RR and Pinsley RR Co.* (Served March 11, 1997) at 9 (emphasis supplied).<sup>12</sup>

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<sup>12</sup> *See also, St. Lawrence & Atlantic Railroad Company – Discontinuance of Service Exemption In Cumberland County, ME*, 2014 WL 712974 (S.T.B. Feb 24, 2014) (NO. AB 1117X); *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to Set Terms and Conditions*, 2008 WL 474151,

Accordingly, while it is true that the owner of a "discontinued" line of rail is not prohibited by 49 U.S.C. §11101 and §10903 from removing track making up the line and/or letting it fall into disrepair if there is no prospect of common carrier railroad operations resuming over the track in the reasonably foreseeable future, it is equally true that the law does not permit a railroad with a rail line that is completely intact to respond to a legitimate opportunity to put the line back into common carrier service by taking immediate steps to dismantle the railroad line and sell the tracks and related assets for their scrap value.

V&S's reliance on the general rule governing removal of the tracks of discontinued lines is fundamentally flawed because the removal of track began *after*, and indeed, *directly because of*, V&S's receipt of KCVN's opening offer to purchase the line and to reactivate common carrier rail service over it. It also occurred after numerous parties expressed their objections to the removal of the track and support for KCVN's offer. That offer clearly explained KCVN's intentions, which were to pay a substantial amount of money in cash for the Western Segment and the remainder of the Towner Line, and to make the investments in the line to preserve and enhance it for the benefit of private and public interests at the state and county levels. The status of KCVN as a financially responsible party is described in the attached Verified Statement of Mr. Osborn, but this was also well known to, or could have been easily determined by V&S had it responded in any way to the July 28 offer.

Instead of fulfilling its common carrier obligations and entering into discussions with KCVN, V&S first misled KCVN by stating it was not entertaining offers to sell the Towner Line at that time, and then, days later, it secretly entered into a contract to sell the track assets making

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at 8 (STB Served February 22, 2008) (noting that the Board had previously held that a carrier may remove track as long as it is prepared to restore the track should it receive a request for service.).

up the Western Segment. V&S then commenced and continued its efforts to remove and sell the track assets despite the protestations of Kiowa County and other parties who supported reinstating rail service over the Western Segment and the remainder of the Towner Line. These actions were clearly contrary to 49 U.S.C. §11101 and in no way consistent with the rules permitting removal of tracks from "discontinued" lines of rail. In fact, the clear indication is that V&S responded to KCVN's offer by ripping up track in order to avoid the OFA process that would be invoked by an application for formal abandonment authority, because it feared that the price established by that process would be less than the value it claimed for the line and because it opportunistically wanted to seize an extant opportunity to sell the line for scrap and did not want to wait.

In summary, based on the facts of this dispute and applicable precedent, KCVN is likely to succeed on the merits of its request that the Board find that V&S has violated 49 U.S.C. §10903 and §11101, and that continued removal of the Western Segment tracks and assets would also violate these provisions.

B. Permitting V&S to Continue to Dismantle the Tracks will Result in Irreparable Harm

The failure to issue the requested injunctive relief will irreparably harm Complainants, as well as other affected rail shippers and entities for the simple reason that, if V&S is allowed to dismantle and sell the rail assets of the Western Segment, then restoration of common carrier rail service over the entire Towner Line will become prohibitively expensive and KCVN will cease pursuing this project. And no one else ever would. This will result in loss of a significant business opportunity for KCVN, and lost opportunities for local rail shippers and wheat growers and the Colorado and U.S. economies.

As a threshold point, it is indisputable that KCVN is a financially responsible party with the wherewithal to acquire the Towner Line and make the necessary investments and take other necessary steps to reinstitute rail service. Osborn V.S. at 2-4. Thus, KCVN's injunction request is distinguishable from instances where the Board denied a request for an injunction concerning the acquisition of a rail line by a third party because the third party did not appear to be in a financial position to reinstitute service. See e.g. *Ballard Terminal Railroad Company, LLC - Acquisition and Operation Exemption - Woodinville Subdivision*, Finance Docket No. 35731; *BNSF Railway Company - Abandonment Exemption - In King County, Wash. (Woodinville Subdivision)*, Docket No. AB 6 (Sub No. 465X), served August 1, 2013.

If the Board does not preliminarily enjoin V&S from removing and selling the rail assets of the Western Segment there is a significant likelihood that, at a minimum, approximately half of the entire Towner Line will disappear before the Board rules on Complainants' Complaint. If so, this will make the acquisition of the line significantly less desirable and the restoration of rail service over the line impossible. Courts have held that a party sustains irreparable harm that warrants the granting of a preliminary injunction if the proceeding on the merits "will be a meaningless or hollow formality unless the status quo is preserved." *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6<sup>th</sup> Cir. 1995). The Board's resolution of the issues presented by the Complaint would become "a meaningless or hollow formality" if V&S is permitted to remove half of the Towner Line assets while the Complaint proceeding progressed.

