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**ROBERT T. OPAL**

*Attorney At Law*  
205 Orchard Lane  
Glen Ellyn, Illinois 60137  
(630) 403-2150  
RobertTOpal@aol.com

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

RE: Finance Docket No. 35459, V&S Railway, LLC – Petition for Declaratory Order --  
Railroad Operations in Hutchinson, KS

Dear Ms. Brown:

This letter is filed on behalf of the Association of Railway Museums, Inc. and the Tourist Railroad Association, Inc. (collectively "ARM/TRAIN"). ARM/TRAIN represent tourist, historic, scenic and excursion rail operators throughout the United States, and are members of the FRA Rail Safety Advisory Committee (RSAC) and the RSAC Tourist & Historic Railroad Working group. ARM/TRAIN respectfully request leave to intervene in this proceeding and to file this letter as a Reply to V&S Railway's Petition for Declaratory Order dated December 28, 2010.

ARM/TRAIN's interest in this proceeding is limited to V&S' claim that "private rail operations [can only be] conducted over private track." (V&S Petition, pp. 3-4, brackets in original). While V&S' concern may be non-common carrier freight operations, the principle it is asserting could potentially also apply to non-common carrier passenger operations.

Many ARM/TRAIN members operate non-common carrier tourist (etc.) passenger service over rail lines owned or leased by common carrier freight railroads.<sup>1</sup> To the knowledge of the undersigned, neither the Board nor the ICC has ever held or suggested that this kind of operation is impermissible. For example, in Finance Docket No. 33472, Fun Trains, Inc – Operations Exemption (STB served March 5, 1998), the Board dismissed a notice of exemption filed by Fun Trains covering a proposed

<sup>1</sup> A recent FRA report identified over 35 tourist (etc.) rail operations using commercial railroad trackage which they do not own. See FRA Museum Locomotive Study, May, 2010, Attachment 2 – "TEM Profile", <http://www.fra.dot.gov/downloads/safety/MuseumLocomotiveStudy2010.pdf>

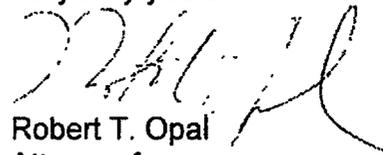
passenger excursion operation over CSXT and Florida DOT owned rail lines, holding that the Board had no jurisdiction over the operation. See also Finance Docket No. 30914, Tennessee Valley RR Museum, Inc. – Operation - AGSRR (ICC decided May 6, 1987), in which the ICC dismissed a TVRM notice of exemption to operate tourist passenger trains over a commercial freight railroad, also due to lack of ICC jurisdiction. In both of these proceedings, the agency was obviously well aware it was dealing with non-certificated passenger operations over common carrier freight trackage, and there is no suggestion in either decision that these operations could not lawfully be conducted.

Finally, the cases cited by V&S do not support its claim that "private rail operations [can only be] conducted over private track." This quotation, according to V&S, is from the Board's decision in Finance Docket No. 34952, Devens Recycling Center, LLC – Declaratory Order (served January 7, 2007), p. 2. However, the actual quotation from the decision is as follows (the words quoted by V&S are highlighted):

"The agency's jurisdiction, however, 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 the owner."

As can be seen, there is nothing in the Board's actual quotation which states or implies that private rail operations "can only be" conducted over private tracks. The decision does not even address this issue. The issue in the case was whether Board authority was required for construction of private trackage over which a common carrier would operate, not whether a private entity could lawfully operate over common carrier track. The Board's decision in Finance Docket No. 34013, B.J. Willis C.P.A.-Declaratory Order (served October 3, 2001), which V&S also cites, similarly involves the regulatory status of private trackage over which a common carrier operated, and does not address whether a private entity can lawfully operate over common carrier trackage.

Very truly yours



Robert T. Opal

Attorney for:

Association of Railway Museums, Inc  
Tourist Railway Association, Inc.

## CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon the following:

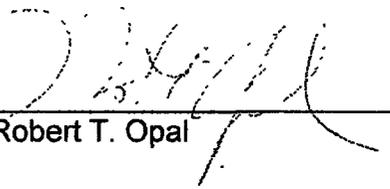
Fritz R. Kahn, Esq.  
Fritz R. Kahn, P.C.  
1920 N. Street, NW (8<sup>th</sup> Floor)  
Washington DC 20036  
[xiccgc@verizon.net](mailto:xiccgc@verizon.net)  
(via E-Mail)

Shannon D. Wead, Esq.  
Charles R. Curran, Esq.  
Foulson Siefkin, LLP  
1551 North Waterfront Parkway (Suite 100)  
Wichita, KS 67206-4466  
(via First Class Mail)

Hutchinson Salt Company  
Hutchinson Transportation Company  
3300 Carey Boulevard  
Hutchinson, KS 67501  
(via First Class Mail)

Kristy D. Clark, Esq.  
General Attorney  
BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Ft. Worth, TX 76161-2828  
[Kristy.Clark@bnsf.com](mailto:Kristy.Clark@bnsf.com)  
(via E-Mail)

Dated at Glen Ellyn, Illinois this 18th day of January, 2011

  
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Robert T. Opal