

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

237791

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

ENTERED  
Office of Proceedings  
February 24, 2015  
Part of  
Public Record

And )

**KCVN, LLC )**

vs. )

**Docket No. NOR 42140**

**V&S RAILWAY, LLC )**

**REPLY TO MOTION FOR PROTECTIVE CONDITIONS**

The Colorado Wheat Administrative Committee (“CWAC”), Colorado Association of Wheat Growers (“CAWG”), Colorado Wheat Research Foundation (“CWRF”) and KCVN, LLC (“KCVN”) (together “Complainants”), hereby submit this Reply to the Motion for Protective Conditions of V and S Railway, LLC (“Motion”) filed in this case on February 4, 2015. For the reasons set forth below, the Motion should be denied because is procedurally defective and also wholly without merit in any event. It also seeks to waste the Board's time and resources on discovery matters that Complainants were attempting to resolve in good faith with defendant V&S Railway, LLC (“V&S”) outside of formal Board involvement, in keeping with the Board's preference in discovery matters. V&S's Motion disingenuously fails to specifically reference this

effort or attach the applicable correspondence, which Complainants' include as Exhibit 1 to this Reply. In further support of their opposition to the Motion, Complainants state as follows.

**I. Relevant Factual and Procedural Background**

The Complaint in this proceeding was filed on October 28, 2014, and it alleges that V&S violated 49 U.S.C. §11101 and §10903 by starting to dismantle and sell the track assets of part of a 121.9 mile line of railroad in Colorado owned by V&S and known as "the Towner Line." V&S took this action despite formally expressing its intent to seek authority to permanently abandon this track, despite the *bona fide* attempt by complainant KVCN to purchase the entire Towner Line and put it back into service, and over the objections of the other complainants in this action, rail shippers in the vicinity of the line, and local counties and other entities who support KVCN's efforts.

Complainants served their First Discovery Requests on V&S on November 21, 2014. The requests were not extensive for an STB formal complaint proceeding, and consisted of two requests for admission, 11 interrogatories, and 16 document requests, a few of the latter with subparts. V&S was given until December 11, 2014 to respond to the requests, which was five days more than the 15 days allowed by the Board's rules. However, V&S purposely allowed<sup>1</sup> this 20 day time period for objecting to or complying with Complainants' discovery requests to lapse. Given V&S's flat refusal to comply with the Board's discovery rules, Complainants were forced to file a motion to have the Board compel V&S to respond, which motion was filed on

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<sup>1</sup> On November 25, V&S counsel informed Complainants' counsel that V&S would not respond to any discovery requests because V&S had deemed them to be "premature." Complainants nevertheless waited until after the December 11 due date to take any action in case V&S changed its mind and complied with the Board's rules.

December 16, 2014.<sup>2</sup> This motion, which remains pending, asks the Board to compel V&S to respond, but it also asks the Board for a ruling that (1) V&S waived any objections to Complainants' discovery by not timely responding; (2) Complainants' Requests for Admissions should be deemed admitted pursuant to 49 C.F.R. §1114.27; and (3) that V&S should pay the reasonable expenses incurred by Complainants' to prepare and file the Motion to Compel, including reasonable attorneys' fees, because V&S's failure to respond was willful, and without any justification. Motion to Compel at 3-4.

On December 31, 2014, fully 20 days out of time, V&S changed its prior position without explanation and served partial discovery responses on Complainants. These partial responses included two (2) documents. Two days later, on January 2, 2015, V&S filed a one sentence reply to the Motion to Compel, stating only that it was "mooted" because V&S had "responded on December 31, 2014." Simply serving partial responses obviously did not "moot" the requests for relief in the Motion to Compel. More significantly, in regards to the subject Motion for Protective Conditions, *neither the Reply to the Motion to Compel, nor the December 31 partial responses contained any objections that Complainants' discovery requests (including the definitions and instructions) were burdensome*, let alone - as V&S now claims in its Motion - that any of the discovery requests or associated definitions and instructions subjected V&S in any way to "annoyance, embarrassment, oppression, or undue burden or expense," or that the discovery "prevent[ed] the raising of issues untimely or inappropriate to the proceeding." 49 C.F.R. §1114.21(c).

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<sup>2</sup> On December 17, the day after Complainants filed and served their Motion to Compel, Discovery, V&S informed the Board that it was refusing to reply to any of Complainants' discovery requests "until the Board has rendered its decision on the stay order." Reply of V&S Railway, at 5. The Board has never issued a "stay order" in this proceeding.

