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December 28, 2010

VIA ELECTRONIC FILING

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

228541

Dear Ms. Brown:

Attached for filing in STB Finance Docket No. 35459 is V&S Railway, LLC—  
Petition for Declaratory Order—Railroad Operations in Hutchinson, Kansas.

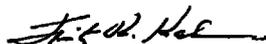
The Petition for Declaratory Order is being filed in compliance with the Memorandum and Order of the United States District Court for the District of Kansas, a copy of which is attached to the Petition as Exhibit A.

The Court directed V&S Railway, LLC to request expeditious handling of the Petition for Declaratory Order.

Credit card information in payment of the \$1,400.00 filing fee has been facsimile transmitted to the Board.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,

  
Fritz R. Kahn

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**STB Finance Docket No. 35459**

**V&S RAILWAY, LLC  
-- PETITION FOR DECLARATORY ORDER --  
RAILROAD OPERATIONS IN HUTCHINSON, KANSAS**

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**Attorneys for**

**V&S RAILWAY LLC**

**Dated: December 28, 2010**

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

STB Finance Docket No. 35459

V&S RAILWAY, LLC  
-- PETITION FOR DECLARATORY ORDER --  
RAILROAD OPERATIONS IN HUTCHINSON, KANSAS

Petitioner, V&S Railway, LLC ("V&S"), pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554(e), and 49 C.F.R. §1117.1, petitions the Board to enter a declaratory order finding (1) that 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"), and to interchange traffic with BNSF Railway Company ("BNSF"), (2) that Hutchinson Salt Company, Inc ("HSC") and/or Hutchinson Transportation Company, Inc. ("HTC") may not operate on the Line without the consent of V&S or interchange traffic with BNSF notwithstanding that HSC and/or HTC may own parcels of the real estate underlying the Line and/or claim ownership of some of the tracks and improvements of the Line which the Board authorized V&S to acquire and operate and (3) that neither The Hutchinson & Northern Railway Company ("HN") nor any successor-in-interest abandoned the segment of the line on Parcel 1 granted by virtue of the 1925 easement or any other segment of the Line.

The Petition for Declaratory Order is being filed by V&S in compliance with the Memorandum and Order of the United States District Court for the District of Kansas in Case No. 08-1402-WEB, V&S Railway, LLC v. Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc. and BNSF Railway Company, dated

December 17, 2010, and filed December 20, 2010, a copy of which is attached as Exhibit A.

Under 5 U.S.C. §554(e), the Board is vested with discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The matters in dispute have been referred by a court of competent jurisdiction and are within the sole and exclusive powers of the Board to determine. See, i.e., Docket No. FD 35290, West Point Relocation, Inc. and Eli Cohen—Petition for Declaratory Order, served October 29, 2010; Docket No. NOR 42102, Railroad Salvage & Restoration, Inc.—Petition for Declaratory Order—Reasonableness of Demurrage Charges, served July 20, 2010; STB Finance Docket No. 35196, Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company—Petition for Declaratory Order, served March 1, 2010.

The Court directed V&S to request the expeditious handling of its Petition for Declaratory Order.

#### The Parties

V&S is a Nevada limited liability company, the office address of which is 1505 South Redwood Road, Salt Lake City, Utah 84104. V&S is a Class III short line rail carrier subject to the Board's jurisdiction. Pursuant to the Verified Notice of Exemption under 49 C.F.R. §1150.41, served May 31, 2006, 71 Fed. Reg. 30978, May 31, 2006, V&S was authorized by the Board to acquire from HN, a Class III short line rail carrier, and to operate the Line. HN was controlled by Pacific Western Railroad, a noncarrier holding company.

HSC is a Kansas corporation, the office address of which is 3300 Carey Boulevard, Hutchinson, Kansas 67501. It mines salt at a mine in Hutchinson, formerly owned and operated by The Carey Salt Company.

HTC is a Kansas corporation, the office address of which is 3300 Carey Boulevard, Hutchinson, Kansas 67501. It transports salt mined by HSC.