Further, if the cost of restoration of rail service over the Towner Line becomes prohibitive because half of the track has been removed, KCVN will suffer a loss of a business opportunity which cannot be adequately compensated by the monetary award. The loss of a business opportunity has been consistently found by courts to be a form of irreparable harm.

*Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995); *Garth v. Steck Tech Corp.*, 876 S.W.2d 545, 549 (Tex. App. 1994), *The York Group, Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234, 1243 (Pa.Super.2007).

Finally, a number of courts have held that where a *status quo* is not preserved during a proceeding and, as a result, the party is damaged to such extent that it would not be able to recover even if it prevails on the merits, the party has suffered irreparable harm. *Gateway E. Ry. Co. v. Terminal R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7<sup>th</sup> Cir. 1994) *Illinois Sporting Goods Ass'n v. County of Cook*, 845 F.Supp. 582, 585 (N.D. Ill. Feb 15, 1994). The facts of this dispute warrant temporary preservation of the *status quo*.

C. Enjoining Further Removal of the Western Segment Tracks Would be in the Public Interest

Granting the requested injunctive relief under these circumstances is clearly in the public interest. First, the public interest requires that rail carriers adhere to the Board's rules and regulations governing the abandonment of railroad lines. A railroad cannot be permitted to unilaterally decide to circumvent those rules, particularly after it has publicly represented to the Board it would follow them. Circumvention of the Board's abandonment rules and unilateral removal and sale of track assets undermines the public policy and associated statutes and regulations - such as the OFA process - that favor the preservation of common carrier lines of rail whenever possible, and disfavor the abandonment and destruction of lines of railroad where the continuation rail service is potentially feasible.

Similarly, it is clearly contrary to the public interest to permit V&S to dismantle and sell the Western Segment despite the presence of the offer to purchase by KCVN, as well as the broad local support for restoring rail service over the Towner Line.

D. V&S Will not be Harmed by a Temporary Emergency Injunction or a Preliminary Injunction

V&S will not be harmed by the Board issuing an emergency injunctive order or a preliminary injunction. First and foremost, while emergency and preliminary injunctions requiring the tracks to remain in place for a period of time might result in less revenue to V&S from selling the tracks, this possibility is greatly outweighed by the fact that these tracks are not private assets for V&S to dispose of how it pleases, but rather they are part of a line of rail subject to this Board's jurisdiction, to which is attached an obligation to act in the public interest.

Moreover, V&S can mitigate or eliminate any perceived harm to it from the preservation of the *status quo* by merely following through on its statements to the Board in 2012 that it would seek formal abandonment of the Western Segment through the Board's Notice of Exemption process. Such a filing would trigger the Board's OFA process, which would permit parties like KCVN to attempt to acquire the rail line by submitting an OFA in accordance with the Board's regulations. If no such offer was made, or if V&S and KCVN could not agree on a price and KCVN did not accept the STB's valuation of the line, V&S would be free to consummate the formal abandonment and dispose of the track assets as it pleased, to whomever it pleased.

**CONCLUSION**

For the reasons stated above, the Board should grant this Motion for Emergency and Preliminary Injunctive Relief. Under the relevant facts and circumstances, the resumption of the removal and sale of the track assets of the Western Segment pending the consideration of the Complaint would be unlawful and cause irreparable harm to Complainants, affected rail shippers and local communities, and to the public interest. The Board should therefore immediately issue

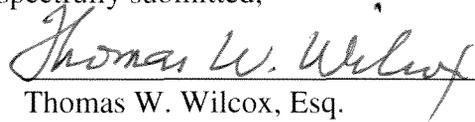
an emergency injunction by 5:00 PM EST on October 31, 2014 to be put in place pending the Board's consideration of Complainants' request for a preliminary injunction to enjoin V&S from removing any of the tracks and related assets comprising the Western Segment of the Towner Line until V&S obtains formal authority from the Board to abandon the Western Segment.



Terry Whiteside  
Registered STB Practitioner  
Whiteside & Associates  
3203 Third Avenue North, Suite 301  
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(406) 245-5132

*Representative for CWAC, CAWG  
and CWRP*

Respectfully submitted,



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Svetlana Lyubchenko, Esq.  
GKG Law, P.C.  
Canal Square  
1054 31<sup>st</sup> Street, N.W., Suite 200  
Washington, DC 20007  
(202) 342-5248

*Counsel for KCVN, LLC*

# Attachment 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
**Magistrate Judge Craig B. Shaffer**

Civil Action: 14-cv-02450-CBS

Date: October 24, 2014

Courtroom Deputy: Amanda Montoya

FTR – Reporter Deck-Courtroom A402

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*Parties:*

*Counsel:*

KCVN, LLC,

Lawrence Treece  
Hannah Misner

Plaintiff,

v.