It is obvious from even a cursory reading of the discovery responses served on December 31, which V&S has attached to its Motion, that they are incomplete, appear to have been drafted by counsel for V&S, and that no V&S employee has conducted a review of any V&S files, let alone the reasonable review of files kept in the ordinary course of business as required by the general rules of discovery. Nevertheless, instead of immediately renewing or supplementing Complainants' pending Motion to Compel, Complainants' counsel sent the letter attached as Exhibit 1 to counsel for V&S on January 26, 2015 outlining their concerns with V&S's discovery responses and asking V&S to supplement them. The letter requested V&S respond by February 5, 2015 whether V&S was going to continue to resist fully responding to Complainants' discovery. However, instead of engaging with Complainants' counsel about the parties' differences regarding discovery and possibly resolving those differences without involving the Board, V&S filed its Motion on February 4.

## II. Argument

### A. The Motion Should be Denied Because is Procedurally Defective

V&S has sought relief under 49 C.F.R. §1114.21(c), which permits parties to seek relief from the Board when it is needed to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding." Complainants explain below why V&S does not come close to meeting this standard. But the Board need not reach the dubious merits of the Motion, since under 49 C.F.R. §1114.21(c), "[a] protective order under this paragraph may *only* be sought after, or in conjunction with, an effort by any party to obtain relief under 1114.24(a)[objections to deposition questions], 1114.26(a)[objections to interrogatories, requiring in part that

interrogatories be timely answered or objected to], or 1114.31[motions to compel]." (emphasis added).

Section 1114.24(a) is inapplicable. Nor can V&S rely on §1114.26(a) because, other than vaguely deeming them "premature," and claiming one document request asked for irrelevant information, V&S did not submit any objections to Complainants' interrogatories or document requests (or any other aspect of the discovery for that matter) until its Motion, 71 days after the discovery was served. This silence is particularly notable since Complainants' Motion to Compel specifically asked the Board to rule that V&S had waived all of its objections by purposely not responding within the time period required by the Board's rules. Finally, V&S cannot rely on §1114.31, since while Complainants filed a Motion to Compel, the vehicle for seeking protective conditions under §1114.21(c) was V&S's reply to that Motion, which contained no complaints about any aspect of Complainants' discovery. V&S is thus precluded from trying to belatedly invoke §1114.21(c) to try and shield V&S from its obligations to comply with the Board's discovery rules.

B. V&S's Request for Protective Conditions is Groundless

In addition to being procedurally defective, the Motion is utterly without merit. Pursuant to the Board's rules of procedure, a party may obtain discovery "regarding any matter, not privileged which is relevant to the subject matter involved in a proceeding." 49 C.F.R. §1114.21. The modest discovery sought by Complainants is straightforward and seeks information that is directly relevant to the allegations in the Complaint. Discoverable material includes relevant documents that are kept by V&S in the ordinary course of business, including but not limited to emails, memoranda, letters, reports, notes, meeting minutes, and other

materials, including all drafts and final versions of that material. See definition of "Document" in Complainants' First Discovery Responses, which V&S has never objected to.

As stated above, it is clear from even a cursory review of V&S's responses that they are incomplete and only partially responsive. It is also obvious that V&S conducted no review of its files kept in the ordinary course of business for documents and information responsive to any of the requests. Rather, many of the responses simply referred Complainants' to various public dockets, which the Motion states fulfilled V&S's discovery obligations. Motion at 3. This assertion is wrong on its face, given the uncontested definition of Document referenced above. Moreover, a responding party must furnish responsive information to discovery requests "as is available through reasonable efforts." See, e.g., *Oatman v. Sec. of Treasury of U.S.*, 893 F.Supp. 937, 939 (D. Idaho May 30, 1995). If the information sought is contained in the responding party's files and records, he or she is under a duty to search the records to provide the answers. See, e.g., *U.S. ex rel. England v. Los Angeles County*, 235 F.R.D. 675, 680 (E.D. Calif. 2006) (citing *Govas v. Chalmers*, 965 F.2d 298, 302 (7th Cir.1992)). Moreover, unless the task of producing an answer or documents is unusual, undue, or extraordinary, the general rule requires the party answering or producing the documents to bear that burden. See, e.g., *Continental Ill. National Bank and Trust Co. of Chicago v. Caton*, 136 F.R.D. 682, 690 (D.Kan.1991); *Bills v. Kennecott Corp.* 108 F.R.D. 459, 462 (D.Utah 1985).