BNSF is a Delaware corporation, the office address of which is 2500 Lou Menk Drive, Ft. Worth, Texas 76161. BNSF is a Class I rail carrier subject to the Board's jurisdiction. Hutchinson is a BNSF station, and traffic is interchanged between it and V&S on interchange tracks on the Line.

#### The dispute

V&S acquired by quitclaim deed all of HN's right, title and interest in the Line. After V&S began rendering service on the Line, it found that HSC and/or HTC, utilizing their own power equipment, were moving cars to and from the interchange tracks on the Line for interchange of the cars with BNSF. V&S asked HSC and/or 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. HSC and/or HTC refused to do so, whereupon V&S brought its suit against them and BNSF.

HSC and/or HTC contend that they are not rail carriers, holding themselves out to serve the public, and that the operations performed by them on the Line are proprietary, that is, they only move carloads of HSC salt to the interchange tracks for interchange with BNSF and empty cars back to the mine. The Board, however, has made it perfectly clear that "private rail operations [can only be] conducted over private track." Finance Docket No. 34952, Devens Recycling Center, LLC—Petition for Declaratory Order,

served January 10, 2007, slip, p. 2. “[P]rivate tracks [are] typically built and maintained by a shipper (or for the shipper at the shipper’s expense).” STB Finance Docket No. 34013, B. Willis, C.P.A., Inc.—Petition for Declaratory Order, served October 3, 2001, slip, p. 2. The Line on which HSC and/or HTC have been operating is not such a private track. In fact, the Line was HN’s since the rail carrier’s certification by the Interstate Commerce Commission (“ICC”), Operation of Hutchinson & Northern Ry., 111 I.C.C. 403 (1926), until the Line was acquired by V&S.

V&S alone can operate on the Line. HSC and/or HTC are interlopers and very properly can be denied access to the Line by V&S.

HSC and/or HTC alternatively argue that they can operate on the Line, because segments of the Line cross property to which they claim title, identified as Parcels 1 and 10. Railroad easements across Parcel 1 and possibly across Parcel 10 were conveyed in 1925 to HN by The Carey Salt Company, and, the Line has operated in its entirety throughout the intervening years. The claimed ownership by HSC and/or HTC of Parcels 1 and 10 in no way impedes V&S’ rendition of service on the Line or permit HSC and/or HTC to operate on it.

As the Supreme Court noted in Presault v. I.C.C., 494 U.S. 1, 8 (1990), “[M]any railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests.” See, i.e., Docket No. FD 35345, Philadelphia Belt Line Railroad Company—Petition for Declaratory Order, served August 4, 2010; STB Finance Docket No. 35314, Massachusetts Coastal Railroad, LLC—Acquisition—CSX Transportation, Inc., served March 29, 2010; STB Finance Docket No. 35196, Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company—

Petition for Declaratory Order, served March 1, 2010. Indeed, the railroads may not even own the tracks and other improvements on which they operate. See, i.e., STB Finance Docket No. 34953, Midtown TDR Ventures LLC—Acquisition Exemption—American Premier Underwriters, Inc., et al., served February 12, 2008; Finance Docket No. 32384, Missouri River Bridge Company—Acquisition Exemption—Certain Assets of Chicago, Central & Pacific Railroad Company, served March 3, 1994; Illinois Term. R. Co. Abandonment, 327 I.C.C. 70, 72-73 (1958).

The Board has been insistent that the owners of the rights-of-way and improvements be without the ability in any way to interfere with the railroad rendering service on the railroad line or to endeavor themselves to operate on the railroad line. See, i.e., Docket No. FD 35394, Regional Transportation District—Acquisition Exemption—Union Pacific Railroad Company in Adams, Denver, and Jefferson Counties, Colo., served December 21, 2010; Docket No. FD 35110, Florida Department of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, Inc., served December 15, 2010; Docket No. FD 35366, Wisconsin Department of Transportation—Petition for Declaratory Order—Rail Lines in Almena, Cameron, and Rice Lake, Barron County, Wis., served September 23, 2010; Maine, DOT—Acq. Exemption, ME. Central R. Co. 8 I.C.C.2d 835 (1991).