V&S RAILWAY, LLC

Gregory Goldberg  
Sean Hanlon

Defendant.

---

**COURTROOM MINUTES/MINUTE ORDER**

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**HEARING: MOTION HEARING**

**Court in session: 01:29 p.m.**

Court calls case. Appearances of counsel.

Defendant Doug Davis is present with counsel.

This hearing comes before the Court in regards to MOTION [13] to Dissolve Temporary Restraining Order. Counsel proceeds with oral arguments.

**ORDERED:** The Court intends to GRANT MOTION [13] to Dissolve Temporary Restraining Order for the reasons stated on the record. Due to the time that has passed since the Temporary Restraining Order has been in place, the Court is treating the Temporary Restraining Order as a Preliminary Injunction, which is to be dissolved. The Court will STAY the effectiveness of the order granting the Motion until October 31, 2014 at 5:00 p.m., to allow the Plaintiff to raise the issue with the Surface Transportation Board. Therefore, a formal Order from the Court granting the Motion will not be entered until October 31, 2014.

Plaintiff's MOTION [29] to Re-File Temporary Restraining Order Bond in This Court is **GRANTED** and the bond may be transferred into the Court's Registry.

A Telephonic Status Conference to discuss progress with the Surface Transportation Board is set for November 24, 2014 at 11:00 a.m. Parties participating in the conference call, shall first initiate a conference call amongst themselves, and then call the court at (303) 844-2117 at the scheduled time.

Discussion regarding increasing the bond.

HEARING CONCLUDED.

**Court in recess: 03:35 p.m.**

Total time in court: 02:06

To order transcripts of hearings with Magistrate Judge Shaffer, please contact Avery Woods Reporting at (303) 825-6119 or toll free at 1-800-962-3345.

# Attachment 2

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**COLORADO WHEAT** )  
**ADMINISTRATIVE COMMITTEE,** )  
**COLORADO ASSOCIATION OF** )  
**WHEAT GROWERS, COLORADO** )  
**WHEAT RESEARCH FOUNDATION** )  
4026 South Timberline Road, Suite 120 )  
Fort Collins, CO 80525 )  
 )  
and )  
 )  
**KCVN, LLC** )  
515 Congress Avenue, Suite 2450 )  
Austin, Texas 78701 )  
 )  
 )  
**vs.** )  
 )  
**V & S RAILWAY, LLC** )  
1505 South Redwood Road )  
Salt Lake City, Utah 84104 )

**Docket No. NOR 42140**

**VERIFIED STATEMENT OF WILLIAM S. OSBORN**

My name is William S. Osborn. I am the Attorney-in Fact for KCVN, LLC. KCVN is a Delaware limited liability company with its principal office located at 515 Congress Avenue, Suite 2450, Austin, Texas, 78701. I am the assistant manager for the company's western operations and am authorized to speak on its behalf.

This verified statement is offered in support of the Motion for Emergency and Preliminary Injunctive Relief filed in this Complaint proceeding by KCVN, the Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, and the

Colorado Wheat Research Foundation. KCVN and the other Complainants allege that Defendant V&S Railway, LLC (“V&S”) violated 49 U.S.C. §10903 and §11101 by dismantling and contracting to sell the railroad assets of the Western Segment of the Towner Line without first receiving formal abandonment authority from the Board, and after receiving a good faith offer from KCVN to purchase the entire Towner Line and reinstitute common carrier rail service over it. V&S's actions were also over the objections of local counties, the other Complainants, and other parties.

The purpose of this Verified Statement is to supplement the factual information supplied in KCVN's Complaint and Motion with additional information about KCVN, its motivation for purchasing and reactivating the Towner Line, and on KCVN's status as a financially responsible party that is capable of consummating the transaction and fulfilling the goal of reinstating rail service over the line.

KCVN owns and oversees the operation of farmland in several western states. The company's manager and active principal is Stefan Soloviev, who is listed in *The Land Report* magazine (<http://www.landreport.com/>) as one of the top 100 landowners in America. His holdings include more than 140,000 acres of land in Kansas, Colorado, and New Mexico. KCVN's landholdings include approximately 25,000 acres of agricultural land in the Colorado counties through which the Towner Line runs. Over its long history, the Towner Line primarily served as a means for wheat producers in this area of Colorado to get their crops to market.

Earlier this year, KCVN began discussing the possibility of restoring rail service over the Towner Line with several Colorado counties, state officials, and individual grain shippers and shipper associations. These entities expressed broad support for the

reinstitution of service over the Towner, and prominent area farmers stated they would make use of the line if KCVN purchased it and made the investments required to reactivate it.

