

228970

K&L|GATES

K&L Gates LLP
1601 K Street NW
Washington, DC 20006-1600
t 202.778.9000 www.klgates.com

Edward J. Fishman
202-778-9456
Fax: 202-778-9100
ed.fishman@klgates.com

**ENTERED
Office of Proceedings**

MAR 9 - 2011

**Part of
Public Record**

March 9, 2011

**ENTERED
Office of Proceedings
MAR 9 2011
Part of
Public Record**

Via Electronic Filing

Ms. Cynthia Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: V&S Railway, LLC, Petition for Declaratory Order
STB Finance Docket No. 35459

Dear Ms. Brown:

In accordance with the Board's decision served in the above-referenced proceeding on February 17, 2011, enclosed please find the Response of the Hutchinson Transportation Company, Inc., Hutchinson Salt Company, Inc., and BNSF Railway Company to the V&S Railway, LLC's Petition for Declaratory Order.

If you have any questions about the enclosed filing, please do not hesitate to contact the undersigned.

Sincerely,



Edward J. Fishman
K&L Gates LLP
1601 K Street N.W.
Washington, D.C. 20006
(202) 778-9456
ed.fishman@klgates.com

Terry Malone
Martin, Pringle, Oliver, Wallace & Bauer LLP
100 N. Broadway
Suite 500
Wichita, KS 67202
(312) 265-9311
tmalone@martinpringle.com

SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Finance Docket No. 35459

**HUTCHINSON SALT COMPANY, INC.,
HUTCHINSON TRANSPORTATION COMPANY, INC.,
AND BNSF RAILWAY COMPANY'S
RESPONSE TO V&S RAILWAY, LLC'S PETITION FOR DECLARATORY ORDER**

Respondents, Hutchinson Salt Company, Inc. ("HSC"), Hutchinson Transportation Company, Inc. ("HTC")(hereinafter collectively "HSC/HTC" unless otherwise designated) and BNSF Railway Company ("BNSF") (together with HSC/HTC, hereinafter collectively "Respondents" unless otherwise designated) and for their Response to Petitioner V&S Railway, LLC's (hereinafter "V&S") Petition For Declaratory Order state as follows.

I. SUMMARY OF ARGUMENT.

In its Petition for Declaratory Order, Petitioner V&S failed to include any verified evidence to support its allegations. It is the Respondents' position that this omission is fatally defective and for this reason alone the Board should deny the Petition. Without waiving this position, Respondents will respond to other issues that have been raised.

The V&S alleges in its summary of the dispute that it acquired by Quit Claim Deed all of the H&N's right, title and interest in a railroad line that it apparently claims extends over real estate owned by HSC/HTC. It also claims that after V&S began rendering service on the line, it found that HSC/HTC were utilizing their own power equipment and moving cars on HSC/HTC's tracks. It further claims V&S asked HSC/HTC to "stop operating on the line, pointing out that it

was the rail carrier authorized by the board to render service on the line.” It further alleges that HSC/HTC “refused to do so, whereupon V&S brought its suit against them and BNSF.”

V&S essentially argues that a non-carrier cannot operate over the line of railroad of a common carrier, even where that right-of-way and trackage is owned by the non-carrier. However, the STB and its predecessor the ICC have repeatedly acknowledged that private rail operations can occur over common carrier trackage, where the private operator is moving its own goods and is not holding itself out to service the general public for compensation. See, e.g., *The Boeing Company -- Acquisition and Operation Exemption -- Chehalis Western Railway Company*, Finance Docket No. 31916 (ICC served October 10, 1991)(non-carrier moving its own property over 13 mile line of railroad owned by rail carrier); *S.D. Warren Company d/b/a Sappi Fine Paper North America -- Acquisition and Operation Exemption -- Maine Central Railroad Company and Springfield Terminal Railway Company*, Finance Docket No. 34133 (STB served September 30, 2002)(shipper performed own switching over line of railroad owned by carrier); *Brotherhood of Locomotive Engineers v. Interstate Railroad Company et al.*, Finance Docket No. 31078 (ICC served November 20, 1987)(shipper moving own property over 13 miles of common carrier trackage). In all of these cases, the Board or the ICC recognized that non-carrier entities can even operate over trackage owned and operated by a common carrier (which is different from this situation, where HSC/HTC predominantly owns the trackage in dispute), and also determined that the Board or the ICC did not have any jurisdiction over these private operations.

In this case, HSC/HTC is moving its own property predominantly over trackage that it owns and that is located on its salt mine property. From time to time, HSC/HTC may use a few hundred feet of trackage owned by the V&S that is located west of the mine property pursuant to

the Operating Rights Agreement between HSC/HTC and V&S. In either case, HSC/HTC has the property rights necessary to access and use that trackage. Thus, despite the extent to which V&S may claim common carrier operating authority over any portion of that trackage as a result of its 2006 notice of exemption filing with the STB, there is nothing that precludes HSC/HTC from operating over its own track on its own property, or from operating on a small portion of the V&S track pursuant to the Operating Rights Agreement.

V&S attempts to argue that any such usage by HSC/HTC would constitute unreasonable interference with V&S' common carrier rights under the *State of Maine* line of cases. However, those cases are distinguishable because for more than three years HSC/HTC (the only customer that could be served by the track in question) has not asked V&S to provide any common carrier service to them. Under 49 USC §11101, a common carrier has the obligation to provide service to a shipper upon reasonable request. Here, HSC/HTC is not requesting V&S to provide any such service. Instead, due to historical poor service by the V&S and its predecessor the H&N, HSC/HTC invested its own funds to build a spur track that connects its salt mine property and trackage to the BNSF (which is adjacent to the salt mine property) and has invested its own funds and resources in moving loaded and empty cars from the mine property to the BNSF trackage. HSC/HTC's activity does not create any material interference with V&S' common carrier obligation because V&S is not serving or being asked to serve the HSC/HTC's facility and therefore has no common carrier activities to perform on HSC/HTC's trackage or the portion of the V&S trackage that may be used by HSC/HTC pursuant to the Operating Rights Agreement. Therefore, the V&S claim here is without merit and the Board should issue a declaratory order to this effect.

II. IDENTIFICATION OF THE PARTIES, AND RELEVANT ENTITIES AND WITNESSES.

A. *V&S Railway, L.L.C.*

The Petitioner V&S claims to be a limited liability company organized and existing in the State of Nevada with a principal place of business in Salt Lake City, Utah. It claims that on or about May 11, 2006, it entered into an Asset Purchase and Sale Agreement with H&N, and as part of that transaction claims that H&N sold it all of the H&N's rights and interest in and to certain assets and the H&N's rights of way to the V&S.

B. *Hutchinson and Northern Railway Company.*

The Hutchinson and Northern Railway Company ("H&N") is a corporation that was formed on or about March 20, 1912. Within a few years of formation, the H&N was acquired by the owners of the Carey Salt Company. The owners of the Carey Salt Company operated the H&N concurrently with their ownership of a salt mine located south and east of Hutchinson, Kansas until they decided to sell both to the North American Salt Company and its subsidiary the American Salt Company in 1988.

C. *Carey Salt Company.*

The Carey Salt Company ("Carey Salt") is a Kansas corporation formed on or about April 25, 1901, which had a principal place of business in Hutchinson, Kansas. One of Carey Salt's principal business activities was to own and operate a salt mine located south and east of Hutchinson, Kansas, that had a common address of 3300 Carey Boulevard, Hutchinson, Kansas. The salt mine was located on a parcel of property consisting of approximately 72 acres. For purposes of this Response, this 72 acre parcel will be referred to as the "Salt Mine Real Estate." As previously mentioned, the owners of Carey Salt also owned and operated the H&N prior to

selling both the salt mine and the H&N to the North American Salt Company and its subsidiary the American Salt Company in 1988.

D. North American Salt Company.

The North American Salt Company was a Delaware corporation that acquired the Salt Mine Real Estate, and the salt mine, as well as the H&N from Carey Salt in approximately 1988. The ownership of these assets was held in one of the North American Salt Company's subsidiary companies, the American Salt Company.

E. Hutchinson Salt Company.

The Hutchinson Salt Company ("HSC") is a Kansas corporation formed on or about May 24, 1990, for the purpose of acquiring the Salt Mine Real Estate, the salt mine, and all personal property and fixtures located on the Salt Mine Real Estate, including but not limited to the rail, switches and ties that are the subject of this dispute. HSC closed its transaction with the American Salt Company for the acquisition of these assets effective August 1, 1990.

F. Hutchinson Transportation Company.

The Hutchinson Transportation Company ("HTC") is a Kansas corporation formed on or about August 15, 1994. It was formed to own certain real estate and assets that were transferred to it by the Hutchinson Salt Company. HTC operates in tandem with HSC, and shares common ownership.

G. BNSF Railway Company.

The BNSF Railway Company ("BNSF") is a corporation organized and existing pursuant to the laws of Delaware with a principal place of business in Fort Worth, Texas.

H. Max Liby.

Max Liby is an employee of HSC/HTC. From approximately 1979 through 2010, Mr. Liby was employed by various owners of the salt mine to be the mine's General Manager, and he held that position continuously for more than 30 years. From approximately 1980 through August of 1990, Mr. Liby was also in charge of the day to day operations of the H&N, and was on the H&N's Board of Directors. Mr. Liby has personal knowledge of the factual issues relevant to this dispute and has submitted his Verified Statement which is attached hereto, and is incorporated by reference. Mr. Liby's Verified Statement will be cited in this Response as "Liby V.S."

III. BACKGROUND FACTS.

The Carey Salt Company was a Kansas corporation with a principal place of business in Hutchinson, Kansas. A primary business activity of Carey Salt was to own and operate a salt mine located south and east of Hutchinson, Kansas, with a common address of 3300 Carey Boulevard, Hutchinson, Kansas. The salt mine is located on a parcel of real estate consisting of approximately 72 acres that Carey Salt also owned. For purposes of the Response, this parcel will be referred to as the "Salt Mine Real Estate."

The H&N is a corporation that appears to have been formed on or about March 20, 1912. Within a few years of its formation, the H&N was acquired by the owners of Carey Salt. In 1971, Carey Salt still owned the H&N. At that time, the H&N provided "switching" rail service to the salt mine by moving rail cars located at the salt mine to a major rail carrier through its interchange located several miles west of the salt mine, and returning empty cars. The H&N did not maintain a train schedule or regular service over the subject tracks located on the Salt Mine Real Estate. The H&N did not maintain buildings, platforms, or the rails or switches on the Salt

Mine Real Estate. Instead, the H&N only entered the Salt Mine Real Estate and traveled over the subject tracks when specifically requested to do so by the owners of the salt mine, for the purpose of moving rail cars loaded with salt from the salt mine to a major rail carrier, or to return empty cars to the mine. Primarily because of H&N's poor and untimely service, it and the entity that claims to be its successor the V&S, have not been asked to travel over the Salt Mine Real Estate to move rail cars from the mine, or to return empty cars to the mine, for at least three years. (Liby V.S. pp. 2, 12).

