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October 31, 2014

ENTERED

Office of Proceedings

October 31, 2014

Part of

Public Record

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

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

Dear Ms. Brown:

Complainants in this proceeding hereby ask the Board to accept this brief reply to the Reply of V and S Railway ("Reply") filed by Defendant yesterday afternoon, in order that the Board may have a more complete record on which to decide Complainants' Motion for Emergency and Preliminary Injunctive Relief.¹

The Reply includes statements about the Colorado court proceedings, the disposition of those proceedings, and why this case is before the Board. It also mischaracterizes the allegations and requests for relief in the Complaint and "the essence of Complainants'

¹ Replies to replies are not permitted under 49 C.F.R. 1104.13(c), but the Board has often allowed them in the interest of compiling a more complete record. Docket No. FD 35745, *New Jersey Ass'n of RR Passengers and Nat'l Ass'n of RR Passengers - Petition for Declaratory Order - Princeton Branch*, fn. 2 (served July 24, 2014). Docket No. FD 35740, *BNSF Railway and Musket Corp. v. Union Pacific RR Co.*, fn 12 (served December 31, 2013). That is the purpose of this filing.

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grievance." Reply at 6. As to the latter, the factual allegations and requests for relief in the Complaint speak for themselves, and will be litigated by the parties under the Board's rules, including its discovery rules. As to the former issues, in order to provide the Board with a more complete record, Complainants submit the attached additional pages from the October 24, 2014 Colorado court hearing transcript, selected pages of which are attached to the Reply. The hearing transcript makes clear that the magistrate judge (1) tends to believe the Board is the proper forum for matters such as the those presented by the Complaint (p.69); (2) recognizes that the Board may decide these issues differently than a court using different standards (pp. 70-71; 73); and (3) took great pains to provide a "clear field [at the STB] so you can do whatever you're going to do." (p. 82).² Clearly, the court had no desire or expectation that exactly the same parties would raise exactly the same arguments, or that the STB would apply exactly the same standards when deciding the issues before it. Statements and inferences in the Reply to the contrary are incorrect.

The Reply also contains statements concerning alleged counteroffers by V&S to KCVN's initial July 28, 2014 cash offer, and valuations of the Towner Line. These statements should be disregarded for several reasons. First and foremost, any "counteroffers" to KCVN's initial cash offer came from V&S after litigation was underway in Colorado. Consequently, any evidence of such offers is inadmissible "compromise offers and negotiations" under Rule 408 of the Federal Rules of Evidence. This is the main reason Complainants did not describe such settlement discussions between the parties in the Motion or the Complaint. Second, the fact that V&S may have made a counteroffer after litigation had commenced is irrelevant to whether V&S's actions upon receiving the initial offer were unlawful. Finally, while V&S did submit an appraisal of the Towner Line's Net Liquidation Value ("NLV") into the U.S. District Court for the District of Colorado proceeding, this appraisal was also prepared for litigation and/or settlement purposes. While the fact of its existence is not inadmissible, the NLV produced by V&S is also not undisputed, and Complainants believe some of its underlying assumptions are flawed and tend to inflate the overall result.

Finally, the Reply asks the Board to dismiss the Complaint. Reply at 10. The only issue presently before the Board is Complainant's motion for the Board to issue an injunction prior to the expiration of the Colorado court Order at 5:00 PM CST today. The motion secondarily asks the Board to issue a preliminary injunction for the reasons set forth therein. Defendant has replied to that motion. Ruling on a request by defendant to dismiss the complaint raised in a reply filing, without Complainants having the ability to respond would be improper, highly prejudicial, and unwarranted in any event. Complainants will respond to the portions of Defendant's Reply that seek dismissal of the Complaint within the time period allotted by the Board's procedural rules.

² *See Id.* ("It's really more a matter of prospectively what I do because if you're going to go to the Surface Transportation Board the last thing I want to do is muck that up.").