HSC and/or HSC do not have the right to operate on the Line to and from the interchange tracks for the interchange of cars with BNSF by virtue of the fact that they claim ownership of parcels of realty underlying the Line. The Line is V&S's alone to operate in fulfilling its obligations as a common carrier.

Finally, HSC and/HTC maintain that the Line was severed before it was acquired by V&S, because the segment of the Line traversing Parcel 1 was abandoned by HN or a successor-in-interest upon the alleged termination of the 1925 easement grant to HN by The Carrey Salt Company. Nothing of record indicates or even suggests that HN or a successor-in-interest applied for and secured the ICC or Board's authorization to abandon the segment of the Line across Parcel 1, the segment of the Line across Parcel 10 or any other segment of the Line. It is well established that a line of railroad is not abandoned until the ICC or the Board has declared it to have been abandoned. See, i.e., STB Finance Docket No. 34376, City of Crede, Co.—Pet. for Declaratory Order, served May 3, 2005; Finance Docket No. 32518, The Phillips Company—Petition for Declaratory Order, served April 18, 1995; Finance Docket No. 29330, Modern Handcraft, Inc.—Abandonment in Jackson County, MO, served August 21, 1981.

No segment of the Line heretofore has been authorized by the ICC or the Board to be abandoned, and no abandonment has been consummated by HN or a successor-in-interest. Having acquired the Line from HN, V&S is authorized to operate on the entire length of the Line.

WHEREFORE, V&S Railway, LLC asks that the Board decide the questions referred to it by the United States District Court for the District of Kansas set out in its Memorandum and Order attached as Exhibit A and find (1) that V&S Railway, LLC 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, and to interchange traffic on its line with BNSF Railway Company, (2) that Hutchinson Salt Company, Inc. and/or Hutchinson Transportation Company, Inc. may not operate on the line of railroad

acquired by V&S Railway, LLC without its consent or interchange traffic with BNSF Railway Company notwithstanding that Hutchinson Salt Company, Inc. and/or Hutchinson Transportation Company, Inc. may own parcels of the real estate underlying the railroad line acquired by V&S Railway LLC and/or claim ownership of some of the tracks and improvements of the railroad line which the Board authorized V&S Railway LLC to acquire and operate and (3) that neither The Hutchinson & Northern Railway Company nor any successor-in-interest has abandoned the segment of the line on Parcel 1 granted to it by virtue of the 1925 easement or any other segment of the line.

A copy of the Board's decision should be mailed to Hon. Wesley E. Brown, United States Senior District Judge, United States District Court for the District of Kansas, U.S. Courthouse, 401 North Market Street, Wichita, KS 67202.

Respectfully submitted,

V&S Railway, LLC

By its attorneys,

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Dated: December 28, 2010

**EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

V&S RAILWAY, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-1402 WEB
	)	
HUTCHINSON SALT COMPANY,	)	
INC.,	)	
	)	
HUTCHINSON TRANSPORTATION	)	
COMPANY, INC., and	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM AND ORDER

This action comes before the Court on Plaintiff’s Motion to Stay the Case and Refer Certain Issues to the Surface Transportation Board (Doc. 88). Defendants have filed a Response (Doc. 114), and Plaintiff filed a Reply (Doc. 140). The matter is fully briefed and ripe for ruling.