A. *Ownership of the Salt Mine and the H&N went from Carey Salt to the North American Salt Company and its Subsidiary the American Salt Company in 1988.*

Carey Salt owned and operated both the salt mine and the H&N until Carey Salt made the decision to sell the salt mine and the H&N in the late 1980's. In approximately 1988, Carey Salt sold both the salt mine and the H&N to the American Salt Company, a subsidiary owned and controlled by the North American Salt Company. (Liby V.S. p. 2).

B. *The United States of America filed an Anti-Trust Action against the North American Salt Company to Force it to Divest itself of the Salt Mine Located in Hutchinson, Kansas.*

The North American Salt Company became motivated to sell the salt mine in Hutchinson in approximately 1990, because of an anti-trust action that had been filed against it by the United States of America in the United States District Court for the Northern District of Illinois as Case No. 90-C-2631. The anti-trust case had been filed as the result of the North American Salt Company's desire and intention to acquire the Cote Blanche salt mine located in Cote Blanche, Louisiana. To settle the anti-trust action, North American Salt Company agreed to divest itself of the Hutchinson salt mine by having its subsidiary, the American Salt Company, sell the salt mine to HSC. As part of the anti-trust settlement negotiations, the issue of whether the H&N

would have to be divested from the North American Salt Company and its subsidiaries was considered and discussed. It was eventually determined that the H&N could operate independently of the salt mine and would not have to be sold by North American Salt Company and its subsidiaries, but there were concerns that the H&N might attempt to undermine the spirit and intent behind the anti-trust action because it was still owned and controlled by North American Salt Company or a subsidiary. (Liby V.S. pp. 4-5).

C. *The North American Salt Company and its Subsidiary the American Salt Company Sold the Salt Mine, the Salt Mine Real Estate, and all Personal Property Located on the Salt Mine Real Estate to HSC effective August 1, 1990.*

It was the intent of the North American Salt Company and the American Salt Company to sell all of the Salt Mine Real Estate and to also transfer to HSC all of the improvements located on this real estate, including but not limited to the tracks that are in dispute. The transaction documents specifically transferred to HSC all of the rail, ties, switches, fixtures and other improvements that are located on the real estate HSC acquired. Prior to American Salt Company's sale of these assets to HSC, Max Liby was an employee of the American Salt Company. Part of his job responsibility was to assist in the preparation of some of the transaction document schedules which transferred the American Salt Company's assets to HSC. One particular schedule that Mr. Liby was responsible for reviewing and, assisting in the preparation of was the schedule to the Bill of Sale which specifically transferred to HSC all of the rail, switches and ties located on the Salt Mine Real Estate to HSC. (Liby V.S. p. 5).

From approximately 1980 through 1990, in addition to being the General Manager of the salt mine, Mr. Liby was in charge of running the day to day operations of the H&N, and was on the H&N Board of Directors. In his Verified Statement that is attached, Mr. Liby has pointed out that at the time the American Salt Company sold the Salt Mine Real Estate and all of the rail,

ties, switches and other improvements located on that real estate, there was no question but that the seller American Salt Company owned this real estate and personal property, and had the authority and intent to sell this property to HSC. (Liby V.S. pp. 3-5). Part of Mr. Liby's job responsibility from 1980 through 1990 was to determine whether the salt mine or the H&N was responsible for any particular repair, maintenance, or improvement that was to be made to any of the rail, switches, or ties that either of them owned. To do this, Mr. Liby had to be familiar with which entity owned which rail, ties and switches. It was made clear to Mr. Liby that all of the rail, ties and switches located on the Salt Mine Real Estate were owned by and was the responsibility of the salt mine. It was also clear that all the rail, switches and ties that were located on the H&N's real estate were owned by and the responsibility of the H&N. None of the H&N's rail, switches, or ties were located on the Salt Mine Real Estate. (Liby V.S. p. 3).

At the time HSC purchased the salt mine, the Salt Mine Real Estate, and the personal property located thereon, including but not limited to the subject track, switches and ties, the H&N did not claim to have any ownership interest in or to any of the rail, ties, or switches located on the Salt Mine Real Estate, nor did the H&N claim to have any right to interfere with the salt mine's operations, including but not limited to the salt mine's movement of its own cars on its real estate. The transaction between American Salt Company and HSC that transferred the real estate and the improvements and personal property located thereon to HSC became effective on August 1, 1990. (Liby V.S. p. 5).

While serving as the salt mine's General Manager and while running the day to day operations of the H&N, Mr. Liby decided it would be advisable for the salt mine and the H&N to have mile markers placed at various locations on the respective track for identification purposes. Because at the time both the mine and the H&N had common ownership, Mr. Liby decided to

designate mile post 0.0 at the eastern most location of the track located on the Salt Mine Real Estate and then designate mile posts from east to west. He did this to make it easier to identify where the repairs to the track were made, and so that Mr. Liby could direct outside contractors to locations along the track where work needed to be performed. (Liby V.S. pp. 3-4). Mr. Liby did not intend for his establishment of mile post markers to be any indication of which entity owned the track located either at the Salt Mine Real Estate, or on the H&N's property. (Liby V.S. p. 4).

D. After HSC Acquired the Hutchinson Salt Mine, the H&N's Poor and Untimely Service Caused HSC to Find Alternative Ways to Ship its Salt to its Customers.

Subsequent to its acquisition of the salt mine, HSC became increasingly dissatisfied with H&N's "switching" service. HSC's dissatisfaction stemmed from H&N's poor and untimely service which deteriorated beginning in August, 1990. During this time, the H&N did not make its switching services timely available when the salt mine needed to move cars on the Salt Mine Real Estate. When HSC requested service from the H&N, most of the time it would be hours or perhaps days before the H&N would move the rail cars. From time to time from August, 1990, through 1995, HSC would be forced to use its heavy equipment to move cars on its track prior to its acquisition of a locomotive in 1995. This was unacceptable to HSC/HTC and H&N's poor and untimely service made it difficult for HSC/HTC to efficiently ship its rock salt by rail. (Liby V.S. pp. 5-6).

The H&N's poor and untimely service caused the HSC to enter into an agreement with The Atchison, Topeka and Santa Fe Railway Company (the predecessor to defendant BNSF Railway Company) on or about March 21, 1994, and to have a spur built on the Salt Mine Real Estate running northwesterly so that the tracks located on the Salt Mine Real Estate would be connected with BNSF's tracks located immediately to the north of the Salt Mine Real Estate.

The building of this spur gave HSC the option to have its rock salt shipped either by the Union Pacific via the H&N, or by the BNSF. Since 1994, most of HSC/HTC's rail cars were transferred to the BNSF or its predecessor for shipment. The spur is located on the northwest corner of the Salt Mine Real Estate and connects its rails to rails on BNSF's property. (Liby V.S. pp. 5-6).

E. In 1995, HSC/HTC Acquired its own Locomotive to Service its own Needs at the Salt Mine but not to Serve the Public at Large or Other Unrelated Entities.

To assist it in its operations, during 1995 HSC/HTC acquired its own locomotive which it placed on its rails located on the Salt Mine Real Estate. The locomotive was acquired by HSC/HTC to serve only HSC/HTC's needs and to move cars on HSC/HTC's tracks, and not with the intention of serving the public at large or other entities. The locomotive has continued to be used there to this day for moving rail cars on the Salt Mine Real Estate. (Liby V.S. p. 6).

F. Effective April 1, 1998, the H&N entered into an Operating Rights Agreement with HSC/HTC to Allow HSC/HTC the Use of 500 Feet of the H&N's Track Located Adjacent to the Salt Mine Real Estate.

On or about April 1, 1998, the H&N entered into an Operating Rights Agreement with the HSC/HTC. A copy is attached to Max Liby's Verified Statement as Exhibit "A." The Operating Rights Agreement was prepared by H&N and not HSC/HTC. In the Operating Rights Agreement, H&N was referred to as the "Owner," and HSC/HTC was identified as the "User." The purpose of this agreement was to allow HSC/HTC to "operate its trains, locomotives, cars and equipment over 500 feet of track of" the H&N located west of the Salt Mine Real Estate property line which were "contiguous to tracks of" HSC/HTC. The 500 feet of adjacent track was referred to in the agreement as "Joint Trackage" and was shown on a map attached to the agreement as Exhibit 1. A copy of this Exhibit 1 is attached to Exhibit "A" to Max Liby's

Verified Statement, attached hereto. The significance of this agreement was the acknowledgment and agreement of the H&N that in 1998 it knew HSC/HTC owned the track located on the Salt Mine Real Estate, that HSC/HTC was operating trains, locomotives, cars and equipment over those tracks located on its property, and H&N did not object to HSC/HTC doing so. This agreement also allowed HSC/HTC to use 500 feet of H&N's track to operate HSC/HTC's trains, locomotives, cars and equipment. This Operating Rights Agreement is still in effect, and has never been terminated by either party. (Liby V.S. p. 7).

HSC/HTC operated its salt mine and utilized all of the improvements on its Real Estate from the date it took possession of the salt mine property on or about August 1, 1990, without any interference from anyone including the H&N for nearly 17 years. During the 17 years in question, and to date, neither the H&N nor its claimed successor V&S ever paid, or attempted to pay for any of the repairs, improvements, additions, or maintenance to any of the rail, switches, or ties located on the Salt Mine Real Estate. On the other hand, over this 17 years, HSC/HTC has spent thousands of dollars and has expended hundreds of man hours repairing, maintaining, improving and making additions to the rail, switches and ties located on the Salt Mine Real Estate. (Liby V.S. pp. 7-8).

G. After 17 Years of HSC/HTC's Uninterrupted Use of the Salt Mine Real Estate and All of the Track, Switches and Rails Located Thereon, V&S as the Successor in Interest to the H&N Sent a Demand Letter to HSC/HTC Claiming to have Rights Acquired from H&N Inconsistent with HSC/HTC's Acquisition of the Subject Track and H&N's Prior Agreement and Conduct.

On or about March 15, 2007, Michael VanWagonon representing the V&S wrote a letter to HSC/HTC claiming that V&S owned the improvements located on the Salt Mine Real Estate, and demanding that HSC/HTC quit using the improvements until HSC/HTC could indemnify V&S in writing against all potential damages and losses, and for the parties to negotiate the

terms of an operating agreement to allow HSC/HTC to utilize these tracks. HSC/HTC, through one of the same counsel that had assisted it in acquiring the Salt Mine Real Estate, the salt mine and all related assets, made a timely response to that letter denying V&S' claim. Nothing of significance happened until V&S filed a lawsuit in the United States District Court for the District of Kansas as Case No. 08-1402-WEB on December 22, 2008. (Liby V.S. pp. 9-10).

In this dispute, V&S is alleging or at least implying that it is operating on HSC/HTC's subject track located on the Salt Mine Real Estate, or that it may have some reason to travel over the track located on the Salt Mine Real Estate. This simply is not true. Primarily because of poor and untimely service which essentially did not improve from August, 1990, the V&S has not been asked by HSC/HTC for several years to travel over the Salt Mine Real Estate to move rail cars from the salt mine, or return empty cars to the mine. (Liby V.S. p. 12).