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Complainants' Motion for Emergency and Preliminary Injunctive Relief should be granted.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive style.

Thomas W. Wilcox
Attorney for KCVN, LLC

Enclosures

Cc: Counsel for Defendants
Director, STB Office of Proceedings
Terry Whiteside
William S. Osborn, Esq.
(all via email)

ATTACHMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 14-cv-02450-CBS

KCVN, LLC,
Plaintiff,
vs.
V&S RAILWAY, LLC
Defendant.

Proceedings before CRAIG B. SHAFFER, United States
Magistrate Judge, United States District Court for the
District of Colorado, commencing at 1:29 p.m., October 24,
2014, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

LAWRENCE TREECE and HANNAH MISNER, Attorneys at
Law, appearing for the plaintiff.

GREGORY GOLDBERG and SEAN HANLON, Attorneys at
Law, appearing for the defendant.

MOTION HEARING

AVERY WOODS REPORTING SERVICE, INC.
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1 THE COURT: -- and -- 10 million. But plaintiff's
2 ability to purchase the Towner Line is not prevented simply
3 because it can't use the OFA process. So in point of fact I
4 do not find that plaintiff has met two of the essential
5 burdens for issuing a preliminary injunction. I do not find
6 plaintiff has demonstrated a substantial likelihood of
7 success on the merits. Now, Mr. Treece is right. There is
8 some case law that suggests a sliding scale. And -- and I
9 agree with Mr. Treece. There is case law in the Tenth
10 Circuit which says that where plaintiff shows a very, very
11 strong likelihood or imminent irreparable harm the degree of
12 proof for success on the merits may be diminished. But the
13 difficulty is that doesn't help the plaintiff in this case
14 because plaintiff has not demonstrated in my view imminent
15 irreparable harm, therefore, plaintiff must show substantial
16 likelihood of success on the merits, and I just don't find
17 that plaintiff has done that.

18 So I'm going to go ahead and grant the motion.
19 I'm going to dissolve what I am now treating as a preliminary
20 injunction. Now, as I read the case law having dissolved the
21 preliminary injunction the plaintiff has the right to go to
22 the Tenth Circuit, and I'm not challenging that for a second.
23 I also think, at least it's my understanding, and somebody
24 can correct me if I'm wrong, that the plaintiffs have the
25 right to go to the Surface Transportation Board and seek

1 relief there. Is this, in fact, correct, counsel? Does the
2 plaintiff have that ability?

3 MR. HANLON: My understanding, Your Honor.

4 THE COURT: Okay. So here's the issue, Mr.
5 Treece, and I'm not trying to put you on the spot and I
6 certainly am not expecting you to make a decision, but you've
7 asked me to continue this for five days. Let me ask the
8 railroad company. To the extent that Mr. Treece -- and is
9 that what you want to do, Mr. Treece, to continue this so you
10 can go to the Surface Transportation Board or are you going
11 to fight on two fronts? And it's your call. I'm not
12 suggesting you can't fight on two fronts, but at some point
13 we've got to get this to somebody.

14 MR. TREECE: Well, we'd like to go to the Surface
15 Transportation Board.

16 THE COURT: All right. Counsel?

17 MR. HANLON: Your Honor, we -- we would object to
18 any -- any continuance of a TRO that -- or PI that should
19 have been dissolved. It was patently deficient.

20 THE COURT: Well, I know, but -- but if I enter an
21 order it -- essentially if I grant your motion, if I treat it
22 as a preliminary injunction, if I grant your motion to
23 dissolve, but I stay the effectiveness of my order for five
24 days that would seem to me to give plaintiff -- because I
25 want to be scrupulously fair, folks, to both sides. It's not

1 my intent to -- to unfairly advantage or disadvantage one
2 side or the other. But if Mr. Treece represents to this
3 Court that he and his client would like to go to the Surface
4 Transportation Board, and if I read between the lines, Mr.
5 Treece, it would be your intention to go to the Surface
6 Transportation Board and seek some sort of stay or injunction
7 there.