Summary of Claims

Plaintiff’s motion states that the current action involves a dispute concerning the ownership of certain parcels of land and the improvements in Hutchinson, Kansas, which comprise part of the right-of-way of a line of railroad which was acquired and is being

operated in interstate commerce by Plaintiff V&S ("V&S"), pursuant to the authorization of the Surface Transportation Board (the "Board"). Plaintiff claims that some of the issues in the case fall within the exclusive jurisdiction of the Board. Plaintiff asserts that the issue of whether V&S is the only rail carrier that has the right to operate on the line of railroad that it acquired and is operating pursuant to the Board's authorization and to interchange traffic with Defendant BNSF Railway Company ("BNSF") is within the exclusive jurisdiction of the Board. Plaintiff also contends that another issue within the exclusive jurisdiction of the Board is the issue of whether Defendants Hutchinson Salt Company, Inc. ("HSC") and/or Hutchinson Transportation Company, Inc. ("HTC") can operate their trains on the line of railroad acquired and operated by V&S and to interchange traffic with BNSF by virtue of their claimed ownership of certain parcels of land and the improvements thereon that comprise part of the right-of-way of V&S's line of railroad. Finally, Plaintiff asserts that the Board is vested with exclusive jurisdiction to determine whether a railroad has abandoned a right-of-way. Plaintiff's motion asks that these issues be referred to the Board and that the case be stayed pending decision by the Board.

Defendants have filed a joint response to Plaintiff's Motion to Stay arguing that there is no dispute regarding the ownership of any of the parcels of land. Defendants point to paragraphs 16 and 17 of the Complaint in saying that all the land that is the subject of this litigation is owned by HSC and HTC. Defendants further assert that Plaintiff's Complaint is more accurately a claim to be successor in interest to an easement

over some of Defendants' land. See Complaint, ¶¶11-14, 18-20. Defendants recognize that Plaintiff has made a claim of ownership to the improvements on Defendants' land. Defendants assert that the claims set forth in the Complaint, including Quiet Title to Right of Way Easement on Parcel 1, Adverse Possession for Right of Way Easement on Parcel 10, Ejectment, Trespass, Slander to Title, Quiet Title to Personal Property, Unjust Enrichment, and Easement by Necessity, are all claims routinely handled by state or federal courts and are not appropriate for referral to an outside agency. Instead, Defendants state that this case involves issues that need to be decided by a finder of fact applying Kansas law.

Facts

Plaintiff asserts that it is the current owner and operator of a line of railroad in Hutchinson, Kansas. The disputed segments of the right-of-way underlying the line of railroad have been referred to in this case as Parcel 1 and Parcel 10. Plaintiff contends that HSC and/or HTC own the fee interest in Parcel 1 and Parcel 10, and V&S claims a railroad right-of-way on Parcel 1 and Parcel 10. V&S further claims that its right to operate the railroad is exclusive and cannot be interfered with by Defendants. (Complaint [Doc. 1] ¶¶ 25, 28, 31, 37, & 38).

Defendants HSC and HTC claim that V&S does not have any rights to Parcel 1, Parcel 10, and the railroad materials thereon or, alternatively, that their rights to Parcel 1, Parcel 10, and the railroad materials are superior to V&S' rights. (HSC's and HTC's Answer and Counterclaim [Doc. 14] ¶¶ 16, 19, 25, & 35; and see page 2 of the May 25,

2007 letter from HSC's counsel to V&S, that provides, in part, that V&S merely has a joint right to use the railroad track at issue).

HSC and HTC further claim that V&S' claimed interest in Parcel 1 was abandoned by V&S' predecessor-in-interest, the Hutchinson and Northern Railway Company. (HSC's and HTC's Answer and Counterclaim [Doc. 14] ¶¶ 15, 35.)

Discussion

Rail carriers are subject to the jurisdiction of the Surface Transportation Board (the "Board"), the agency that succeeded the Interstate Commerce Commission to administer the economic regulation of the Nation's railroads. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

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).

Where an entity handles only its own goods and does not offer for hire transportation to anyone, 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 (served Sept. 30, 2002).

The Board 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").

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).