H. In the Litigation and in the Present Proceeding, the V&S Admits that it is only the Successor in Interest to the H&N's Rights, but V&S Claims Rights Inconsistent with the H&N's Conduct and the Terms of the Operating Rights Agreement.

In the underlying lawsuit, the plaintiff V&S claims to be the successor in interest to certain H&N assets pursuant to a certain Asset Purchase and Sale Agreement it claims it entered into with H&N on or about May 11, 2006. V&S also claims that it became the successor in interest to the H&N's right, title and interest in and to, what V&S described as "Parcel 1" and "Parcel 10." (Liby V.S. p. 10).

(1.) A Description of the Subject Rail Track.

The subject rail track that is at the center of this dispute is less than one-half of a mile long and is located exclusively upon the Salt Mine Real Estate owned by HSC. The east end of the track is a dead end terminated east of the salt mine shaft. The west end of the subject track

connects to the "Joint Trackage" formerly owned by H&N and now claimed by V&S. The "Joint Trackage" is identified in the Operating Rights Agreement attached hereto as Exhibit "A" to the Verified Statement of Max Liby. The subject track on the Salt Mine Real Estate has never been used for any purpose other than salt mine operations consisting of the loading of salt on rail cars for eventual delivery to the salt mine's customers, or receiving the empty cars back once the salt has been delivered. (Liby V.S. p. 11).

(2.) A Description of Parcel 1 and Parcel 10.

A portion of the subject track in question is not located within the boundary of V&S's claimed easement which it is describing in its dispute with HSC as "Parcel 1." There have been two surveyors attempt to locate Parcel 1, and they have differing opinions which of the subject rail, ties and other improvements are located within Parcel 1, and which ones are not. Both have determined that at least some of the subject track is not located with V&S's claimed easement. What is not in dispute is that approximately 350 feet of the subject track located near the west side of the Salt Mine Real Estate is not located within Parcel 1. The parcel where this portion of the subject track is located has been identified in this dispute by V&S as "Parcel 10." All of Parcel 10 is located on the Salt Mine Real Estate. Parcel 10 is not included in any part of Parcel 1, V&S's claimed easement area. Prior to V&S acquiring any purported rights to an easement over Parcel 1, V&S was informed that if it wished to travel over or use Parcel 10, that it would need to obtain an easement from HSC for Parcel 10. (Liby V.S. pp. 10-11).

K. *In Spite of the V&S's Allegations, the Uncontroverted Evidence is that HSC/HTC Owns the Hutchinson Salt Mine, the Salt Mine Real Estate, and all of the Personal Property Located Thereon, Including but Not Limited to the Subject Track, Switches and Ties in Question, and HSC/HTC is Entitled to the Right to Continue its Salt Mine Operations on its Track Uninterrupted by any Interference of the V&S.*

In spite of the V&S's allegations in the litigation, as the Verified Statement of Max Liby points out, the H&N did not own, nor could it have transferred to the V&S, any of the rail, switches, or ties located on the Salt Mine Real Estate because the H&N did not own these rails, switches, or ties, and all of these items had previously been sold to HSC effective August 1, 1990. (Liby V.S. pp. 10-11). Furthermore, the H&N did not own any rights to the parcel of land described as Parcel 10, and had been informed by at least one title insurance company that the H&N had no rights to Parcel 10 prior to its transaction with the H&N. Also, because the easement at issue had expired by its own terms, the H&N did not have any rights to the parcel of land described as Parcel 1 to transfer to the V&S in June of 2006. (Liby V.S. pp. 10-11).

IV. ARGUMENT AND AUTHORITIES.

Petitioner argues that the Surface Transportation Board (the "Board") has exclusive or primary jurisdiction, pursuant to the ICC Termination Act (the "Act"), to determine certain questions identified in its Petition. But as set forth more fully below, two of the three questions are not really in dispute at all, and the remaining question does not fall within the Board's jurisdiction. *See PCI Transportation, Inc. v. Fort Worth & Western Railroad Co.*, STB Finance Docket No. 42094, 2008 WL 1840576 (Apr. 25, 2008). Finally, even if this Board has the jurisdiction to respond to these questions, Petitioner is not entitled to the declaratory order it seeks. Therefore, Respondents urge the Board to deny the V&S Petition for Declaratory Order,

and rule that HSC/HTC are well within their rights to continue their private operations on their property.

A. HSC/HTC and Their Operations at Issue in This Case Are Not Within the Board's Jurisdiction.

1. HSC/HTC are not rail carriers.

Petitioner frames its first question as whether “V&S is the sole rail carrier authorized to operate on the railroad line between Milepost 0.0 and Milepost 5.14 in Hutchinson, Reno County, Kansas (the ‘Line’).” (Petition for Declaratory Order at p. 1). But this question is not genuinely in dispute. There has never been an allegation in this case that any other “rail carrier” has been operating on the Line.¹

A rail carrier within the meaning of the ICC Termination Act (the “Act”) is “a person providing common carrier railroad transportation for compensation, ...” 49 U.S.C. § 10102(5). The essence of a common carrier is an entity that holds itself out to the public to provide public transportation upon request. It is well-settled that an industrial entity that moves its own goods within and beyond the confines of its own plant or facility is not a common carrier. *E.g., Devens Recycling Center, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34952, 2007 WL 61948 (January 9, 2007); *S.D. Warren Co.– Acquisition and Operation Exemption – Maine Central RR Co.*, STB Finance Docket No. 34133, 2002 WL 31160840 at n.4 (September 25, 2002) (a person is not a rail carrier “unless it holds itself out to provide rail service to others”); *The Boeing Company – Acquisition and Operation Exemption – Chehalis Western Ry Co.*, STB Finance Docket No. 31916, 1991 WL 212940 (October 10, 1991) (“The Commission’s jurisdiction over railroads is limited to common carriers.”). Petitioner has never contended, nor

¹ A portion of the Line located on the Salt Mine Real Estate is outside the area covered by the claimed easement over Parcel 1 by which Petitioner claims its right to operate. Therefore, *no* rail carrier has ever had a right-of-way to operate as a rail carrier on that section of track.

is there any evidence, that HSC/HTC are rail carriers within the meaning of the Act. HSC/HTC simply do not hold themselves out to the public to provide common carrier railroad transportation for compensation on the subject track.

Furthermore, although Petitioner's briefing in this case vaguely implies that BNSF operates on the Line, there has been no evidence presented that BNSF has done so. For more than fifteen years, the practice has been for HSC/HTC to move cars along its tracks and to offer cars loaded with rock salt to BNSF for eventual delivery to HSC/HTC's customers.

Because HSC/HTC are not rail carriers, the Board does not have jurisdiction over them. There is no contention by any party that some entity other than Petitioner has sought authorization to operate as a rail carrier on the Line, and there is no other rail carrier that has been operating on the Line.

2. Private carriage, such as HSC/HTC's use of the section of track at issue in this case, is not regulated by the Board.

In addition to lacking jurisdiction over HSC/HTC because they are not rail carriers, the Board also lacks jurisdiction over the operations at issue in this case. Petitioner seeks to prevent HSC/HTC from using its subject track located on the Salt Mine Real Estate for the purpose of moving its rock salt.² There is no allegation in the Petition that HSC/HTC, has or plans to conduct any for-hire transportation of rock salt for third parties. Furthermore, to the extent Petitioner or its predecessor has ever traveled over the subject track in the past, it was exclusively when HSC/HTC requested that Petitioner or the H&N do so. There have never been

² V&S's allegations that it has in effect a captive monopoly over the transportation of HSC's traffic is also contradicted by the fact that rock salt – the only commodity that is shipped from the mine site – is exempt from STB regulations and the common carrier authority. 49 CFR 1039.11 provides that “the rail transportation of the commodities listed below is exempt from the provisions of 49 U.S.C. subtitle IV.” The STCC code for rock salt – 14715 – is included in that list of exempt commodities. This means that a common carrier has no obligation to quote a rate or transport rock salt unless it voluntarily agrees to do so. This also means, for relevant purposes here, that a common carrier cannot assert any exclusive right to transport such commodity.

any other customers for Petitioner to serve on the subject track, and the subject track's eastern most point is a dead end on the Salt Mine Real Estate.

Where an entity handles only its own goods and does not offer for-hire transportation to the public, those operations constitute "private carriage – operations beyond the scope of the Board's jurisdiction." *S.D. Warren Company*, STB Finance Docket No. 34133, 2002 WL 31160840.

The Agency's jurisdiction . . . does not extend to wholly private rail operations conducted over private track, even when such operations are conducted by an operator that conducts common carrier operations elsewhere, if it operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner. Private track is typically built by a shipper or its contractors) to serve only that shipper, moving the shipper's own goods, so that there is no holding out" to serve the public at large.

Devens Recycling Center, STB Finance Docket 34952, 2007 WL 61948 (internal citations omitted).

As Petitioner notes in its opening statement, private tracks are "typically built and maintained by a shipper (or for the shipper at the shipper's expense)." *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013 (Oct. 3, 2001). That is precisely the situation here. Although there is no evidence who built the subject track many years ago, it is uncontroverted that since at least 1980 the salt mine owner has owned, operated and maintained the subject track. The owners of the salt mine, Carey Salt, acquired the H&N many years ago. Carey Salt contemporaneously operated the salt mine and the H&N for many years before selling both in 1988 to the American Salt Company, a subsidiary of the North American Salt Company. After the North American Salt Company and the American Salt Company divested themselves of the salt mine, the Salt Mine Real Estate, and the subject track in question, HSC/HTC have been solely responsible for operating and maintaining the subject track. It is

undisputed that Petitioner and its predecessor never made any repairs or performed any maintenance on the subject track. Furthermore, since August 1, 1990, all traffic on the subject track has been by, or at the specific request of, HSC/HTC. In other words, this case involves HSC/HTC's private carriage operations on track it owns and maintains located on its real estate. The Board, therefore, does not have jurisdiction over HSC/HTC's use of the subject track.

The Board also lacks jurisdiction over contracts dealing with private carriage. *See Chevron U.S.A., Inc. – Lease and Operation Exemption – Richmond Belt Ry*, STB Finance Docket No. 32352, 1995 WL 348739 (May 25, 1995) (no ICC jurisdiction to approve lease “where trackage rights are acquired for switching purposes only”). Therefore, the Board lacks jurisdiction over HSC/HTC's contracts with BNSF or V&S to the extent they affect private carriage issues.