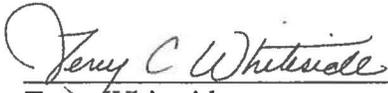
Tellingly, nowhere in the Motion does V&S state that it even attempted a review of files it keeps in the ordinary course of business and found it to be at all burdensome, oppressive, or any of the other factors of §1114.21(c), even though counsel for Complainants specifically raised this contention in their January 26, 2015 letter. Rather, V&S takes the completely untenable position that §1114.21(c) can be invoked by V&S to obtain an order from the Board excusing it

from even attempting such a review. *See, e.g.* Motion at 5-6. In addition, as set forth in Exhibit 1, there are numerous examples where even V&S's incomplete responses acknowledge that there are responsive documents, but V&S did not produce them. One such example is Document Request No. 7, where V&S refers to an email exchange between counsel for Kiowa County, Colorado and V&S's STB counsel about the removal of track materials - documents that are clearly relevant to this proceeding and subject to no privileges - yet V&S did not produce copies of the email exchange or any other documents from V&S's files on this issue. In short, there is nothing annoying, embarrassing, oppressive, unduly burdensome or expensive (§1114.21(c)), or provocative and humiliating (Motion at 2) about Complainants' first discovery requests. They are focused and straightforward and seek information and documents that are directly relevant to the allegations in the Complaint. V&S simply does not want to undertake the effort required by the Board's discovery rules to respond to them.

### **III. Conclusion**

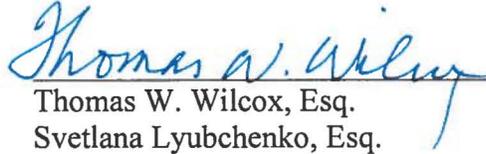
The Board should summarily deny the Motion because V&S long ago waived, and/or affirmatively elected not to raise, any objections to Complainants' first discovery requests, and V&S therefore cannot meet the procedural prerequisites for seeking protective conditions pursuant to §1114.21(c). Even if V&S could overcome these significant procedural hurdles to its Motion, it must still be denied because the discovery sought by Complainants is modest, straightforward and clearly relevant, and V&S has made no attempt to meet its discovery obligations before asking for relief. In either case, the Board should deny the Motion, grant all of the relief sought by Complainants' Motion to Compel, and further order V&S to supplement its December 31, 2014 responses with responsive documents and information from files kept by V&S in the ordinary course of its business, obtained from a reasonable search of those files.

Respectfully submitted,



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February 24, 2015

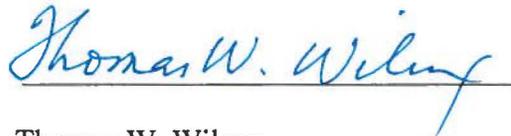
**CERTIFICATE OF SERVICE**

I do hereby certify that on this 24th day of February, 2015, I have served a copy of the foregoing Supplement to Motion for Preliminary Injunction on counsel for Defendant by first class mail to:

Gregory E. Goldberg  
Sean M. Hanlon  
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and by email and hand-delivery to:

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Thomas W. Wilcox

# **Exhibit 1**



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January 26, 2015

**VIA EMAIL and HAND DELIVERY**

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

Dear Fritz:

On December 31, 2014, we received V&S Railway, LLC's Responses to the Complainants' First Discovery Requests. We have reviewed the responses and the two documents that accompanied your written responses, and have concluded that the responses are incomplete and not fully responsive to the discovery requests. We therefore disagree with your statement to the Surface Transportation Board ("Board") that V&S's responses "mooted" the Motion to Compel Discovery filed by Complainants in this proceeding on December 16, 2014. This letter outlines the additional material that we believe is discoverable and relevant, and we ask that V&S immediately supplement its responses with the requested information

We note preliminarily that V&S's responses did not include any objections to any of the Instructions or Definitions contained in Complainants' First Discovery Requests. V&S also did not make any objections to the individual requests on grounds of burden, and only made a few objections as to relevancy (which we disagree with). The Complainants' position is that this failure to object, combined with the fact that V&S's responses were served long after they were

## **GKG Law, P.C.**

Mr. Fritz R. Kahn

January 26, 2015

Page 2

due under the Board's rules, means that V&S either has no objections, or any specific objections are waived.

### 1. V&S's Referral of Complainants to Publicly Available Information

In response to document requests Nos. 1, 2, 3, 4, 5.b, 5.c, 10.a and 16, V&S has responded by merely referring Complainants to certain public sources of information, such as Board dockets. These requests, and the general definition of "Document," however, clearly cover a much broader scope of responsive material. Consequently, V&S's responses to these requests are patently inadequate and incomplete. Discoverable material includes relevant documents that are kept by V&S in the ordinary course of business, including but not limited to emails, memoranda, letters, reports, notes, meeting minutes, and other materials, including all drafts and final versions of that material.