8 MR. TREECE: That's correct, Your Honor.

9 THE COURT: Well, it would seem to me that the
10 defendant is not prejudiced if I stay the effect of my order.
11 I'm going to grant the motion. I'm not changing my mind.
12 I'm going to grant the motion to dissolve, but I'll stay the
13 effectiveness of that order for five days. If the plaintiff
14 moves before the Surface Transportation Board for some sort
15 of stay or protective order or injunction then basically the
16 issue is properly framed before them and I'll go ahead and --
17 and dissolve -- I'll enter an order because, frankly, your
18 fight is now at the Surface Transportation Board. If Mr.
19 Treece doesn't file something with the Surface Transportation
20 Board within five days then I'll grant your motion to
21 dissolve, but you're going to know one way or the other in
22 five days.

23 MR. TREECE: Since this is Friday can it be five
24 business days?

25 THE COURT: I think -- well, I'm just going to

1 make a rash assumption that nobody is hanging out at the
2 Surface Transportation Board on Saturdays and Sundays.

3 MR. TREECE: I don't think so.

4 THE COURT: Right. So, counsel, I guess my sense
5 is this. Because, you know, one of the interesting questions
6 that -- that I don't have facts to support and so I can't
7 decide, the whole purpose of the bond was to protect the
8 defendant during the pendency of the TRO. Now, to the extent
9 that a bond was posted, to the extent that the defendant
10 believes it's been injured by an improvidently entered TRO
11 that's a separate issue and I'm not precluding you from
12 pursuing some relief in that regard subject to a proper
13 showing that I don't have right now.

14 MR. TREECE: Your Honor, while you're on that just
15 to make things more interesting --

16 THE COURT: Is it that more necessary?

17 MR. TREECE: -- the -- the state court released
18 the funds to us.

19 THE COURT: Right.

20 MR. TREECE: We filed a motion --

21 THE COURT: I know and I'm going to get to that.

22 MR. TREECE: -- to let us put the money --

23 THE COURT: I got -- I got your motion. Right.
24 Yeah. Here's what I would propose to do, and -- and -- but I
25 want to -- I want both sides to weigh in on this because I'm

1 truly interested in your position. My intent would be to
2 grant plaintiff's motion and transfer the bond to you. My
3 intent would be -- in fact, I will be granting your motion to
4 dissolve what I now am treating as a preliminary injunction.
5 I would stay the effectiveness of that order until
6 5:00 o'clock next Friday. Now, if the plaintiff moves for
7 injunctive relief or some other form of protection before the
8 Surface Transportation Board then, frankly, that's probably
9 where this all should have been brought in the first place.
10 If the plaintiff doesn't, either way I'm going to dissolve --
11 I'm going to dissolve the preliminary injunction and then
12 you're free under the bond to seek whatever relief or remedy
13 you think is appropriate. But essentially all I would be
14 doing is staying the effectiveness of the order for five days
15 and you're not prejudiced because you still have the right to
16 seek relief under the terms of the bond, but the plaintiff
17 isn't prejudiced because the situation doesn't get any worse
18 until it can explore its options in Washington before the
19 Surface Transportation Board. So it seems almost beautiful
20 in its solemn-like -- Solomon-like wisdom.

21 MR. HANLON: Your Honor, the defendant is being
22 prejudiced.

23 THE COURT: I understand, but you've got the bond.

24 MR. HANLON: The bond is woefully deficient. The
25 bond is for \$500,000. We've been damaged as of today

1 -- and to some extent while I didn't find it persuasive for
2 purposes of Rule 65, plaintiff's counsel raises an
3 interesting point. To what extent is your, quote, unquote,
4 "desire to discontinue", belied by your attempt to abandon?