As explained in KCVN's Complaint and Motion, on July 28, 2014, after learning that V&S had informed the Surface Transportation Board and affected Colorado parties that V&S was planning to abandon the Middle Segment of the Towner Line, KCVN, through me as its Attorney-in-Fact, submitted to the President of V&S, Mr. Ken Schumacher, a good faith offer to purchase the entire Towner Line for \$10,000,000 cash. Complaint Exhibit 1. This starting offer was comparable to the amount V&S had paid for the line when it purchased it from the State of Colorado. Simultaneously with sending the offer, KCVN submitted a wire transfer in the amount of \$1,000,000 to Kim Richards of Kiowa County Abstract Company in Eads, Colorado, to serve as an earnest money under an anticipated purchase and sale agreement. KCVN informed V&S of the transfer in its offer. KCVN also made it clear in the July 28 letter that KCVN's offer was not a "take-it-or-leave-it" offer, and that it was open to discussing alternative valuation amounts with V&S. The purchase offer remains open, and the earnest money remains in escrow.

KCVN's offer letter also informed V&S that KCVN planned to retain a short line railroad operator to provide rail service over the line, and that KCVN was prepared to make the necessary investments to provide access to shippers along the line. To this end, KCVN has approached the Watco Company to assess its interest in leasing and operating the railroad over the Towner Line should KCVN acquire it. In our discussions, Watco has indicated an interest in serving this role, subject to agreement on mutually

satisfactory commercial terms. Watco is currently lessee and operator of the same rail line east of Towner Junction. We have also retained counsel and consulting experts who have the specialized knowledge of the laws, regulations and Board procedures related to common carrier railroad line acquisition, rehabilitation, and operations and maintenance.

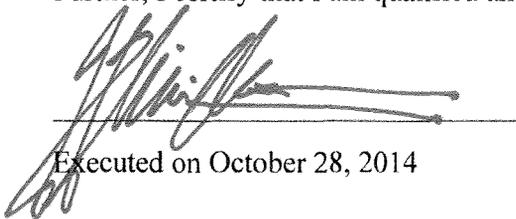
As explained in the Complaint and the Exhibits to the Complaint, on July 31, 2014, counsel for V&S emailed me, that "due to other commitments, V&S will not be in a position to consider any offers to purchase our Towner Line until, at the earliest, the end of August. Please feel free to check back with me at that time." However, within two weeks of this email being sent, V&S began dismantling portions of the Western Segment of the Towner Line by removing rail materials, which led to court proceedings in Colorado, and subsequently, the filing of the Complaint and motion for injunctive relief in this proceeding.

KCVN remains very highly interested in acquiring the Towner Line and reinstating common carrier rail service over it. Its general manager is very interested in preserving the railroad line for the wheat farmers in Eastern Colorado, and for potentially transporting wheat and other commodities grown or produced by KCVN on land it owns along the line. We are aware that certain new varieties of wheat, such as the "Snowmass" variety being grown by Ardent Mills, are showing promise in that area. KCVN's efforts to acquire and reinstitute service over the Towner Line have received broad support in the community. KCVN intends to continue its efforts to acquire the line from V&S, whether it is a mutually agreeable purchase arrangement, or through the means for acquiring such lines of rail available through the statutes and regulations administered by this Board.

In the meantime, however, unless V&S is enjoined from tearing up and removing the tracks making up the Western Segment, KCVN's efforts will become futile because the Western Segment is roughly half of the entire line, and once that track is removed it will become prohibitively expensive to restore the railroad line. We understand that the generally accepted "rule of thumb" for new track construction to the specifications needed for the Towner Line's projected use is a minimum of \$2 million per mile. If V&S is permitted to continue to remove and sell the track assets of half the Towner Line under these circumstances, it would not only be unlawful for the reasons set forth in the Complaint, it would cause irreparable harm because the goal of reactivating common carrier rail service over the Towner Line will be rendered prohibitively expensive, and the line will permanently go out of service.

VERIFICATION:

I hereby certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.



Executed on October 28, 2014

William S. Osborn,  
Attorney-in Fact for KVCN, LLC

Osborn, Griffith & Hargrove  
515 Congress, Suite 2450  
Austin, Texas

# Attachment 3

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**COLORADO WHEAT )  
ADMINISTRATIVE COMMITTEE, )  
COLORADO ASSOCIATION OF )  
WHEAT GROWERS, COLORADO )  
WHEAT RESEARCH FOUNDATION )**

4026 South Timberline Road, Suite 120 )  
Fort Collins, CO 80525 )

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 )**

**VERIFIED STATEMENT OF DARRELL L. HANAVAN**

My name is Darrell L. Hanavan. I have been the Executive Director of the Colorado Wheat Administrative Committee (CWAC) since 1982, Colorado Association of Wheat Growers (CAWG) since 1998, and Colorado Wheat Research Foundation (CWRF) since 1989. There are 287 CWAC producers and 62 CAWG members which own and operate wheat farms in Central Colorado along the "Towner Line" that is the subject of the captioned litigation.<sup>1</sup> As Executive Director of CWAC, I have responsibility for developing a team to oversee the research and