Generally, a responding party must furnish responsive information to discovery requests "as is available through reasonable efforts." *See, e.g., Oatman v. Sec. of Treasury of U.S.*, 893 F.Supp. 937, 939 (D.Idaho May 30, 1995). Further, if the information sought is contained in the responding party's files and records, he or she is under a duty to search the records to provide the answers. *See, e.g., U.S. ex rel. England v. Los Angeles County*, 235 F.R.D. 675, 680 (E.D. Calif. 2006) (*citing Govas v. Chalmers*, 965 F.2d 298, 302 (7th Cir.1992)). Moreover, unless the task of producing an answer or documents is unusual, undue, or extraordinary, the general rule requires the party answering or producing the documents to bear that burden. *See, e.g., Continental Ill. National Bank and Trust Co. of Chicago v. Caton*, 136 F.R.D. 682, 690 (D.Kan.1991); *Bills v. Kennecott Corp.* 108 F.R.D. 459, 462 (D.Utah 1985).

The basic rules of discovery require V&S to conduct a search of its files for responsive material included within the definition of Document, and produce them. This applies to all of the document requests propounded by Complainants. We see no evidence from the responses served on December 31, 2014 that such a review was conducted.

### 2. Request 5.a

This request asks for "documents relating to, discussing, referring to, or commenting on Defendant's plans, and actions taken, to abandon . . . the Western Segment." V&S's response to this document request is that "there are none." This response is not consistent with the facts surrounding the Western Segment and V&S's filings at the Board concerning it, wherein V&S told the Board in 2012 that it would abandon the line in "the near future." Documents in V&S's files that discuss, refer to, or relate to this statement, including V&S's reasons for abandoning the line, the timing of the abandonment and other information related to V&S's stated intention are clearly relevant to the issues encompassed by the complaint in this proceeding, and are therefore discoverable.

3. Requests 6.a, 6.b and 6.c

Request 6 asks for “all documents comprising, relating to, responding to, discussing, or referring to any requests by a rail shipper for rail service from Defendant over any portion of the Towner Line from December 1, 2005 to date. . . .” Request 6.a asks for all requests for rates and service terms; Request 6.b asks for all internal discussions of Defendant about how to respond to such requests; and Request 6.c asks for summaries of commodities and volumes transported by Defendant over the Towner Line as a result of such requests.

In response to these requests, V&S indicated that there were two shippers (Bartlett Grain Company and Temple Grain Company) on the Eastern Segment of the Towner Line. V&S, however, refused to provide any materials related to these two shippers as irrelevant and not subject to production by Defendant because “the current proceeding before the STB . . . is limited to the Western Segment.” V&S is clearly mistaken in believing that only materials pertaining to the Western Segment of the Line are relevant and discoverable. The division of the Towner Line into segments is purely nominal. The Western Segment is an integral part of the line and cannot be considered without other segments comprising the line. Therefore, the presence of shippers on other segments of the line is undeniably relevant to this proceeding and all documents responsive to this request are relevant and therefore discoverable. In that regard, please provide all documents relating to the indicated shippers and the requested/provided service over the line.

4. Request 7

Request 7 asks for “all documents relating to, discussing, referring to, or commenting on the letter of counsel of Kiowa County, Colorado to Defendant, sent on August 22, 2014. . . .” In response to this request, V&S indicated the existence of an email exchange between counsel for Kiowa County and V&S’s STB counsel and briefly described the contents of the exchange. This response is obviously deficient, since V&S did not produce copies of the email exchange. Other documents are clearly responsive to this request, such as internal emails between V&S employees, memoranda discussing the letter, any draft letters in response, etc. Please provide the actual email exchange in hardcopy, electronic or any other format, and any other documents from the files of V&S.

5. Request 8

Request 8 asks for all documents relating to actual sale of the Rail Track Material of the Towner Line to A&K Railroad Material, Inc., or any other purchaser. In response to this request, V&S provided a single document – Track Materials Sales Agreement. As noted in Paragraph 1 above, the general definition of “Documents” covers a much broader scope of responsive materials. Therefore, documents responsive to this particular request include but are not limited to all drafts of the agreement, emails, memoranda, letters, reports, notes, meeting minutes and

other materials relating to, discussing, referring to, or commenting on the potential or actual sale of the track material and should be produced immediately.