5 MR. HANLON: As this Court has pointed out today,
6 the law is clear that in order to abandon you have to have
7 STB authority --

8 THE COURT: Right.

9 MR. HANLON: -- even if the STB grants.

10 THE COURT: Sure. But the point of the matter is
11 if the STB says that you've exceeded your discontinuance
12 authority they could very well make you put all that stuff
13 back.

14 MR. HANLON: Correct.

15 THE COURT: Right. And so right now, frankly, if
16 your client chooses to take what might be construed as an
17 aggressive position that's your client's choice. It's not
18 necessarily what I would do, but it's your client's choice.
19 Whether or not your client has been harmed -- to some extent
20 the irony is if the Surface Transportation Board says that
21 you've exceeded your authority then you haven't been harmed.
22 And for all I know the Surface Transportation Board could
23 enter a preliminary injunction and tell you don't move a dang
24 thing. So right now all Mr. Treece is telling me is he wants
25 to take these issues to the regulatory agency best positioned

1 to decide that and I'm inclined to allow him to do that. I'm
2 inclined to stay the effectiveness of my order for five days.

3 MR. HANLON: And plaintiff had the ability to do
4 that under 49 USC --

5 THE COURT: I understand, counsel. I understand
6 that and whether or not plaintiff should have done that
7 before. What we're talking about is whether or not I should
8 stay the effectiveness of my order for five business days.

9 MR. HANLON: And defendant objects.

10 THE COURT: I understand that and I appreciate the
11 objection.

12 MR. GOLDBERG: Your Honor, could I supplement what
13 Mr. Hanlon has provided to the Court?

14 THE COURT: Sure. Sure.

15 MR. GOLDBERG: In addition to the damages
16 discussed as -- as referenced in some of our papers our
17 client has been under contract to sell some of the materials
18 it has removed, and it remains in breach of those contracts
19 because of a TRO and the eyes --

20 THE COURT: Okay.

21 MR. GOLDBERG: -- of the Court has now undercut
22 and found happened legally improper. So those damages are
23 ongoing and I would submit to the Court that, in fact, the
24 damages continue to increase every day, even five more days
25 of breach to the third-party being (inaudible) --

1 THE COURT: Right. And -- and I suppose,
2 Mr. Goldberg, to be perfectly candid with you -- and, again,
3 I'm not suggesting what you should or shouldn't do. To the
4 extent that you believe that plaintiff has tortiously
5 interfered with your contract I suppose you're entitled to
6 seek relief.

7 MR. GOLDBERG: Under the bond you're suggesting.

8 THE COURT: I'm -- technically I suppose you could
9 file a separate lawsuit. You could -- you could bring a
10 counterclaim, assuming you've got diversity or assuming the
11 Court uses supplemental authority. Nothing prevents the
12 railroad from fully vindicating its rights. And we're
13 getting ahead of ourselves. All I am suggesting is that
14 because I don't know what the Surface Transportation Board is
15 going to do -- and I can't rule out the possibility that the
16 Surface Transportation Board would impose its own form of
17 injunctive relief. And we all seem to agree it would have
18 the ability to do that as I understand it. All I'm
19 suggesting is that giving the plaintiff some period of time
20 to pursue some remedy or to pursue relief in the form of the
21 Surface -- before the Surface Transportation Board
22 essentially doesn't do any violence to the plaintiff -- to
23 the defendant. The defendant is certainly free to exercise
24 all of its legal options. I'm not suggesting -- you could
25 very well say I want every penny of the bond and if the bond

1 is not sufficient to satisfy we're bringing an independent
2 action for tortious interference of a contract.

3 MR. GOLDBERG: I guess what I would then request
4 of the Court is to increase the amount of the bond to
5 securitize the next five days of the TRO staying put.

6 THE COURT: And what would that translate into? I
7 mean, I'm not necessarily opposed to that. I just don't know
8 what that would be.