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<sup>1</sup> The CWAC and CAWG Boards of Directors separately passed the following motion on August 14, 2014: "CWAC/CAWG oppose the abandonment and scrapping of the Towner Rail Line by the V&S, LLC Railway and support the sale and continued operation of this rail line to KCVN, LLC or other viable rail line operator."

development of wheat and wheat marketing for the Colorado wheat both domestically and internationally. We work both in private and government based public entities as the CWAC is administratively attached to the Colorado State Government.<sup>2</sup>

CAWG belongs and participates actively in a national organization consisting of state wheat growers groups from all over the United States called NAWG. NAWG's primary charter is to provide representation and education within the U.S. affecting domestic policy on wheat. CAWG is a voluntary membership association that represents its members at the state legislature and before Congress. It also educates legislators and the public about Colorado wheat.

CWRF is a non-profit corporation developed by CWAC to further educational and scientific programs related to wheat, acquire ownership of new wheat varieties developed by Colorado State University (CSU), and collect royalties to provide additional funding support to the wheat related research at CSU. The CWRF Board of Directors is comprised of the Executive Committees of CWAC and CAWG. The CWRF varieties are now planted on more than 70 percent of the state's winter wheat acres.

CWRF has granted an exclusive license for a revolutionary hard white wheat variety named "Snowmass" to Ardent Mills for Ultragrain whole white wheat. Ardent Mills operates 40 flour mills in the U.S. and has a 30 percent U.S. market share. They are the largest flour milling company in the North America. Ardent Mills—which is a new joint venture of ConAgra Mills and Horizon Mills—recently located its national headquarters in Denver and Colorado Governor

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<sup>2</sup> CWAC belongs to a national organization consisting of state Wheat Commissions/Committees from the United States called U.S. Wheat Associates (USWA). This organization is focused on development of wheat markets all over the world. I currently serve and have served, in the past, on numerous action and study Committees within U.S. Wheat Associates including chairing the joint USWA/National Association of Wheat Growers (NAWG) Biotechnology Committee for eight years. CWAC is also involved in transportation policy since 80 percent of Colorado's winter wheat production is typically exported, and it has contracted with Mr. Terry Whiteside as Transportation Consultant since 1998.

John Hickenlooper credited me in his State of the State address with bringing the opportunity to the state's attention and helping him persuade Ardent Mills to locate their company in Colorado.

Since 1985 I have traveled to over 25 countries on market development missions with USWA representing Colorado wheat growers.

I have had extensive experience with the marketing and the development of markets of and for wheat. Additionally, I have worked to develop strong working relationships with the Class I railroads serving Colorado. In our work at CWAC and CAWG we have brought together growers, merchandisers, and the railroads with the goal of developing stronger understandings of transportation needs and future focuses including formation of the Colorado Wheat/Union Pacific Working Group in 2010 to discuss service and rate issues. CWAC's Transportation Consultant Terry Whiteside has filed more than 30 Briefs, Comments, and Statements on our behalf with the STB since 1998.

Railroad service is critically important to grain and grain products shippers who have recently experienced a combination of deterioration of service and an increase in rates. Export movements of grain and grain products, which often involve high volumes, long rail distances and efficient shuttle and trainload movements are also critically important to grain and grain products shippers. There is an economic relationship between grain prices and grain exports, i.e. when grain prices decrease, exports increase, and high railroad export grain rates serve to depress exports.

Agricultural producers and shippers in Colorado have three major markets for their products: domestic consumption, markets accessible from tidewater transfer points (export) and international markets in Mexico. What is common to all of these three markets is that in order for agriculture production to have or create value to the farm producers, the farm products must

be moved from the field to the ultimate markets in good condition. The distance of the move and the amount of the harvest can vary from a few miles and a few truckloads to thousands of miles and hundreds of thousands of carloads. Generally, agricultural commodities require movement in bulk. Without access to railroad service it would be virtually impossible to move the Colorado winter wheat production of 68.3 million bushels from the farm to the ultimate markets. It would require over 100,000 truckloads per year moving 24 hours per day.

CWAC and CAWG have a long history with the Towner Line, which runs for nearly 122 miles from Towner Junction, Colorado to NA Junction, Colorado. CAWG and I led the lobbying effort in 1998 to gain introduction and passage of HB 1395 by the Colorado General Assembly, which appropriated \$10.4 million for the immediate acquisition of the rail line as part of the state rail bank after the STB approved the abandonment of the rail line as part of the Union Pacific – Southern Pacific rail merger. The V&S Railway is the third operator on this line for the Colorado Department of Transportation (CDOT). CAWG was not consulted by CDOT on the sale of the Towner Line to V&S.