6. Request 9

Request 9 asks for all documents relating to, discussing, referring to, or commenting on dismantling and removing of any Rail Track Material of the Towner Line. V&S's response to this document request is that "there are none." The response is not consistent with the facts as according to V&S's own admission that some tie plates and spikes were removed from the track. All documents retained by V&S in its regular course of business that discuss, refer to or relate to the dismantlement are clearly relevant to this proceeding, responsive to this request and therefore discoverable.

7. Requests 10.b and 13

In addition to referring Complainants to allegedly publicly available documents from Colorado agencies in response to Request 10.a, which as discussed above was patently deficient and incomplete, V&S did not provide any documents in response to Request Nos. 10.b and 13 by stating that the answers to the requests are privileged oral communication between V&S's attorneys and management of V&S. This response is also patently inadequate and incomplete. Communications, correspondence, and other materials relating to the issues described in requests 10.b and 13 in V&S's files that do not involve V&S's attorneys are discoverable and should therefore be produced immediately.

8. Request 11

Request 11 asks for all documents relating to, discussing, referring to or commenting on any valuation prepared for the Towner Line and its Rail Track Material, including any valuation of the underlying land and track assets. In response to this request, V&S referred to the appraisal of R.L. Banks & Associates, Inc. However, other documents, communications and correspondence in the files of V&S—including those between R.L Banks & Associates, Inc. and V&S/A&K or any other materials relating to or commenting on the appraisal—are likewise relevant and responsive and should be provided to Complainants.

9. Requests 12, 14.a, 14.b, 14.c, 14.d 15.a and 15.b

Document Request Nos. 12, 14.a, 14.b, 14.c, 14.d 15.a and 15.b, all pertain to the sale of track material from the Towner Line by A&K Railroad Materials, Inc. to a number of entities, collectively called "OmniTRAX parties." In response to those document requests, V&S provided a single document – Sale and Purchase of Railroad Track Materials Letter Agreement between A&K Railroad Materials, Inc. and OmniTRAX parties. The requests, however, ask for a much broader range of responsive material. As a result, V&S's responses to these requests are

**GKG Law, P.C.**

Mr. Fritz R. Kahn  
January 26, 2015  
Page 5

obviously inadequate and incomplete. Specifically, as noted, discoverable materials include all materials, correspondence, meeting minutes, reports, notes relating to, discussing, referring to or commenting on contract between OmniTRAX parties and A&K Railroad Materials, including documents that demonstrate acquisition of ownership of, or a sufficient interest in, the “tracks and associated equipment” of the Western Segment from Defendant, correspondence between defendant, A&K Railroad Materials and OmniTRAX parties, all drafts of the agreement between A&K Railroad Materials and OmniTRAX parties and other relevant documents as specified in the document requests discussed in this paragraph. In that regard, please provide all the requested documents immediately.

10. Written Interrogatory 9

Written Interrogatory 9 requests that Defendant provide the date on which Defendant first discussed selling the Rail Track Material of the Western Segment to any potential purchaser. V&S’s response to this interrogatory that there was no date is clearly inconsistent with V&S’s own admissions and the facts of the current proceeding. The track material was evidently contracted for and dismantled for the sale purposes, the discussions relating the sale obviously took place and started at some distinctive point in time. V&S therefore should respond to this interrogatory with an exact or at least approximate date.

11. Written Interrogatory 10

In response to Written Interrogatory 10, V&S provided a list of all acquisitions of common carrier lines of rail by A&K Railroad Material, Inc., V&S and any other affiliate of A&K Railroad Material, Inc. over the past 10 years. V&S however did not specify which common carrier line was acquired by which of the A&K affiliates. The interrogatory also asks V&S to specify the disposition of the rail assets that were sold and removed. V&S’s response to this part of the interrogatory is that “records of the salvaged track materials and their disposition are not maintained by the name of the rail carrier.” This response is clearly incomplete and should be supplemented with the information regarding salvaged track materials, regardless of whether or not materials documenting the disposition of track are maintained by the name of the rail carrier.

Please feel free to contact either of the undersigned if you have any questions about the contents of this letter. If V&S decides to refuse to provide the requested additional information and documents, then please inform us of this fact by February 5, 2015 so we can pursue an appropriate order from the Board compelling V&S to do so, as necessary.

**GKG Law, P.C.**

Mr. Fritz R. Kahn  
January 26, 2015  
Page 6

Very truly yours,



Thomas W. Wilcox  
*Attorney for KCVN, LLC*



Terry Whiteside  
*Representative of Colorado Wheat  
Administrative Committee, Colorado  
Association of Wheat Growers, and  
Colorado Wheat Research Foundation*

cc: William S. Osborn, Esq.