9 MR. GOLDBERG: Well, logistically I don't know,
10 Your Honor, because I've never addressed the issue in terms
11 of seeking compensation from a bond posted under a TRO. I
12 guess my sense would be the Court would order the plaintiff
13 to increase the amount of the bond and we would propose
14 \$2.8 million.

15 THE COURT: 2.8 million because you're going to do
16 something over the next five days? What are you going to do
17 in the next five days?

18 MR. GOLDBERG: Well, we were thinking --

19 THE COURT: Because basically that would be the
20 only purpose to increase the bond to address whatever relief
21 is necessary during the intervening five days.

22 MR. GOLDBERG: Well, and --

23 THE COURT: To the extent the bond has been
24 inadequate in the past I can't deal with that problem. That
25 -- that -- that's -- it is what it is. You're asking me to

1 -- I'm proposing to stay the effect of my order for five
2 days. If I stay the effect of the order for five days what
3 does that trans to in terms of practical damage to your
4 client?

5 MR. GOLDBERG: Well, I guess I don't necessarily
6 agree with the Court's premise that it can't increase the
7 amount of the bond.

8 THE COURT: But I'm not going to increase the bond
9 to deal -- I mean, Mr. Goldberg, whatever the deficiencies in
10 the old bond -- tell me -- if I stay this order because Mr.
11 Treece wants me to stay the order for five business days I
12 certainly have to look to you to tell me what your client
13 plans to do in the next five days.

14 MR. GOLDBERG: Well, I guess, Your Honor, I -- I
15 would simply say I do think that the Court, based on its
16 findings today and the woeful insufficiency of the TRO and
17 how it was entered, could review and revisit some of the
18 damage that has been caused in the pendency of this two-month
19 period.

20 THE COURT: And don't misunderstand me. That's a
21 separate question. I'm not foreclosing that possibility.
22 I'm not preventing the railroad from seeking relief. I'm
23 simply talking about over the intervening five days you're
24 saying I need to increase the bond. Give me some sense of
25 what incremental harm would arise over the next five days.

1 MR. GOLDBERG: Your Honor, I guess in the next
2 five days we can't come up with any incremental harm more
3 than has been done in the past several weeks.

4 THE COURT: Right. Right. And, see, that -- and
5 that's my problem. I -- I -- the \$500,000 bond was probably
6 less than adequate. But to the extent that Mr. Treece is
7 saying give me five business days to pursue whatever relief I
8 can before the Surface Transportation Board, unless you can
9 demonstrate that during that same five-day business period
10 your client is going to suffer some measurable harm that I
11 can deal with by increasing the bond amount -- and what
12 you're basically saying, Judge, is we want you to increase
13 the bond because of harm that we've already suffered. Well,
14 I haven't made any factual determinations. That's my
15 problem. In other words, you're basically saying Judge, just
16 trust us when I tell you we've suffered 2.8. I'm going to
17 need a little more horsepower than that. So if you want me
18 to remedy the next five days give me some factual basis for
19 doing that, but I'm not going to just increase the bond
20 willy-nilly for past problems.

21 MR. GOLDBERG: Thank you, Your Honor.

22 THE COURT: So, Mr. Treece, what I'm going to do
23 for the reasons stated on the record, I continue to believe
24 that the TRO was improvidently granted. I'm treating it as a
25 preliminary injunction based upon the passage of time. I'm

1 going to grant the motion to dissolve. I will stay the
2 effectiveness of that order for five days. To the extent
3 that you file or your client files some further proceeding
4 before the Surface Transportation Board at 5:00 o'clock on
5 Friday I will enter an order vacating the preliminary
6 injunction and you'll either replace it with something by the
7 Surface Transportation Board or everyone simply goes forward
8 without injunctive relief. In granting the motion but
9 staying the effect of the order to the extent that the
10 railroad believes it wishes to pursue whatever remedies it
11 has under the bond you're certainly free to do that and we'll
12 look forward to briefing on that question.

13 Now, I guess the last question that I have -- and
14 I'll go ahead and grant the motion and for now you can put
15 the bond money in the registry of the Court.