There are approximately 500 wheat farmers, representing approximately 500,000 acres of farm land that could potentially ship their crops to domestic terminal and export markets by rail service over the Towner Line. The area of Colorado the Towner Line runs through is one of the prime development areas for the growing of the Snowmass strain of wheat described above. However, the V&S Railway has no present interest in providing rail service over the Towner Line, and instead desires to sell its tracks and other assets for scrap. V&S has made its intentions known in two primary ways. First, it has discouraged rail movements of wheat by establishing rates when requested that are prohibitively high. As an example, I was advised and understand that around 2010, ConAgra Mills (now Ardent Mills) received rate quotes from the V&S

Railway of over \$8,000/car, or about \$2.35 per bushel for 268,000 pound cars, for movement of Snowmass from Brandon on the Towner Line to a domestic flour mill position. As shown on the charts contained in Attachment A, this rate is twice the rate typically charged for shuttle car lots from this part of Eastern Colorado and Central Colorado. It is also twice the typical rates from Commerce City (Denver area) on both the Union Pacific and BNSF to the Gulf Coast for shuttle trains. By establishing a rate of \$8,000 per car, V&S ensured this traffic would not move over the Towner Line. This circumstantially embargoed the Towner Line rail service.

There is a newly developed domestic and international market for Snowmass. It is anticipated, based upon my experience, the development and marketing of this revolutionary wheat variety could be a game changer and great impetus for the farmers and elevators located on the Towner Line. One major buyer of Ultragain whole white wheat flour has stated that they want Snowmass and only Snowmass for their future supplies of whole white wheat flour in the U.S., Canada, Mexico, and Argentina.

Second, rather than engage in discussions with CWAC and CAWG and other local interests to explore how service over the Towner Line might be reinstated, the V&S has, since mid-2012, repeatedly informed the STB of its intention to abandon the Towner Line. More recently, and over the objection of local wheat growers, county governments, and other parties, and despite not applying to the Board for abandonment authority, V&S began tearing up and removing the "Western Segment" of the Towner Line to sell it for scrap. There are seven potential wheat shippers located along that section of the Towner Line.

The wheat growers and the Commissions/Committees that represent them are therefore faced with the combined effects in this case of a railroad that doesn't want to serve the public and desires to circumvent its public responsibility by tearing out the track and selling for profit

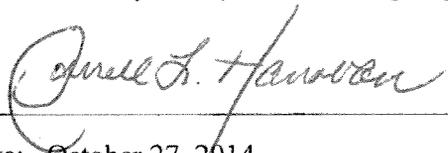
the line as scrap/recycle material, without exploring alternative servicing of the shippers on that line. Without service from the Towner Line, Eastern Colorado wheat farmers who want to get their grain to market must truck it to other shipping locations served by rail. The closest other shipping points are at Cheyenne Wells, Colorado and Coolidge, Kansas.

In July of this year, KCVN, LLC made a commercial offer to V&S to purchase the entire Towner Line and reinstitute common carrier rail service over it. CWAC, CAWG and CWRP all support this effort by KCVN which has a vested interest in the line because it has local farming operations. We were very disappointed to learn that V&S, instead of entering into negotiations with KCVN for the Towner Line, a rail line over which it clearly has no interest in providing rail service, responded by contracting with a third party to sell the tracks and track assets of the Western Segment. I understand that once the tracks of the Towner Line are removed, it would be commercially impracticable, if not prohibitively expensive, to reconstruct the line and resume rail service over it. If so, the possibility of resuming rail service for the wheat farmers in this region of Colorado would vanish. No award of money damages could remedy this harm.

VERIFICATION:

I hereby certify that the foregoing is true and correct on penalty of perjury.