B. Petitioner's request for declaratory order fails on the merits.

Even if the Board has jurisdiction to answer the questions submitted, Petitioner is not entitled to the declaratory order it seeks in this case. The crux of the claim by V&S is that a non-carrier such as HSC/HTC cannot operate over any portion of track on which a common carrier has operating authority. V&S cites no support whatsoever for this exclusivity theory. The decisions cited by V&S in its Petition explicitly contradict its assertion (see Petition at 5) that the owners of the right-of-way and track improvements have no right to operate themselves on property that may be part of a line of railroad. The *State of Maine* line of cases cited by V&S (see Petition at 5) all establish that non-carriers may and routinely do operate over a line of railroad, as long as there is no material interference with any concurrent operations by the

common carrier.³ In this situation, the V&S has not operated on the relevant track for more than 3 years. In addition, the V&S has not been asked to provide common carrier service over that track by HSC/HTC, the only potential customer that could receive common carrier service over the track in question. Under 49 USC § 11101, a common carrier is obligated to provide service upon the reasonable request of a shipper. Without such a request, there is no mandatory right for the common carrier to force a shipper to use its service. Here, HSC/HTC's use of its own trackage within the boundaries of the salt mine (and, periodically, about 500 feet of V&S trackage outside of the salt mine property pursuant to the Operating Rights Agreement) cannot and does not result in any material interference with the V&S, which is not engaged in common carrier operations over that trackage.

There are numerous ICC and STB decisions which recognize that private rail operations (such as those of HSC/HTC) can be conducted on tracks over which a common carrier also may have operating authority. *See, e.g., The Boeing Company -- Acquisition and Operation Exemption -- Chehalis Western Railway Company*, Finance Docket No. 31916 (ICC served October 10, 1991)(non-carrier moving its own property over 13 mile line of railroad owned by rail carrier); *S.D. Warren Company d/b/a Sappi Fine Paper North America -- Acquisition and Operation Exemption -- Maine Central Railroad Company and Springfield Terminal Railway Company*, Finance Docket No. 34133 (STB served September 30, 2002)(shipper performed own switching over line of railroad owned by carrier); *Brotherhood of Locomotive Engineers v. Interstate Railroad Company et al.*, Finance Docket No. 31078 (ICC served November 20, 1987)(shipper moving own property over 13 miles of common carrier trackage).

³ The other decisions cited by V&S in support of its exclusivity claim (*Devens Recycling* and *B.J. Willis*) merely establish that private rail operations conducted over private track are not within the STB's jurisdiction. These decisions are not relevant to whether a non-carrier can operate over common carrier track.

In this case, HSC/HTC is predominantly using its own track on its own property to move its own traffic to a connection with the BNSF. HSC/HTC invested its own money and resources in establishing a connection with the BNSF because of the poor service provided by the V&S and its predecessor. V&S now asserts, several years after it allegedly acquired rights from H&N, that it has the exclusive, mandatory right to provide rail transportation service to HSC/HTC because it filed a notice of exemption with the STB in 2006 for operating authority over trackage that extends into the HSC/HTC salt mine. There is no authority in the ICC Termination Act (as amended) for V&S' claim that a shipper must be held hostage to a common carrier's operating rights (if any) if the Shipper does not want service from that carrier.⁴

Turning specifically to the questions Petitioner presents:

1. *Is Petitioner the sole rail carrier authorized to operate on the railroad line between Milepost 0.0 and Milepost 5.14 in Hutchinson, Reno County, Kansas, and to interchange traffic with Defendant BNSF Railway Company?*

Petitioner asks whether it is the sole "rail carrier" authorized to operate on the subject rail line. As discussed above, this question is a red herring because no party has contended that another rail carrier is, or has asked to be, authorized by the Board to operate on the subject track. Likewise, a reading of the Petition for Declaratory Order reveals that Petitioner does not directly allege, although it is implied, that any other rail carrier within the meaning of the Act operates on the Line. To be perfectly clear, although HSC/HTC moves rail cars on its track, and offers rail

⁴ There also is a question here of what property rights V&S would rely on to access all of the trackage on the HSC/HTC property that is encompassed within the common carrier operating authority that it claims as a result of the 2006 notice of exemption. We are not aware of any underlying agreement which would provide V&S with the right to operate on the salt mine property aside from its claims under the 1925 easement. As the Board has held in other decisions, a common carrier must reach some agreement with the owners of the right-of-way and trackage that it seeks to use for providing common carrier service. *See, e.g., San Francisco Bay Railroad – Mare Island – Operation Exemption – California Northern Railroad*, Finance Docket No. 35303 (STB served Dec. 6, 2010). This access is a necessary predicate to obtaining any Board authority to operate over a right-of-way.

cars loaded with salt to BNSF, the spur HSC/HTC's uses is not part of the Line, nor has it ever been part of the Line.

Essentially, Petitioner brought this action seeking a determination that HSC/HTC, as private users, cannot operate on their own track located on their own real property, for its own purposes. Again, HSC/HTC are not rail carriers as defined by the Act and, therefore, are not subject to STB jurisdiction (*See* Section A.1 above and authorities cited therein). Furthermore, STB Finance Docket No. 34875, which Petitioner cites as its authority to operate on the subject track, does not purport to exclude others, including but not limited to non-carrier, industrial users from engaging in private carriage operations. *See V&S Ry., LLC – Acquisition and Operation Exemption – The Hutchinson & Northern Ry. Co.*, 71 FR 30978-01, 2006 WL 1464029 (May 31, 2006). Therefore, plaintiff's first question does not raise a material issue for the Board to decide. This issue is also a red herring because for more than three years the V&S and its predecessor in interest have not been asked to perform any services or to be on the subject track nor have they been on the subject track for more than three years. V&S's allegations imply, although do not state, that they are continuing to operate on the subject track located on the Salt Mine Real Estate. This is simply not true. The V&S does not enter the subject track unless specifically asked to do so by HSC/HTC, and V&S has not been asked to enter the subject track for more than three years.

2. *Does HSC and/or HTC have the right to operate on the railroad line and to interchange traffic with Defendant BNSF Railway Company by virtue of the fact that they own part of the real property underlying the railroad line and/or the fact that they claim ownership of some of the tracks and improvements that are part of the railroad line the Board authorized V&S to acquire and operate?*

As an initial matter, although it is implied in the Petition that HSC/HTC's use of the Line interferes with Petitioner's rail carrier operations, Petitioner has presented no evidence of any

such interference, and none exists. HSC/HTC do not interfere with Petitioner's rail carrier operations, because Petitioner does not travel over or conduct any operations over this track and has not physically been on the track at all for more than three years. Even when it traveled on this track, it was only at the express request of HSC/HTC. There are no other shippers located on the subject track for Petitioner to serve, and Petitioner and its predecessor never had any other customers on the subject track at issue in this case. In short, there are no rail carrier operations with which HSC/HTC could interfere. HSC/HTC has not interfered with Petitioner's service; they have simply declined to use Petitioner's service which HSC/HTC consider to be poor, untimely and substandard.

As discussed in Subsection A above, the Board has jurisdiction and authority to regulate transportation by rail carriers on lines of railroad. 49 U.S.C. § 10501(b). HSC/HTC are not rail carriers, as discussed in Subsection A.1. In addition, this dispute involves HSC/HTC's private carriage operations on track that HSC/HTC owns and maintains, which is also not within the Board's jurisdiction, as discussed in Subsection A.2. Therefore, the right of HSC/HTC to operate on the subject tracks, including moving its rock salt and tendering traffic from that track, does not fall under the authority of the Board. Their rights are governed by Kansas property law, the documents by which they acquired the subject property, and the agreements that relate to the operation of the subject track.

But even if the Board did have jurisdiction, the Board's rulings cited by Petitioner do not support its position. HSC/HTC entered into an Operating Rights Agreement in 1998 with Petitioner's predecessor in interest, specifically allowing HSC/HTC to operate on 500 feet of track to the west of the subject track at issue in this case. The Operating Rights Agreement does not interfere with V&S's rail carrier operations, because V&S does not have rail carrier

operations on the subject track. Furthermore, the Operating Rights Agreement specifically provides that the H&N's "right to use the Joint Trackage shall not be diminished." (Exhibit "A" at p. A.1). Therefore, pursuant to the Operating Rights Agreement, HSC/HTC are expressly prohibited from interfering with Petitioner's rail operations as the claimed successor to the H&N, and Petitioner has not alleged a breach of the terms of the Operating Rights Agreement. *See S.D. Warren Co. – Acquisition and Operating Exemption – Maine Central Railroad Co.*, STB Finance Docket No. 34133, 2002 WL 31160840 (September 25, 2002). The Operating Rights Agreement has never been terminated by either party.

Because HSC/HTC have not requested Petitioner's services for years, Petitioner does not have any rail carrier obligations to fulfill. HSC/HTC has declined to use Petitioner's services that it considers to be substandard, but that does not constitute interference under any of the Board's rulings cited by Petitioner. Petitioner also fails to provide any authority for its assertion that common carrier rights create exclusive usage rights and that HSC/HTC must be captive to Petitioner's rail service.

3. *Did the Hutchinson & Northern Railway Company or any successor-in-interest abandon the right-of-way on Parcel 1 granted to it by virtue of the 1925 Easement?*

Although Petitioner's third question uses the term "abandon," the parties to these proceedings have not sought a formal abandonment determination in this case. "Abandonment" has a specific meaning under the Act. It "is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 314 n.2 (1981) (quoting *ICC v. Chicago & N.W. Transp. Co.*, 533 F.2d 1036, 1028 (8th Cir. 1976)). Generally, when a rail carrier wishes to abandon or discontinue service on a line of railroad, it must obtain Board approval for that

abandonment of service. 49 U.S.C. § 10903; *see also Phillips Co. v. Denver & Rio Grande Western RR Co.*, 97 F.3d 1375 (10th Cir. 1996). So Petitioner's third question involves a non-issue.

Implicit in plaintiff's third question is an admission that V&S's easement rights, if any, as the claimed successor to the H&N, arose from the 1925 Easement. Petitioner appears to agree that its rights, if any, arise under that easement. (*See* Petition at p. 4, citing *Presault v. ICC*, 494 U.S. 1, 8 (1990)). Certain key issues in this case arise out of the interpretation and enforcement of the terms of that easement: (1) What real property is covered by the 1925 Easement?⁵ (2) Are the subject tracks located on the real property covered by that 1925 Easement? (3) Has the 1925 Easement expired by its own terms? (4) What has been the course of dealing of the parties (or their predecessors in interest), with respect to the 1925 Easement? (5) If the 1925 Easement is no longer in force, can Petitioner establish a claim of adverse possession or easement by necessity? None of these questions fall within the jurisdiction of the Board, because the Board does not have jurisdiction over property issues governed by state law. *Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY*, 1988 WL 225779, ICC Docket No. AB-167, *3 (January 29, 1988) ("Only a court of competent jurisdiction can resolve a dispute requiring an interpretation of local property law," including in that instance a determination whether the easements underlying the rail line preclude its use for public transportation).