"The fundamental test for determining whether a party is a common carrier is whether there has been a holding out to the public as a common carrier . . ." *Santa Clara Valley Transp. Auth.—Acquisition Exemption-Union Pac. R.R. Co.*, STB Finance Docket No. 34094, 2001 STB LEXIS 868, at \*7 (served Nov. 16, 2001) (citing *Status of Bush Universal, Inc* , 342 I.C.C. 550, 564 (1973)).

Defendants assert that since they are not rail carriers, the Board does not have jurisdiction over them. *See*, Doc. 114, p. 9. They further argue that to the extent that V&S, as successor in interest to H&N which provided a switching service, has traveled over the subject track in the past, it has been exclusively for the purpose of serving Defendants on a contractual basis. *Id.*

However, there is no dispute that V&S is a common-carrier railroad or that the Board has regulatory jurisdiction over V&S. Moreover, the Board considers the railroad line at issue to include the portion of the track in dispute that is located on Parcels 1 and 10, which are located between mileposts 0.0 and 0.5. *V & S Railway LLC—Acquisition*

*and Operation Exemption—The Hutchinson and Northern Railway Company*, STB Finance Docket No. 34875, 71 Fed. Reg. 30978 (served May 31, 2006); V&S’s Memorandum in Support of Motion to Stay (Doc. 89) at 3.

The Board’s jurisdiction is exclusive and plenary. In *Seaboard Air Line Railroad Co v. Daniel*, 333 U.S. 118, 125 (1948), the Supreme Court emphasized that “Congress granted the Commission ‘exclusive and plenary’ authority in refusing or approving railroad consolidations, mergers, acquisitions, etc.”

The ICC Termination Act made explicit what the Supreme Court had held to be implicit. The language of 49 U.S.C. § 10501(b) declares:

The jurisdiction of the Board over --

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, facilities of such carriers . . . is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

“Section 10501(b) gives the Board exclusive jurisdiction over ‘transportation by rail carriers,’ and the term ‘transportation’ is defined by . . . statute, at 49 U.S.C. 10102(9), to embrace all of the equipment, facilities, and services relating to the movement of property by rail.” *CSX Transp., Inc. – Pet. for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, at \*2 (served May 3, 2005).

The Board’s governing statute, 49 U.S.C. § 11323(a), provides that the Board must approve and authorize the “[c]onsolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of

the previously separately owned properties” and “[a]cquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.” 49 U.S.C. § 11323(a)(1), (6).

The Board has jurisdiction over transportation by common-carrier railroads and may issue a declaratory order to terminate a controversy or remove uncertainty as to the status of particular track. *Devens Recycling Center, LLC—Pet. for Declaratory Order*, STB Finance Docket No. 34952, 2007 STB LEXIS 8, at \*4-5 (served Jan. 10, 2007).

Because the Board has jurisdiction to address the controversy or uncertainty as to the status of a particular track, and because there is a dispute between the parties as to the status of track on Parcels 1 and 10--which the Board considers to be part of the railroad operated by V&S (*V & S Railway LLC—Acquisition and Operation Exemption—The Hutchinson and Northern Railway Company*, STB Finance Docket No. 34875, 71 Fed. Reg. 30978 (served May 31, 2006))--the issue of whether V&S has the exclusive right to operate on the track should be referred to the Board. *See, e.g., City of Creede, Co.—Pet. for Declaratory Order*, STB Finance Doc. No. 34376, 2005 STB LEXIS 486, at \*21 (served May 3, 2005) (“Once rail operations have been authorized by the Board, the track remains a line of railroad subject to full agency regulation until the agency authorizes its abandonment.”). This case clearly involves allegations that V&S has the exclusive right to operate on the track at issue. Complaint, Doc. 1, ¶ 28 (“V&S is entitled to an order . . . that V&S’ rights to operate the Railroad on Parcel 1 include the right to the uninterrupted

and exclusive use of the right of way easement on Parcel 1 . . . .”), ¶31 (“As a result, V&S is entitled to an order . . . that V&S’ rights to operate the Railroad on Parcel 10 include the right to the uninterrupted and exclusive use of the right of way easement on Parcel 10.”), ¶37 (uninterrupted and exclusive use of right of way easements on Parcels 1 and 10), and ¶44 (V&S’ right to uninterrupted and exclusive use of a right of way easement on Parcel 1).