S/

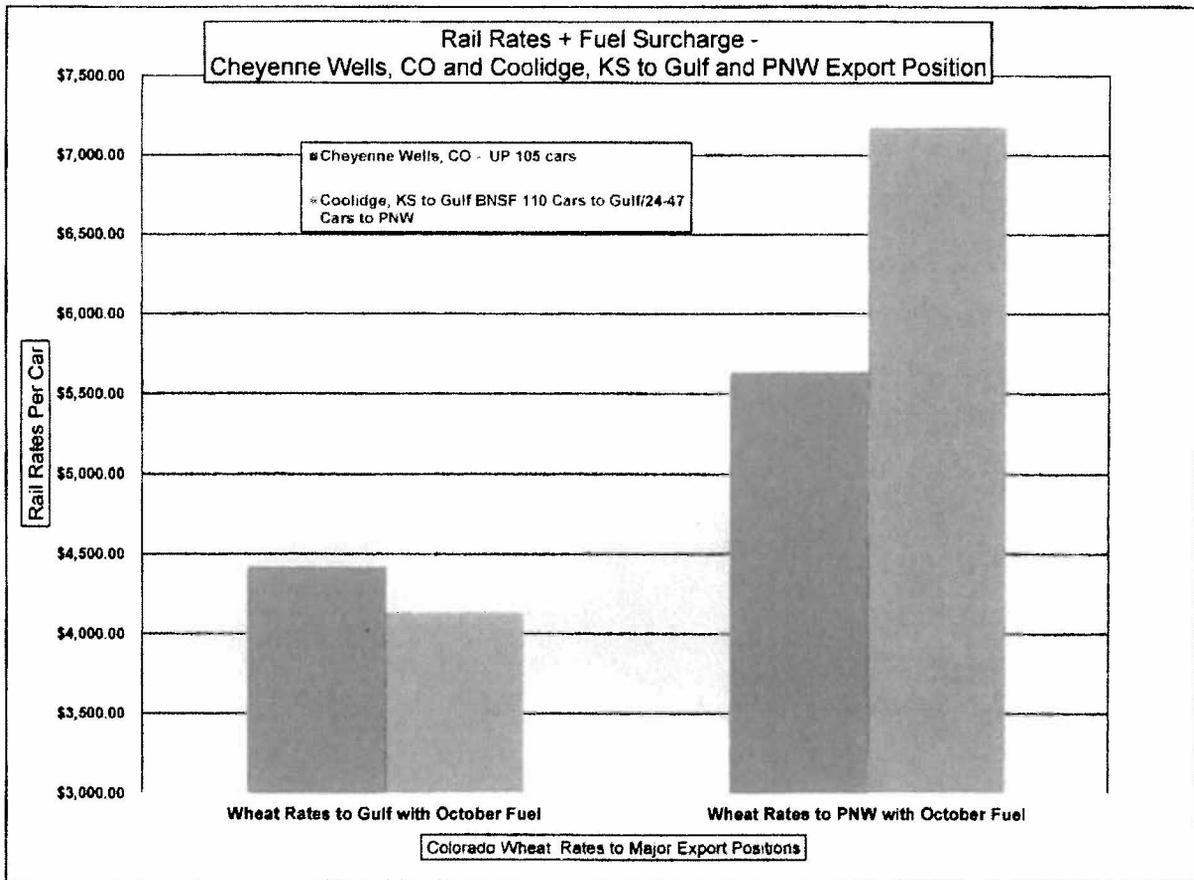


Date: October 27, 2014

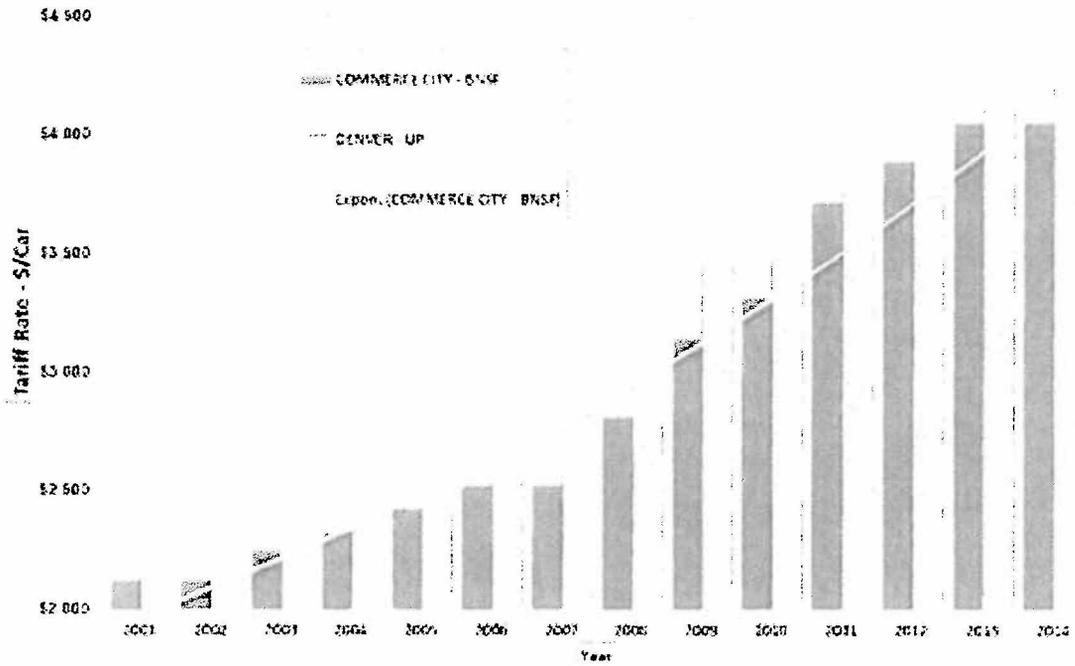
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## Appendix I

The chart below shows the rail rates (including current fuel surcharges – October, 2014) from Cheyenne Wells, Colorado and Coolidge, Kansas. As can be seen the export rates run in the \$4,000 - \$4,200 per car range or about \$1.10 per bushel to Gulf for shuttle movements.