16 MR. TREECE: So you'll sign that order?

17 THE COURT: I will sign that order. I may just as
18 well go ahead and just sign that order.

19 Now, my question is this, folks, and this is
20 probably the penultimate question. To the extent that
21 plaintiff now appears intent upon going to the Surface
22 Transportation Board to seek whatever relief or remedies it
23 has available before that regulatory body, what does that do
24 vis-a-vis the merits of this lawsuit?

25 MR. TREECE: Your Honor, I'm not tot -- I'm not

1 tot --

2 THE COURT: I mean, at the risk of sounding
3 facetious, it sounds like you all are catching the first
4 train out of town.

5 MR. TREECE: The last train.

6 MR. GOLDBERG: Downhill.

7 MR. TREECE: I'm not totally sure. On a
8 theoretical level only this case would just proceed and the
9 STB case would proceed. This doesn't make any sense. And so
10 likely there would be a request to at least stay this
11 proceeding while the STB proceeding went on and not dismiss
12 it --

13 THE COURT: No. No. Yeah. No.

14 MR. TREECE: -- but -- but -- but to stay. That's
15 the most sensible.

16 THE COURT: Right. And -- and, Mr. Treece, I
17 think you and I are on the same wavelength because at the
18 bottom line there's no value to anybody by having the Surface
19 Transportation Board address some of the issues raised in the
20 request for declaratory relief at the same time I would have
21 (inaudible) those. So it would seem to me that once I find
22 out what, if anything, the plaintiff is doing before the
23 Surface Transportation Board then it still leaves me the
24 question of the bond. And even if I stay further analysis of
25 the merits I would retain the jurisdiction to address your

1 concerns about the bond. But I think what we need to do is
2 this: If you file some proceeding before the Surface
3 Transportation Board, Mr. Treece, then I probably would
4 suggest that the logical thing for you to do is to stay
5 further issues, save further consideration of the merits of
6 your Complaint here until we get a sense of what the Surface
7 Transportation Board is going to do. If they decline to take
8 up the matter then you're free to come back here.

9 MR. TREECE: Could I make just a technical
10 suggestion --

11 THE COURT: Sure.

12 MR. TREECE: -- about needing to --

13 THE COURT: No. Go ahead.

14 MR. TREECE: -- presume to --

15 THE COURT: No. By all means go ahead.

16 MR. TREECE: It seems to me in terms of how what
17 you're doing really works, I think you're granting the motion
18 to dissolve now staying it for five days and after that five
19 days --

20 THE COURT: Right.

21 MR. TREECE: -- I'm not sure there's anything left
22 for you to do.

23 THE COURT: Well, I didn't -- no, because your
24 motion -- your -- your -- your Verified Complaint seeks
25 declaratory relief. It seeks (undecipherable).

1 MR. TREECE: No. No. I mean anything more to do
2 with regard to the granting of the motion to dissolve. You
3 talked as if --

4 THE COURT: No. But the bottom line is is the
5 whole purpose of the bond is to protect the rights of the
6 defendant so that issue is still outstanding.

7 MR. TREECE: Oh, absolutely, absolutely,
8 absolutely.

9 THE COURT: Right. But --

10 MR. TREECE: You just sounded like there was
11 something more you needed to do with effecting your
12 granting --

13 THE COURT: Oh, no.

14 MR. TREECE: -- of the motion --

15 THE COURT: Oh, no, no, no, no.

16 MR. TREECE: -- to dissolve.

17 THE COURT: As far as this motion is concerned
18 that -- the only outstanding issue is what, if any, claims
19 the defendant might have under the bond. No. You and I,
20 we're on the same wavelength. Mr. Goldberg?