V. CONCLUSION.

Regulation of rail transportation in the United States, by statute, is designed to further public policy, including "to prohibit predatory pricing and practices, to avoid undue

⁵ Some of the track that Petitioner contends is part of the Line was not included in the 1925 Easement. Petitioner has not explained how it has acquired the right to operate on the portion of track outside the 1925 Easement.

concentrations of market power.” 49 U.S.C. § 10101(9) and (12). To award the declaratory order Petitioner seeks in this case would not promote any of the public policies listed in 49 U.S.C. § 10101. Instead, it would in effect thwart public policy by forcing an industrial user to forcibly and retroactively purchase services it does not want from a rail carrier that did not provide those services for years (and whose services were unsatisfactory when used). This would be especially unjust given that the rail carrier’s predecessor in interest expressly agreed in writing in 1998 that the industrial user could move its own cars and locomotive on the subject track and also use 500 feet of the Petitioner’s track for the industrial users operation that had gone on for years. There is no support for the exclusivity theory upon which V&S’ claim is predicated, and ample support for allowing HSC/HTC to continue engaging in private operations over their own property and over a portion of the V&S’ track pursuant to the Operating Rights Agreement (which remains in effect).

For all the reasons stated above, the Board should deny Petitioner’s Petition for Declaratory Order and issue a decision confirming that HSC/HTC may continue to engage in their present activities.

Respectfully submitted,

By: /s/ Edward J. Fishman

Edward J. Fishman
K&L GATES LLP
1601 K Street N.W.
Washington, DC 20006
Telephone: (202) 778-9456
ed.fishman@klgates.com

Terry L. Malone
Martin, Pringle, Oliver, Wallace & Bauer, LLP
100 North Broadway, Suite 500
Wichita, KS 67202
Telephone: (316) 265-9311

timalone@martinpringle.com

*Attorneys for Defendants Hutchinson Salt
Company, Inc., Hutchinson Transportation
Company, Inc. and BNSF Railway Company*

**SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB Finance Docket No. 35459

**V&S RAILWAY, L.L.C.
PETITION FOR DECLARATORY ORDER
RAILROAD OPERATIONS IN HUTCHINSON, KANSAS**

VERIFIED STATEMENT OF MAX LIBY

My name is Max Liby. I am the Vice President of Manufacturing of Hutchinson Salt Company, Inc. ("HSC") and a Vice President of Hutchinson Transportation Company, Inc. ("HTC") (hereinafter collectively "HSC/HTC," unless otherwise designated). HSC is a Kansas corporation formed on or about May 24, 1990. HTC is a Kansas corporation formed on or about August 15, 1994. My business address is 3300 Carey Boulevard, Hutchinson, Kansas 67501. I am authorized to make this Verified Statement on behalf of HSC/HTC, and I make it based upon my personal knowledge.

My employment history has provided me with personal knowledge of the facts relevant to the issues that are in dispute. I began working for the Carey Salt Company ("Carey Salt") in 1971. The Carey Salt Company was a Kansas corporation with a principal place of business in Hutchinson, Kansas. A primary business activity of Carey Salt was to own and operate a salt mine located south and east of Hutchinson, Kansas, with a common address of 3300 Carey Boulevard, Hutchinson, Kansas. The salt mine is located on a parcel of real estate consisting of approximately 72 acres that Carey Salt also owned. For purposes of my Verified Statement, I will refer to this parcel as the "Salt Mine Real Estate."

Beginning in 1979, I became the Manager of the salt mine. I continued to be responsible for the day-to-day operations of the salt mine, which included but was not limited to the production and shipping of salt, until 2010 when I retired from my responsibilities as the Manager of the salt mine. Although I was continuously the Manager of the salt mine from 1979 through 2010, as I will explain in more detail herein, I had different employers during this period as the ownership of the salt mine changed. I am still employed by HSC/HTC, and I am still familiar with the operation of the salt mine.

Approximately a year to a year and a half after I became the Manager of the salt mine, I also became responsible for running the day to day operations of the Hutchison and Northern Railway Company ("H&N"). The H&N is a corporation that appears to have been formed on or about March 20, 1912. Within a few years of its formation, the H&N was acquired by the owners of Carey Salt. When I began working for Carey Salt in 1971, it still owned the H&N. At the time, the H&N provided "switching" rail service to the salt mine by moving rail cars loaded at the salt mine to be interchanged with a major rail carrier which took place several miles west of the salt mine, and returning empty cars to the salt mine. The H&N did not maintain a train schedule or regular service over the subject tracks located on the Salt Mine Real Estate. The H&N did not maintain buildings, platforms, or the rails or switches on the Salt Mine Real Estate. Instead, the H&N only entered the Salt Mine Real Estate and traveled over the subject tracks when specifically requested to do so by the then owners of the salt mine for the purpose of moving rail cars loaded with salt from the salt mine to a major rail carrier, or to return empty cars to the mine.

Carey Salt owned and operated both the salt mine and the H&N beginning some time before I began working for Carey Salt in 1971, until Carey Salt made the decision to sell both the salt mine and the H&N during the 1980's. In approximately 1988, Carey Salt sold both the salt mine and the H&N to the American Salt Company, a company I believe to be a subsidiary owned and controlled by the North American Salt Company. When the mine and the H&N were sold to the American Salt Company, I became employed by the American Salt Company and continued my responsibilities as the Manager of the salt mine, and also as the person in charge of running the H&N. The H&N continued to provide switching service to the salt mine after both were acquired by the American Salt Company.

Because of my position as the Manager of the salt mine and as the person running the H&N between 1980 and 1990, I became very familiar with the ownership of the property each entities owned. Part of my job responsibility during this period was to determine whether the salt mine or the H&N was responsible for any particular repair, maintenance, or improvement that was to be made to any of the rail, switches, or ties that either of them owned. To do this I had to be familiar with which entity owned which rail, ties and switches. Starting with the time I was given the responsibility for the day to day operations of the H&N, it was clear to me that all of the rail, ties and switches located on the Salt Mine Real Estate was owned by and was the responsibility of the salt mine. It was also clear that all of the rail, switches and ties that were located on the H&N's real estate were owned by and the responsibility of the H&N. None of the H&N's rails, switches, or ties were located on the Salt Mine Real Estate.

During the time that I was in charge of running the day to day operations of the H&N, and while serving as the salt mine's manager, it became advisable for the salt mine and the H&N

to have mile markers placed at various locations on their respective track for identification purposes. Because at the time both the mine and the H&N had common ownership, I decided to designate mile post 0.0 at the eastern most location of the track located on the Salt Mine Real Estate, and then designate mile posts from east to west. I did this to make it easier to identify where repairs to the track were made, and so that I could direct outside contractors to locations along the track where work needed to be performed. I did not intend for my establishment of these mile post markers to be an indication of which entity owned the track located either on the Salt Mine Real Estate, or on the H&N's property. By early 1990, it was well established that the American Salt Company owned all of the rail, ties, switches and other improvements located on the Salt Mine Real Estate.

The North American Salt Company became motivated to sell the salt mine in Hutchinson in approximately 1990, because of an anti-trust action that had been filed against it by the United States of America in the United States District Court for the Northern District of Illinois as Case No. 90-C-2631 (hereinafter "Anti-Trust Litigation"). The Anti-Trust Litigation had been filed as the result of the North American Salt Company's desire and intention to acquire the Cote Blanche salt mine located in Cote Blanche, Louisiana. To settle the Anti-Trust Litigation, North American Salt Company agreed to divest itself of the Hutchinson salt mine by having its subsidiary, the American Salt Company, sell the salt mine to HSC. HSC was formed in 1990 to acquire the salt mine from the American Salt Company. As part of the Anti-Trust Litigation settlement negotiations, the issue of whether the H&N would have to be divested from the North American Salt Company and its subsidiaries was considered and discussed. It was eventually determined that the H&N could operate independently of the salt mine and would not have to be

sold by North American Salt Company or its subsidiary, but there were concerns that the H&N might attempt to undermine the spirit and intent behind the Anti-Trust Litigation because it was still owned and controlled by North American Salt Company or a subsidiary.

It was the intent of the North American Salt Company and the American Salt Company to comply with the terms of the Anti-Trust Litigation settlement, and to sell all of the Salt Mine Real Estate to HSC and to also transfer to HSC all of the improvements located on this real estate, including but not limited to the track located on the Salt Mine Real Estate. At the time this transaction was being negotiated, I worked for the seller, the American Salt Company. I was asked to assist in the preparation of the schedule to the Bill of Sale to transfer the American Salt Company's property to the buyer, HSC. As part of this transaction, the seller sold to HSC the salt mine, the Salt Mine Real Estate, and all of the rail, ties, switches, fixtures and other improvements that are located on the Salt Mine Real Estate.

The transaction between American Salt Company and HSC that transferred the real estate and the improvements and personal property located thereon to HSC became effective on August 1, 1990. I became an employee of HSC on or about August 1, 1990, and continued to serve uninterrupted as the Manager of the salt mine until 2010. However, because it was decided that the H&N would not be sold to HSC, I was no longer responsible for running the H&N effective August 1, 1990. Although I had been a member of the Board of Directors of the H&N for several years, I resigned my position as a director shortly after August 1, 1990.

Subsequent to its acquisition of the salt mine, HSC became increasingly dissatisfied with H&N's "switching" service. Beginning at this time, the H&N did not make its switching services timely available when the salt mine needed to move its cars on the Salt Mine Real

Estate. When HSC requested service from the H&N, most of the time it would be hours or perhaps days before the H&N would move the rail cars. From time to time from August, 1990 through 1995, HSC would be forced to use its heavy equipment to move cars on its track prior to its acquisition of a locomotive in 1995. This was simply unacceptable to HSC, and H&N's poor and untimely service made it difficult for HSC to efficiently ship its rock salt by rail. As a result, on or about March 21, 1994, HSC entered into an agreement with The Atchison, Topeka and Santa Fe Railway Company (the predecessor to BNSF Railway Company), to have a spur built on the Salt Mine Real Estate running northwesterly so that the tracks located on the Salt Mine Real Estate would be connected to BNSF's tracks located on BNSF's property adjacent to the Salt Mine Real Estate's north boundary. The construction of this spur gave HSC/HTC the option to have rail cars shipped either by the Union Pacific via the H&N, or by the BNSF. Since 1994, most of HSC/HTC's rail cars have been transferred to the BNSF or its predecessor for shipment.

In 1994, the owners of HSC made a business decision to form HTC. HTC's purpose was to own certain assets transferred to it by HSC, including but not limited to the surface rights to most of the Salt Mine Real Estate.

To assist it in its operations, and in part due to H&N's poor and untimely service, during 1995 HSC/HTC acquired its own locomotive which it placed on its tracks located on the Salt Mine Real Estate. The locomotive was acquired by HSC/HTC to serve only HSC/HTC's needs and to move cars on HSC/HTC's tracks, and not with the intention of serving the public at large, or other entities. Since 1995, the locomotive has continuously been used on the Salt Mine Real Estate for moving rail cars located on it.