“The private line exemption provides, in essence, that a ‘private line’ is not a ‘railroad line’ as that term is used in sections 10901(a) and 10903(a).” *Hanson Natural Res. Co.-Non-Common Carrier Status-Pet. for Declaratory Order*, Finance Docket No. 32248, 1994 MCC LEXIS 111, at \*53 (I.C.C. served Nov. 15, 1994). The Board has previously held that V&S’ track, which extends from milepost 0.0 to milepost 5.14 is not a private line, but is the line of a rail carrier. *Citing, V& S Railway LLC—Acquisition and Operation Exemption—The Hutchinson and Northern Railway Company*, STB Finance Docket No. 34875, 71 Fed. Reg. 30978 (served May 31, 2006).

Further, the Board is vested with exclusive and plenary jurisdiction to determine whether a railroad has abandoned a right-of-way. *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981) (citations omitted); *Moody v. Great W. Rwy.*, 536 F.3d 1158, 1161 (10th Cir. 2008); *Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d 1375, 1377-78 (10th Cir. 1996) (citing *Kalo Brick*).

While “[s]tate law generally governs the disposition of reversionary interests,”

state law is “subject of course to the [Board’s] ‘exclusive and plenary’ jurisdiction to regulate abandonments.” *Preseault v. Interstate Commerce Comm.*, 494 U.S. 1, 8 (1990); *see also Moody v. Great W. Rwy.*, 536 F.3d 1158, 1161 (10th Cir. 2008) (state court could not grant relief to person claiming reversionary interest as a result of abandonment because Congress granted the Board “exclusive jurisdiction to determine whether a railroad has abandoned a right-of-way”).

“Prior to discontinuing service and abandoning a railway line, a railroad must obtain authorization from the STB. Such authorization, once granted, is permissive, rather than mandatory. Thus, to consummate an abandonment and trigger reversionary interests, the railroad must take further action manifesting a clear objective intent to abandon.” *Wheeler v. Mat’l Recovery of Erie, Inc.*, No. 06-85 Erie, 2009 U.S. Dist LEXIS 82326, at \*4 (W.D. Pa. Sept. 10, 2009). Further, in the absence of the Board’s authorization allowing a carrier to lawfully abandon service, a court cannot even find that a *de facto* abandonment has occurred. *Phillips Co.—Pet. for Declaratory Order*, Finance Doc. No. 32518, 1995 MCC LEXIS 26, at \*14-15 (I.C.C. served Apt. 18, 1995); *Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d 1375, 1377 (10th Cir. 1996) (deferring to the ICC’s interpretation of its governing statutes).

The Court of Appeals of Kansas recently came to the same conclusion. In *Bimer v. Watco Co., Inc.*, \_\_\_ Kan. App. 2d \_\_\_, No. 101,916, 2010 Kan. App. LEXIS 31, at \*2 (Mar. 26, 2010), the appellate court was confronted with a case in which the landowners claimed that the railroads abandoned their interests. None of the parties to the case had

filed for an abandonment order with the Surface Transportation Board and no abandonment order had previously issued. *Id.* at \*2-3. Looking to both Kansas and federal law, the court found that both federal and state law required entry of an abandonment order before an abandonment of a railroad right of way could be found. *Id.* at \*6-7 (citing 49 U.S.C. § 10903(a)(1)(A) and K.S.A. 66-525).

Like in *Bitner*, V&S asserts that there is no evidence that any party to this action, nor any of their predecessors-in-interest, filed an abandonment application with the Board or the ICC. Since an abandonment order is necessary before this Court may find that the portion of the railroad existing on Parcels 1 and 10 are no longer part of the railroad, the Board has the exclusive and plenary jurisdiction to determine whether this prerequisite for finding an abandonment under state law has been met.