21 MR. GOLDBERG: I had the same clarifications as
22 Mr. Treece, Your Honor, which was I wanted to make sure that
23 the staying of the granting of the motion to dissolve which
24 is stayed for five days is sort of a self-effectuating order
25 so that in five days regardless of what Mr. Treece has done

1 it will --

2 THE COURT: No. I -- well, it's not
3 self-effecting because I'll enter a text entry order. In
4 other words, at 5:00 o'clock on Friday I will enter an order
5 on the docket granting the motion. I'm simply telling you
6 right now that's what I'm going to do. I don't want anybody
7 to leave here in some bit of a quandary as to whether or not
8 the motion is going to be granted. The motion is going to be
9 granted. I will not enter an order granting the motion until
10 5:00 o'clock on Friday, but I'm going to enter that order at
11 5:00 o'clock on Friday.

12 MR. GOLDBERG: With no further action by the
13 parties if --

14 THE COURT: No. No. No.

15 MR. GOLDBERG: Okay. Very good, Your Honor.

16 MR. TREECE: And I think -- I understand that. So
17 I think we need to and will advise you that we have filed
18 with the STB or we have not so you --

19 THE COURT: Well, I mean, you could -- I mean, the
20 truth of the matter is, Mr. Treece, I'm going to grant the
21 motion regardless. I mean, the only real issue is going to
22 be not so much what I do with this motion. The only thing --
23 practically speaking, if you notify me that you've initiated
24 proceedings in the Surface Transportation Board that's more
25 prospective in its effect because then I have some sense do I

1 address the merits of the Complaint? Do I defer further
2 action and essentially stay further action in the case
3 pending a decision by the Surface Transportation Board? Your
4 notice doesn't help me with respect to this motion because
5 I'm going to act in any event. It's really more a matter of
6 prospectively what do I do because if you're going to go to
7 the Surface Transportation Board the last thing I want to do
8 is muck that up. I want to give you a clear field so you can
9 do whatever you're going to do. Mr. Goldberg?

10 MR. GOLDBERG: Your Honor, also -- it's another
11 point of clarification.

12 THE COURT: Sure.

13 MR. GOLDBERG: With regard to -- we don't object
14 to the colloquy you've had with Mr. Treece --

15 THE COURT: Okay.

16 MR. GOLDBERG: -- in terms of staying the case --

17 THE COURT: Right.

18 MR. GOLDBERG: -- sort of indefinitely --

19 THE COURT: Right.

20 MR. GOLDBERG: -- pending some -- maybe some
21 status report and motion to sort of get it going again in
22 several months. Our understanding of that is all dates and
23 deadlines including our response deadline on Monday would
24 also be stayed.

25 THE COURT: Right. Right.

1 MR. TREECE: Yeah. Limit your response date to
2 the Complaint.

3 MR. HANLON: Our response to the Complaint is due
4 Monday.

5 MR. TREECE: Well, I think we should just agree
6 that that's extended till this shakes out a little bit
7 because we probably won't get a motion to stay filed by
8 Monday.

9 THE COURT: Yeah. No.

10 MR. TREECE: But I don't think they should have to
11 answer until that --

12 THE COURT: No. I -- I don't -- I -- there's --
13 there's truly no value in filing an answer to this. I mean,
14 here it seems to me that you've got two choices and I'm --
15 I'm not wedded to either one so I truly want your considered
16 opinion. If proceedings go forward before the Surface
17 Transportation Board then I could do one of two things. I
18 can stay the case which means it remains on the docket as an
19 active matter or I can administratively close the case with
20 the ability to reopen upon a showing of good cause. You guys
21 have a better feel for the Surface Transportation Board than
22 I do. Any sense of how quickly they would move? I really am
23 at a loss to know. If -- if they're going to do something in
24 a matter of a couple of months then I would probably keep the
25 case active. If it's going to take them, you know, a year

1 then as a practical matter it probably makes more sense to
2 administratively close it. I'm just not familiar with that
3 process.