On or about April 1, 1998, the H&N entered into an Operating Rights Agreement with the HSC/HTC. A copy is attached hereto as Exhibit "A." The Operating Rights Agreement was prepared by H&N and not HSC/HTC. I signed this agreement on HSC/HTC's behalf. In the Operating Rights Agreement, H&N was referred to as the "Owner," and HSC/HTC was identified as the "User." The purpose of this agreement was to allow HSC/HTC to "operate its trains, locomotives, cars and equipment over 500 feet of track of" H&N located west of the Salt Mine Real Estate property line which were "contiguous to tracks of" HSC/HTC. The 500 feet of adjacent track was referred to in the agreement as "Joint Trackage" and was shown on a map attached to Exhibit "A" as Exhibit "1." The significance of this agreement was the acknowledgment and agreement of the H&N that as of April 1, 1998, HSC/HTC owned the track located on the Salt Mine Real Estate, and that the H&N knew that HSC/HTC was operating trains, locomotives, cars and equipment over those tracks located on HSC/HTC's property, and H&N did not object to it doing so. This agreement obviously also allowed HSC/HTC to use 500 feet of H&N's track located west of the Salt Mine Real Estate property line of HSC/HTC to operate its trains, locomotives, cars and equipment. The Operating Rights Agreement has not been terminated by either party.

HSC/HTC operated its salt mine and utilized all of the improvements on the Salt Mine Real Estate from the date it took possession of the salt mine property on or about August 1, 1990, without any interference from anyone including the H&N for nearly 17 years. During the 17 years in question, and to date, neither the H&N nor its claimed successor V&S Railway, L.L.C. (hereinafter "V&S") ever paid, or attempted to pay for any of the repairs, improvements, additions, or maintenance to any of the rail, switches, or ties located on the Salt Mine Real

Estate. On the other hand, over this 17 years, HSC/HTC has spent thousands of dollars and has expended hundreds of man hours repairing, maintaining, improving and making additions to the rail, switches and ties located on the Salt Mine Real Estate.

From 1999 through 2006, various entities claimed ownership of the H&N, and they made offers from time to time to sell the H&N, or its assets. In July of 1999, IMC Salt, Inc. contacted me about having HSC/HTC make an offer to purchase the H&N. At the time, it was not clear to me how IMC Salt, Inc. acquired the ownership of the H&N as I had not been privy to the day to day operation of the H&N since the time I had relinquished that responsibility in August of 1990. HSC/HTC was unable to negotiate terms acceptable to it to purchase the H&N in 1999.

In approximately October of 2004, IMC Chemical North American, L.L.C., and Mosaic USA Holdings, Inc. made an offer to sell H&N's stock to HSC/HTC. HSC/HTC was provided with no explanation how either of those entities had acquired the ownership of the H&N or the terms upon which they had made the acquisition. HSC/HTC was unable to negotiate terms acceptable to it to acquire the stock of the H&N in 2004.

In approximately August of 2005, the Pacific Western Railroad contacted me about soliciting an offer from the owners of HSC/HTC to purchase the assets of the H&N. I was not provided with any information at the time to explain how the Pacific Western Railroad had acquired ownership of the H&N or upon what terms. Neither HSC/HTC nor any company owned and/or controlled by the owners of the HSC/HTC were able to negotiate the purchase of the H&N or its assets in 2005.

On or about March of 2006, HSC/HTC was contacted by A&K Railroad Materials (hereinafter "A&K"), offering to sell the assets of the H&N to HSC/HTC. By letter dated March

15, 2006, Steven VanWagenen wrote to HSC/HTC claiming that A&K had entered into a contract to purchase the assets of the H&N "upon H&N abandonment." In A&K's letter to HSC/HTC, it claims that the "H&N has proceeded with the preliminary steps of the abandonment process and A&K's affiliate, V&S Railway, has operated the H&N as a contract operator." At the time HSC/HTC was not provided with any proof of A&K's agreement to purchase the assets of the H&N or the H&N's abandonment proceeding, and HSC/HTC was not provided with the terms of that contract. HSC/HTC was unable to negotiate the acquisition of the H&N's assets from A&K in 2006.

At no time during the communications from 1999 through 2006 did the entity claiming to own the H&N ever take the position that the H&N owned any of the track located on the Salt Mine Real Estate. None of these owners objected to HSC/HTC operating its locomotive on the Salt Mine Real Estate or HSC/HTC moving rail cars on the Salt Mine Real Estate, and none claimed that HSC/HTC did not have the right to tender cars to the BNSF via the BNSF spur to ship salt from the salt mine to HSC/HTC's ultimate customers.

On or about March 15, 2007, Michael VanWagenen representing the V&S, wrote a letter to HSC/HTC claiming that V&S owned the improvements located on the Salt Mine Real Estate, and demanding that HSC/HTC quit using the improvements until HSC/HTC agreed to indemnify V&S in writing against all damages and losses, and for the parties to negotiate the terms of an operating agreement to allow HSC/HTC to utilize these tracks. HSC/HTC, through one of its counsel that had assisted HSC/HTC in acquiring the salt mine, the Salt Mine Real Estate and the related assets, made a timely response to that letter denying the accuracy and validity of V&S' claim. Nothing of significance happened until V&S filed a lawsuit approximately eighteen

months later in the United States District Court for the District of Kansas as Case No. 08-1402-WEB on December 22, 2008 (hereinafter "Litigation").

In the lawsuit, the plaintiff V&S claims to be a limited liability company organized and existing pursuant to the laws of the State of Nevada with a principal place of business in Salt Lake City, Utah. V&S also claims to be the successor in interest to the H&N pursuant to its allegation that on or about May 11, 2006, it entered into a certain Asset Purchase and Sale Agreement with H&N. V&S also claims that it became the successor in interest to the H&N's right, title and interest in and to Parcel 1 and Parcel 10. Parcel 1 and Parcel 10 are parcels of land V&S alleges are located on the Salt Mine Real Estate.

Because I was in charge of the day to day operations of the H&N from approximately 1980 through August of 1990, I am aware that the H&N did not own, nor could it have transferred to the V&S, any of the rail, switches, or ties located on the Salt Mine Real Estate. All of this property was sold to HSC effective August 1, 1990, so the H&N did not own this property in 2006. Also as previously stated, neither the H&N nor any of its owners had claimed to have any ownership interest of the rail, switches, or ties located on the salt mine property from 1980 through 2006. In fact, the H&N had entered into the Operating Rights Agreement on or about April 1, 1988, and in it expressly admitted it did not own these rails, switches, or ties, and that it was HSC that owned them. Furthermore, the H&N has never owned, or claimed to own, any rights to the parcel of land the V&S described as Parcel 10. Also, based upon my study of the H&N operating history and my review of the easement terms, I believe that the H&N's claim to an easement over a parcel of land the V&S described as Parcel 1 had expired by its own terms

prior to 2006, so at that time the H&N did not have easement rights to Parcel 1 to transfer to the V&S.

The subject track that is at the center of this dispute in the Litigation and these proceedings is less than one-half of a mile long and is located exclusively upon the Salt Mine Real Estate owned by HSC/HTC. The east end of the subject track is a dead end. The west end of the subject track connects to the "Joint Trackage" identified by the April 1, 1998, Operating Rights Agreement. (See Exhibit "1" to Exhibit "A" attached hereto). The "Joint Trackage" is located immediately west of the Salt Mine Real Estate. The subject track has never been used for any purpose other than salt mine operations consisting of the loading of salt on rail cars for eventual delivery to the salt mine's customers, or receiving the empty cars back once the salt has been delivered.

A portion of the subject track in question is not located within the boundary of V&S's claimed "Parcel 1." There have been two surveyors attempt to locate Parcel 1, and they have differing opinions about which of the subject rail, ties and other improvements are located within Parcel 1, and which ones are not. Both have determined that some portion of the subject track is not located with V&S's claimed Parcel 1. What is not in dispute is that none of approximately 350 feet of subject track located near the Salt Mine Real Estate western boundary is located within Parcel 1. The parcel where this portion of the subject track is located has been identified in this dispute by the V&S as Parcel 10. All of Parcel 10 is located on the Salt Mine Real Estate. Parcel 10 is not included in any part of Parcel 1. Prior to V&S acquiring any purported rights from the H&N, V&S was informed by a title insurance company that if it wished to acquire

rights to travel over or use Parcel 10, that it would need to obtain an easement from HSC/HTC for Parcel 10.

In this dispute it appears that V&S is alleging or at least implying that it is operating on HSC/HTC's tracks located on the Salt Mine Real Estate, or that it may have some reason to travel over the track located on the Salt Mine Real Estate. This is simply not true. Primarily because of poor and untimely service which essentially did not improve from August, 1990, the V&S has not been asked by HSC/HTC for several years to travel over the Salt Mine Real Estate to move rail cars from the mine, or to return empty cars to the mine.

This concludes my Verified Statement.


Max Liby

VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF RENO)

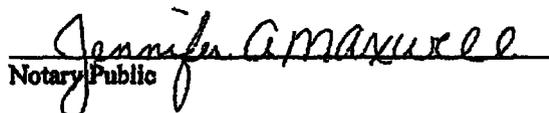
Max Liby, of lawful age and being first duly sworn, upon oath deposes and states:

That he has read the foregoing Verified Statement and knows the contents thereof, and that the statements therein contained are true and correct to the best of his knowledge and belief.



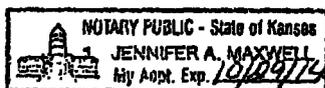
Max Liby

SUBSCRIBED AND SWORN to before me, a notary public within and for the County and State aforesaid, on this 9 day of March, 2011.



Notary Public

My commission expires:



OPERATING RIGHTS AGREEMENT

THIS AGREEMENT, made this 1st day of April, 1998, between Hutchinson and Northern Railway, hereinafter "Owner" and Hutchinson Salt Mine, hereinafter "User",

WITNESS THAT;

WHEREAS, Owner owns and operates 5.14 miles of trackage in Hutchinson, Kansas;

and

WHEREAS, User desires to operate its trains over 500 feet of track of the Owner for the sole purpose of switching rail cars into and out of their facility at Hutchinson, Kansas;

and

WHEREAS, Owner agrees to grant User the right to operate its trains, locomotives, cars and equipment over 500 feet of track of Owner, hereinafter, "Operating Rights" and contiguous to tracks of User, as herein provided,

NOW THEREFORE, the parties hereby agree to be bound as follows:

SECTION 1. GRANT OF TRackage RIGHTS

Subject to the terms and conditions herein provided, Owner hereby grants to User the right to operate its trains, locomotives, cars and equipment with User's crews over Owner's rail line between the Hutchinson Salt Mine facility gate, west on Owner's track not to exceed 500 continuous feet. Said tracks and appurtenant facilities being hereinafter together referred to as "Joint Trackage" and as shown on the plan attached hereto, made a part hereof and marked "Exhibit 1".

SECTION 2. GENERAL CONDITIONS - FORM A

Except as may otherwise be provided below, this Agreement is subject to and shall be governed by the "General Conditions - Form A", attached hereto and made a part hereof and incorporated herein by reference with the same force and effect as if set forth at length herein.