**Commerce City BNSF VS Denver UP  
Colorado Wheat Rates to Gulf Coast  
2001-2014 - UP 92+ Cars/BNSF 110-120 Cars w/o Fuel**



## VITAE

Darrell Hanavan has been the Executive Director of the Colorado Wheat Administrative Committee (CWAC) since 1982. CWAC is the research and promotion organization representing the state's 8,000 wheat producers. He has also been Executive Director of the Colorado Association of Wheat Growers (CAWG) since 1998 and the Colorado Wheat Research Foundation (CWRP) since 1989. CAWG is the membership and lobbying organization representing the state's wheat growers and CWRP is a non-profit corporation developed by CWAC to acquire ownership of all new wheat technology (wheat varieties and novel traits) developed at Colorado State University, including the first publicly developed variety of Clearfield Wheat named "Above." Hanavan has also been Executive Director of Colorado Sorghum Producers (CSP) since 2007. CSP is a membership and research and promotion organization whose purpose is to promote, protect and safeguard the industry of growing sorghum in Colorado.

Hanavan served as Chairman of the National Jointed Goatgrass Research Program from its inception in 1994 to its completion in 2010. This program administered special federal grant totaling \$4.15 million to thirty-five scientists in 10 Great Plains and western states that were engaged in an integrated, multi-disciplinary effort to reduce the impact of jointed goatgrass on winter wheat production.

Hanavan served as Chairman of the U.S. Wheat Associates/National Association of Wheat Growers Joint Biotechnology Committee from January of 2000 to January of 2008, when the chairmanship transitioned to a wheat producer chairman on an alternating rotation between U.S. Wheat Associates and National Association of Wheat Growers. He has served as an ex-officio member of the Joint Biotechnology Committee since that time. The role of this committee is to develop and recommend a unified policy on biotechnology for the U.S. wheat industry.

Hanavan received a B.A. in Political Science and Economics from the University of Northern Colorado in 1973 and a M.A. in Economics from the University of Denver in 1977.

Hanavan is a Colorado native born on a wheat farm near Cheyenne Wells. He is the second oldest of twelve children of parents Charles and Patsy Hanavan. He has two grown children.

### **Honors:**

- Conferred the title of "Honorary Member" in 1990 by the Colorado Young Farmers Association.
- Honored as "State Friend of Extension" in 1990 and 2004 by the Colorado State University Cooperative Extension.
- Conferred "The Distinguished Achievement in Agriculture" Award of Merit in 1998 by the Colorado State University Chapter of the Honor Society Agriculture Gamma Sigma Delta.
- Awarded "Certificate of Recognition for Meritorious Service" in 1999 by Colorado Commissioner of Agriculture Don Ament for demonstrating the

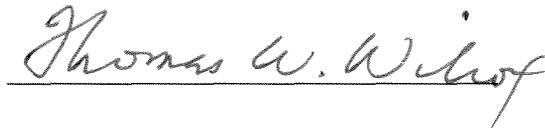
highest attributes of public service for the Colorado Department of Agriculture.

- Awarded the United State's Department of Agriculture's "Certificate of Appreciation" in 2000 by Deputy Secretary of Agriculture Richard Rominger for outstanding service to American agriculture and exemplary commitment to the family farm and ranch and rural communities.
- Selected as an Honorary Member of the Western Society of Weed Science in 2001 for significant contribution to the field of weed science through leadership and involvement in the National Jointed Goatgrass Research Program which has enabled many weed scientists to develop a better understanding of this weed and contributed to winter wheat producers being able to implement integrated management strategies for this problem weed.
- Honored by the Colorado Seed Growers Association in 2001 for "dedicated efforts and foresight in developing and administering the Colorado Wheat Research Foundation Program."
- Selected as an Honorary Member of American Society of Agronomy in 2012 for his leadership of successful initiatives to increase state, regional, national and producer funding of public wheat breeding and university and USDA-ARS research "recognizing sustained, outstanding service to the agronomic sciences."
- Selected as an Honorary Member of Crop Science Society of America in 2012 for his leadership of successful initiatives to increase state, regional, national and producer funding of public wheat breeding and university and USDA-ARS research "recognizing sustained, outstanding service to the crop sciences."
- Named Honorary Guest Cannoneer by CSU President Tony Frank in 2014 to fire the cannon in pregame festivities at the CSU vs Tulsa football game while CWAC and he was recognized on the jumbotron.

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 28th day of October 2014, I have served a copy of the foregoing Motion for Emergency and Preliminary Injunctive Relief via e-mail and first class mail to the chief legal counsel for Defendant at the following address:

Doug Davis, Esquire  
General Counsel  
V&S Railway, LLC  
P.O. Pox 30076  
Salt Lake City, Utah 84130  
Ddavis@akrailroad.com

A handwritten signature in cursive script that reads "Thomas W. Wilcox". The signature is written in black ink and is positioned above a horizontal line.

Thomas W. Wilcox