4 MR. TREECE: Your Honor, I get the question and I
5 guess I would like to think and talk to Mr. Goldberg --

6 THE COURT: Right.

7 MR. TREECE: -- about it about how exactly we do
8 that, but we don't want (indecipherable).

9 THE COURT: Yeah. I don't either, but -- but I
10 also don't want you guys to have to spin your wheels sort of
11 monitoring what's happening here.

12 MR. TREECE: Right.

13 THE COURT: So administratively closing the case
14 might be neater and cleaner subject to, of course, the bond
15 issue. Mr. Goldberg?

16 MR. GOLDBERG: That was our -- that was our point.
17 I think our preference would be to stay the case, not
18 administratively close it. We could always if it looks like
19 it's going to get bogged down for years at the STB move to
20 administratively close it, but I think at this point it makes
21 sense due to some of the moving parts to keep it stayed maybe
22 with a status report in --

23 THE COURT: Right.

24 MR. GOLDBERG: -- three months or something like
25 that.

1 THE COURT: Here's -- here's what I would like to
2 do. Amanda, let's set this for a telephone status conference
3 in 30 days. And the whole purpose of that is just simply,
4 one, bring me up to speed about what's happening before the
5 Surface Transportation Board. Hopefully within that 30-day
6 window everybody will have a better sense of how things are
7 likely to evolve in terms of timing before the Surface
8 Transportation Board, then we're all in a better position to
9 talk in concrete terms because I'm just not familiar enough
10 to even begin to hazard a guess.

11 THE CLERK: We can do 11:00 o'clock, Monday,
12 November 24th.

13 THE COURT: And, again, it's just a telephone
14 status conference. You can tell me what you filed. Somebody
15 can give me a sense of -- of procedurally what happens next
16 before the Surface Transportation Board. You can give me a
17 sense of how quickly or how slowly they're likely to act.

18 MR. GOLDBERG: That works for the defendant, Your
19 Honor.

20 THE COURT: Okay. All right. So to recap, I
21 intend to enter an order by 5:00 o'clock on Friday granting
22 the motion. I will dissolve the preliminary injunction.
23 I'll set the matter for a status conference in 30 days and at
24 that point hopefully we'll have a better sense of what's
25 happening. In the meantime I will stay any obligation the

1 defendant has to file an answer or otherwise respond under
2 Rule 12. And to the extent that defendant wishes to seek
3 whatever remedies or relief it has under the bond the
4 defendant is free to do that as well. Okay.

5 MR. GOLDBERG: I think that seems fine, Your
6 Honor. And then you're going to grant the motion to transfer
7 the bond or remit the bond to the Court's --

8 THE COURT: Right. I've already -- we're going to
9 grant that. We'll sign that order. The bond will be
10 transferred so that way at least everything is here. Okay.
11 Anything else?

12 MR. TREECE: That all sounds fine, Your Honor.
13 Nothing from the plaintiff.

14 MR. HANLON: Nothing further.

15 THE COURT: Now, Mr. Treece, just so you
16 understand, I don't want to leave you with the wrong
17 impression. I think you've raised some interesting
18 arguments. I really think you have. I have gone around and
19 around with this several times. You know, the interplay of
20 the various segments has to some extent created an
21 interesting conundrum, but I'm afraid my analysis was really
22 constrained under Rule 65. So I think those arguments are
23 interesting arguments. I'll be fascinated to sit on the
24 sidelines and see what the Surface Transportation Board does.

25 MR. TREECE: Well, Your Honor, I appreciate the

1 words, and you call balls and strikes and I get it.

2 THE COURT: Thanks. We'll be in recess.

3 THE CLERK: All rise.

4 (Whereupon, the within hearing was then in
5 conclusion at 3:35 p.m.)

6

7 I certify that the foregoing is a correct
8 transcript, to the best of my knowledge and belief (pursuant
9 to the quality of the recording) from the record of
10 proceedings in the above-entitled matter.

11

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14 /s/ Laurel Tubbs

October 28, 2014

15 Signature of Transcriber

Date

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