SECTION 3. COMPENSATION

- (a) User agrees to pay Owner an annual fee of one dollar (\$1.00).
- (b) User agrees to furnish Owner at the end of each month a statement of the total number of loaded and empty cars operated over the Joint Trackage during the month.

SECTION 4. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS

- (a) Existing connections or facilities which are jointly used by the parties hereto shall continue to be maintained, repaired, and renewed by and at the expense of the party or parties responsible for such maintenance, repair, and renewal at the time of execution of this Agreement.
- (b) Any additional connections or additions to the Joint Trackage which may be required shall be constructed, maintained, repaired, and renewed as follows:
 - (i) User or others shall furnish all labor and material and shall construct, maintain, repair, and renew at their sole cost and expense such portions of the tracks located on the right-of-way of User which connect the respective lines to the parties hereto.
 - (ii) Owner shall furnish all labor and material and shall construct, maintain, repair, and renew at the sole cost and expense of User such portions of the tracks located on the right-of-way of Owner which connect the respective lines of the parties hereto.

SECTION 5. RESTRICTIONS ON USE

- (a) The Operating Rights herein granted are granted for the sole purpose of User for serving Hutchinson Salt Mine only between the end points of the Joint Trackage and User shall not perform any other local freight service what so ever at any point located on the Joint Trackage. User shall not at any time park equipment on the Joint Trackage included in this Agreement nor shall User unhook the engine(s) except as absolutely necessary to the

continuous operation of the switching procedure of classifying cars.

- (b) User's usage of the Joint Trackage shall be limited to a maximum of two (2) switch moves in each direction on the Joint Trackage per calendar day and not more than sixty (60) trains on the Joint Trackage in each direction per calendar month. However, User may make additional moves on the Joint Trackage within a calendar day with prior written consent of Owner. These are maximum usage figures and Owner makes no guarantee whatsoever to User that User can achieve such maximums during a calendar day or during a calendar month.
- (c) User's trains shall be limited to a maximum of ten (10) cars per train moving under the Operating Rights. Locomotives and cabooses are excluded from the car count solely for purposes of determining the number of cars subject to the ten (10) car maximum. Owner shall have no obligation whatsoever to allow access to Joint Trackage of User's trains transporting in excess of the ten (10) car maximum.
- (d) User is prohibited from transporting any cars of hazardous materials over the Joint Trackage. Hazardous materials shall include all cars which under applicable regulatory guidelines require that such cars be placarded. Violation of this clause shall result in immediate suspension of User's Operating Rights upon verbal notification by Owner followed by written notice within 30 days.

SECTION 6. TERM

- (a) This Agreement shall be effective on the date first above written. Either party may cancel this Agreement for any reason upon thirty (30) days written notice to the other party of such cancellation.
- (b) Termination of this Agreement shall not relieve or release either party hereto from any

obligation assumed or from any liability which may have arisen or having been incurred by either party under the terms of this Agreement prior to the termination hereof.

SECTION 7. NOTICE

Any notice required or permitted to be given by one party to the other under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may agree, and shall be addressed as follows:

- (a) If to Owner: Kim Kirmer, Assistant General Manager
 Hutchinson and Northern Railway
 1800 Carey Blvd.
 Hutchinson, KS 67501

- (b) If to User: Max Liby, Vice President - Manufacturing
 Hutchinson Salt Mine
 3300 Carey Blvd.
 Hutchinson, KS 67501

Either party may provide changes in the above addresses to the other party by personal service or certified mail.

SECTION 8. GOVERNING LAW

Except as otherwise provided herein, this Agreement and the rights and obligations accruing hereunder shall be construed and enforced in accordance with the laws of the State of Kansas and relevant federal law.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS

Kelly M. O'Brien

HUTCHINSON AND NORTHERN RAILWAY

Andrew J. Anderson

WITNESS

HUTCHINSON SALT MINE

Max Libby

TITLE

V. P. MFG

GENERAL CONDITIONS - FORM A

Attachment to OPERATING RIGHTS AGREEMENT dated this 31st day of December, 1997,
between Owner and User relating to Operating Rights of usage for usage of Joint Trackage.

ARTICLE 1. USE OF JOINT TRACKAGE

- (a) User's use of the Joint Trackage shall be in common with Owner and Owner's right to use the Joint Trackage shall not be diminished by this Agreement. Owner shall retain the exclusive right to grant to other persons rights of any nature in the Joint Trackage.
- (b) User shall not use any part of the Joint Trackage for the purpose of switching, storage, or servicing cars or equipment, or the making or breaking up of trains, unless related to serving the Hutchinson Salt Mine facility; provided, however, that nothing contained herein shall, preclude the emergency use by User, upon prior approval of Owner, of such auxiliary tracks as may be designated by Owner for such emergency use.
- (c) Owner shall have exclusive control of the management and operation of the Joint Trackage. User shall not have any claim against Owner for liability on account of loss or damage of any kind in the event the use of the Joint Trackage by User is interrupted or delayed at any time from any cause.

ARTICLE 2. REVISION OF CHARGES

- (a) The annual compensation shall be subject to changes to reflect increases in operating costs.

ARTICLE 3. ADDITIONS, RETIREMENTS, AND ALTERATIONS

- (a) Owner, from time to time and at its sole cost and expense, may make such changes in, additions and improvements to or retirements from the Joint Trackage as shall, in its sole judgment, be necessary or desirable for the economical or safe operation thereof or

as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and improvements shall become a part of the Joint Trackage and such retirements shall be excluded from the Joint Trackage.

- (b) If the parties here to agree that changes in or additions and improvements to the Joint Trackage, including changes in communication or signal facilities, are required to accommodate User's operations beyond that required by Owner to accommodate its own operations, Owner shall construct the additional or altered facilities and User shall pay to Owner the cost thereof, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities.

ARTICLE 4. MAINTENANCE OF JOINT TRACKAGE

- (a) Owner shall maintain, repair, and renew the Joint Trackage with its own supervision and labor. Owner shall keep and maintain the Joint Trackage at or above the least accepted track standards, but Owner does not guarantee the condition of the Joint Trackage or that operations there over will not be interrupted. Owner shall take all reasonable steps to ensure that any interruptions of operations will be kept to a minimum.
- (b) Owner shall perform within a reasonable time period, at the expense of User, such additional maintenance as User may reasonably require or request.

ARTICLE 5. MANAGEMENT AND OPERATIONS

- (a) User shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal, state, and local laws, regulations, and rules respecting the operation, condition, inspection, and safety of its trains, locomotives, cars, and equipment while such trains, locomotives, cars, and equipment are being operated over the Joint Trackage. User shall indemnify, protect,

defend, and save harmless Owner and its directors, officers, agents and employees from and against all fines, penalties, and liabilities imposed upon Owner or its directors, officers, agents, and employees under such laws, rules, and regulations by any public authority or court, when attributable solely or substantially to the failure of User to comply with its obligations hereunder.

- (b) User in its use of Joint Trackage shall comply in all respects with the safety rules, operating rules, and other regulations of Owner, and the movement of User's trains, locomotives, cars, and equipment over the Joint Trackage shall at all times be subject to the orders of the transportation officers of Owner. User's trains shall not include locomotives, cars, or equipment which exceed the width, height, weight or other restrictions or capacities of the Joint Trackage as published in Railway Line Clearances, and no train shall contain cars or equipment which contain hazardous materials.
- (c) User shall make such arrangements with Owner, if required, to have all of its employees who shall operate its trains, locomotives, cars, and equipment over the Joint Trackage qualified for operation there over, and User shall pay to Owner, upon receipt of bills therefore, any cost incurred by Owner in connection with the qualification of such employees of User, as well as the cost of pilots furnished by Owner, until such time as such employees are deemed by the appropriate examining officer or Owner to be properly qualified for operation as herein contemplated.
- (d) In the event of any investigation or hearing concerning the violation of any operating rule or practice by User's employees while on the Joint Trackage, User shall be notified in advance of any such investigation or hearing, and such investigation or hearing may be attended by any official designated by User, and any such investigation or hearing shall be conducted in accordance with the collective bargaining agreements, if any, that

pertain to User's employee or employees required to attend such hearings.

- (e) Owner shall have the right to exclude from its trackage any employee of User determined by Section (d) above, to be in violation of Owner's rules, regulations, orders, practices, or instructions issued by Timetable or otherwise. User shall release, indemnify, defend, and save harmless Owner and its directors, officers, agents, and employees from and against any and all liabilities, damages, claims, and expenses resulting from such exclusion.
- (f) The trains, locomotives, cars, and equipment of User, Owner, and any other present or future user of the Joint Trackage or any portion thereof, shall be operated without prejudice or partiality to either party and in such manner as will afford the most economical and efficient manner of movement of all traffic.
- (g) In the event that a train of User shall be forced to stop on Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's crew, or due to mechanical failure of User's equipment, or any other cause not resulting from an accident or derailment, and such train is unable to proceed, or if in emergencies, crippled or otherwise defective cars are set out of User's trains on the Joint Trackage, Owner shall have the option to (i) furnish motive power or (ii) render such other assistance (including, but not limited to the right to recrew User's train) as may be necessary to haul, help, or push such trains, locomotives, or cars, or to properly move the disabled equipment off the Joint Trackage, and User shall reimburse Owner for any all cost and expenses incurred by Owner in connection with rendering such assistance.
- (h) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Joint Trackage, such work shall be done by Owner, and User shall reimburse Owner for any and all costs and expenses

incurred on the part of Owner in connection therewith.

- (i) In the event Owner and User agree that Owner should retain employees or provide additional employees for the sole benefit of User, the parties hereto shall enter into a separate agreement under which User shall bear all costs and expenses for any such retained or additional employees provided, including without limitation all costs and expenses associated with labor protective payments which are made by Owner and which would not have been incurred had the retained or additional employees not been provided.

ARTICLE 6. MILEAGE AND CAR HIRE

All mileage and car hire charges accruing on cars in User's trains while on the Joint Trackage shall be assumed by User and reported and paid by it directly to the owner of such cars.

ARTICLE 7. CLEARING OF WRECKS

Whenever User's use of the Joint Trackage requires rerailling, wrecking service or wrecking train service, User shall perform or provide such service, including services for the repair and restoration of roadbed, track, and structures. Owner shall have the option to pick up or provide for the pick-up of a wreck within six (6) hours of the wreck. The cost, liability, and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom, shall be apportioned in accordance with the provisions of Article 8 entitled "LIABILITY" in these General Conditions. All locomotives, cars, and equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by User at the time of such wreck, shall be promptly delivered to User.