In *Far East Conference v. United States*, 342 U.S. 570, 574 (1952), the Supreme Court noted, “[N]ow firmly established [is the principle], that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.” In *United States v. Western Pacific RR. Co.*, 352 U.S. 59, 63-64 (1956), the Supreme Court declared that “[p]rimary jurisdiction[]’ . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body

for its views.” See also *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 756-57 (10th Cir. 2005); *Crystal Clear Comm'cns v. S Bell*, 415 F.3d 1171, 1176 (10th Cir. 2005); *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996).

The reasons the primary jurisdiction doctrine exists have been summarized by the Tenth Circuit as follows:

Primary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies. An issue of primary jurisdiction arises when a litigant asks a court to resolve “[an] issue[] which, under a regulatory scheme, has been placed within the special competence of an administrative body.” If the issue is one “that Congress has assigned to a specific agency,” the doctrine of primary jurisdiction allows the court to stay the judicial proceedings and direct the parties to seek a decision before the appropriate administrative agency. The agency is then said to have “primary jurisdiction.”

*S. Utah Wilderness*, 425 F.3d at 750-51 (internal citations omitted). As recounted by the Tenth Circuit in *Williams Pipe Line*, “[i]n essence, the doctrine represents a determination that administrative agencies are better equipped than the courts to handle particular questions, and that referral of appropriate questions to an agency ensures desirable uniformity of results.” 76 F.3d at 1496. The primary jurisdiction doctrine is therefore properly invoked when the reasons for the existence of the doctrine are present and the doctrine’s dual purposes—regulatory uniformity and agency expertise—will be aided by its application. *S. Utah Wilderness*, 425 F.3d at 751.

Further, courts routinely stay the proceedings before them to permit the referral of controverted issues within the jurisdiction of the Board for decision by the Board. See,

*e.g., Victoria Wheeler v. Mat'l Recovery of Erie, Inc.*, No. 06-85 Erie, 2007 U.S. Dist. LEXIS 23573 (W.D. Pa. Mar. 30, 2007) (McLaughlin, J.); *E. W. Resort Transp., LLC v. Sopkin*, 371 F. Supp. 2d 1253, 1265-67 (D. Colo. 2005) (Babcock, J.); 28 U.S.C. § 1336(b) (discusses a district court's jurisdiction when a question or issue is referred to the Board).

Conclusion

The Board has primary jurisdiction over the issue of whether V&S is the only rail carrier that has the right to operate on the line of railroad that it acquired and is operating pursuant to the Board's authorization. The Board also has jurisdiction over whether Defendants can operate their trains on the line of railroad acquired and operated by V&S. The Board has exclusive jurisdiction to determine whether a railroad has abandoned its right-of-way. Accordingly, Plaintiff's motion (Doc. 88) that these issues be referred to the Board shall be GRANTED and the case will be stayed pending decision by the Board.

IT IS THEREFORE ORDERED that the following issues be referred to the Surface Transportation Board for determination:

1. Is V&S 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?
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?

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?

IT IS FURTHER ORDERED that all further proceedings in this case be stayed pending a decision by the Board. V&S is directed to promptly file with the Board a Petition for Declaratory Order. V&S is further directed to request expeditious handling of the Petition for Declaratory Order.

IT IS SO ORDERED this 17th day of December, 2010 at Wichita, Kansas.

s/ Wesley E. Brown  
Wesley E. Brown  
U.S. Senior District Judge

CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing Petition for Declaratory Order on Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc. and BNSF Railway Company by mailing a copy to their counsel, Terry L. Malone, Esq., Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 100 N. Broadway, Suite 500, Wichita, KS 67202 and by e-mailing a copy to him at [tlmalone@martinpringle.com](mailto:tlmalone@martinpringle.com).

Dated at Washington, DC, this 28<sup>th</sup> day of December 2010.

  
Fritz R. Kahn