ARTICLE 8. LIABILITY

- (a) The responsibility of the parties to this Agreement as between themselves for the loss

of, damage to, or destruction of property, and for injury to or death of any person or persons resulting from, arising out of, incidental to, or occurring in connection with this Agreement will be determined as follows:

- (i) Whenever any such loss involves only trains, locomotives, cars, or equipment operated by or in the possession of one of the parties hereto, that party will assume all liability therefore, and bear all cost and expense in connection therewith, including all cost, expense, and liability arising under this Agreement, and will forever protect, defend, indemnify, and save harmless the other party and its directors, officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns from and against any such liability, cost, and expense;
- (ii) Whenever any such loss involves trains, locomotives, cars, or equipment operated by or in the possession of both parties, all liability, cost, and expense for injury to or death of any other person or persons or for loss of, damage to, and destruction of all other property and all cost, expense, and liability arising under this Agreement will be borne by each party in proportion to its own negligence.
- (iii) Each party hereto will bear all loss, damage, and expense for which it is responsible pursuant to this Agreement. Such party will forever indemnify and save harmless the other party and the other party's directors, officers, agents, employees, successors, assigns, parent corporation, subsidiaries, affiliates, and lessors from and against all liability and claims of whatever kind or nature by reason thereof and will pay, satisfy, and discharge all judgments that may be rendered by reason thereof and all costs, charges, and expenses incident thereto.

ARTICLE 9. INSURANCE

During the term of this Agreement, User agrees to procure and maintain at its sole cost and expense insurance policies in an insurance company or companies satisfactory to the Owner of the following types and of not less than the amounts specified.

- (a) As used in this Article, Owner shall be defined as Hutchinson and Northern Railway and its parent corporation, subsidiaries or affiliated companies, and the directors, officers, agents and employees of each;
- (b) Statutory Workers Compensation, including Employers' Liability Insurance with limits not less than \$1,000,000, covering all of User's employees. This policy shall specifically be endorsed to provide coverage as required under the Federal Employers Liability Act.
- (c) Comprehensive General Liability Insurance covering all operations (including but not limited to Railroad Operations and covering all equipment, including foreign rolling stock, used in the activities performed under this Agreement (whether owned, rented or borrowed) with a minimum combined single limit not less than \$5,000,000 per occurrence for bodily injury, including death, and property damage. This policy shall specifically be endorsed to contain a broad form property damage endorsement.
- (d) Cargo Insurance covering cargo in the care, custody, or control of User with a minimum per occurrence limit not less than the replacement cost value of the cargo.

Each policy shall expressly:

- (a) provide coverage that shall be primary without regard to any insurance carried and maintained by the Owner;
- (b) provide a waiver of subrogation against the Owner, and
- (c) include the following statement:
"Insurer will provide thirty (30) days written notice to Owner before material change

in, cancellation or nonrenewal of the policy shall be effective.”

User agrees that, prior to commencing activities performed under the Agreement, User shall furnish to Owner a certificate of insurance from each insurer showing that insurance with the required coverage and endorsements is in force on the effective date of the Agreement, starting policy numbers, dates of expiration, deductibles, self-insured retention and limits of liability thereunder. The certificate shall be subject to the prior approval of Owner. User shall furnish to Owner a copy of each such policy. User further agrees to provide the Owner with any special insurance and additional coverage or limits which the Owner may be notice to User require.

The consent of the Owner to the insurance and minimum limits insured as shown in the Article shall not be considered as a limitation of User’s liability under this Agreement, nor an agreement by the Owner to assume liability in excess of said amounts or for risks not insured against.

ARTICLE 10. INVESTIGATION

- (a) Except as provided in Section (b) of this Article, all claims, injuries, deaths, property damages, and losses arising out of or connected with this Agreement shall be investigated, adjusted, and defended by the party bearing the liability, cost, and expense therefore under the provisions of this Agreement.
- (b) In the event a claim or suit is asserted against Owner or User which is the other's duty hereunder to investigate, adjust or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.
- (c) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Agreement, except that salaries or wages of full-time claim agents, full-time attorneys, and other full-time employees of

either party engaged directly or indirectly in such work shall be borne by such party.

- (d) Neither party shall settle or compromise any claim, demand, suit, or cause of action for which the other party has any liability under this Agreement without the written concurrence of such other party.
- (e) It is understood that nothing in this Article shall modify or waive the conditions, obligations, assumptions, or apportionments provided in Article 8 entitled "LIABILITY" of these General Conditions.

ARTICLE 11. PAYMENT OF BILLS

- (a) All payments called for under this Agreement shall be made by User within thirty (30) days after receipt of bills therefore. No payments shall be withheld because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. The records of each party hereto, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times for inspection by the other party.
- (b) Bills rendered pursuant to the provisions of this Agreement, other than those set forth in Section 3 entitled "COMPENSATION" of this Agreement, shall include direct labor and material costs, together with the surcharges, overhead percentages, and equipment rentals as specified by Owner at the time any work is performed by Owner for User.

ARTICLE 12. DEFAULT AND TERMINATION

In the event of any substantial failure on the part of User to perform its obligations under this Agreement and its continuance in such default for a period of ten (10) days after written notice thereof by certified mail from Owner, Owner shall have the right at its option, after first giving User thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by Owner of any prior break thereof, to terminate the Trackage Rights and User's use of the Joint Trackage. The exercise of such right

by Owner shall not impair its rights under this Agreement for any cause or causes of action it may have against User for the recovery of damages.

ARTICLE 13. REGULATORY APPROVAL

- (a) Should this Agreement require the prior approval of the Surface Transportation Board (STB), User at its own cost and expense will initiate and thereafter diligently pursue an appropriate application or petition to secure such approval. Owner will assist and support efforts of User to secure any necessary STB approval of this Agreement.
- (b) Should the STB at any time during the term of this Agreement impose any labor protective conditions upon the User's arrangements; User shall be solely responsible for any and all payments in satisfaction of such conditions.

ARTICLE 14. ABANDONMENT OF JOINT TRackage

- (a) Owner shall have the right, subject to securing any necessary regulatory approval, to abandon the Joint Trackage or any portion thereof.
- (b) Should Owner abandon the Joint Trackage or any portion thereof, User shall have the first option to acquire the abandoned trackage.

ARTICLE 15. ARBITRATION

Any irreconcilable dispute arising between the parties with respect to this Agreement shall be settled through binding arbitration by a sole, disinterested arbitrator to be selected jointly by the parties. If the parties fail to select such arbitrator within sixty (60) days after demand for arbitration is made by either party hereto, then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and conclusive upon the parties hereto. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs, and expenses of the arbitrator, if any, shall be borne equally by the parties hereto.

ARTICLE 16. SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, except that any succession or assignment by either party must first have the express written consent of the other party.

ARTICLE 17. GENERAL PROVISIONS

- (a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be construed as creating or increasing any right of any third party to recover by way of damages or otherwise against either of the parties hereto.
- (b) All Section and Article headings are inserted for convenience only and shall not effect any construction or interpretation of this Agreement.
- (c) This Agreement and the attachments annexed hereto and integrated herewith contain the entire agreement of the parties hereto and supersede any and all oral understandings between the parties hereto.
- (d) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing signed by both parties of this Agreement.
- (e) As used in this Agreement, whenever reference is made to the trains, locomotives, cars, or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars, or equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars, or equipment which are owned by, leased to, or in the account of such party. Whenever such locomotives, cars, or equipment are owned or leased by one party to this Agreement and are in the possession or account of the other party to this Agreement, such locomotives, cars, or equipment shall be considered those of the other party under this Agreement.

(f) All words, terms, and phrases used in this Agreement (unless defined in the Agreement) shall be construed in accordance with the generally applicable definition or meaning of such words, terms, and phrase in the railroad industry.

AGREED TO: OWNER

By:

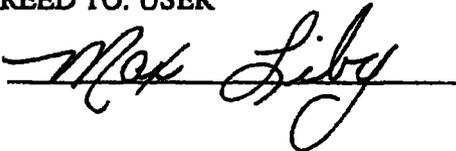


Title:

V.P. LOGISTICS

AGREED TO: USER

By:



Title:

V.P. MFG.

EXHIBIT I
MAP SHOWING TRACK IN QUESTION

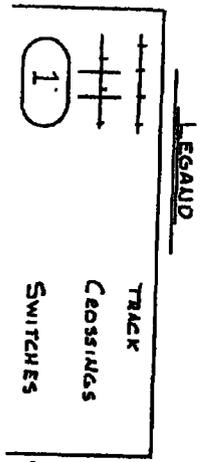
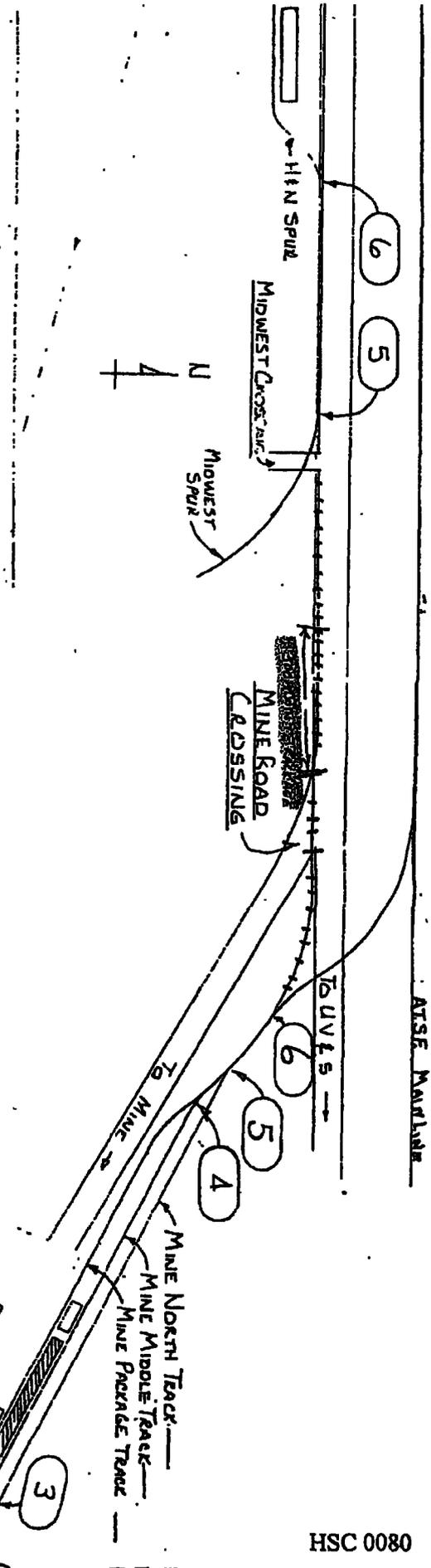


EXHIBIT
1

CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing *Response of the Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc. and BNSF Railway Company's Response to the V&S Railway LLC's Petition for Declaratory Order* by e-mailing a copy to its counsel Fritz R. Kahn, Esq., at xicccg@verizon.net, and upon the Association of Railway Museums, Inc., and the Tourist Railroad Association, Inc., by e-mailing a copy to their counsel, Robert T. Opal, Esq., at RobertTOpal@aol.com.

Dated at Washington, DC, this 9th Day of March 2011.

A handwritten signature in black ink, appearing to read 'E. Fishman', with a long horizontal flourish extending to the right.

Edward J. Fishman