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February 11, 2011

Via Electronic Filing

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

ENTERED
Office of Proceedings

FEB 11 2011

Part of
Public Record

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

Dear Ms. Brown:

On February 8, 2011, V&S Railway, Inc. ("V&S") filed a letter with the Surface Transportation Board ("Board") claiming that Hutchinson Transportation Company, Inc., Hutchinson Salt Company, Inc., and BNSF Railway Company (collectively, "Respondents") have forfeited their right to reply to V&S' Petition for Declaratory Order. We respectfully disagree. The Respondents timely responded to the Petition and have twice informed the Board in their January 18, 2011, and February 8, 2011 letters of their intent to submit evidence and argument once the Board has established a procedural schedule in this proceeding.

Under 49 C.F.R. § 1104.13(a), "[a] party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided." V&S filed the Petition on December 28, 2010, and the Respondents submitted a letter in reply on January 18, 2011, within the 20 day time period specified in the regulation. Indeed, V&S admits as much in its letter: "HSC, HTC, and BNSF *did file* a letter on January 18, 2010 [sic], *20 days after* V&S's Petition for Declaratory Order had been filed . . ." (February 8, 2011 Letter of V&S Railway at 1) (emphasis added).

V&S attempts to deny the force of its own admission by claiming that the Respondents' reply was not substantive, and is, thus, ineffective. Tellingly, V&S cites no authority whatsoever for this proposition or its suggestion that the Board should issue the requested declaratory order in its favor by default. Section 1104.13 does not mandate the specific content of a party's initial response to a Petition for Declaratory Order. Rather, the regulation states only that a "reply or motion addressed to any pleading" *may* be filed within 20 days. 49 C.F.R. § 1104.13(a). Nor does the regulation, as V&S suggests, provide that a party forfeits its ability to file a substantive pleading in the proceeding if it does not do so within the first 20 days. The words "waiver," "forfeiture" or "default" do not appear anywhere in section 1104.13(a).

The regulations applicable to Petitions for Declaratory Order should be contrasted with the Board's regulations applicable to the filing of formal complaints and responses thereto. Under 49 C.F.R. § 1111.4(c), an answer to a formal complaint "must be filed within 20 days after the service of the complaint or within such additional time as the Board may provide." The same regulations applicable to formal complaint procedures provide that any factual averment in a complaint is admitted when not denied in an answer to the complaint. *Id.* at 1111.4(e). Those regulations are not applicable here.

The Board typically handles these types of Petitions for Declaratory Order by instituting a proceeding under the modified procedure rules and establishing a procedural schedule for the submission of evidence and argument.¹ For example, in STB Finance Docket No. 35239, Allegheny Valley Railroad Company – Petition for Declaratory Order, the Allegheny Valley Railroad Company ("AVRR") filed a Petition for Declaratory Order with the Board in April 2009. The Buncher Company ("Buncher") filed a brief letter within the initial 20-day period expressing its intent to submit evidence and argument in opposition to the Petition upon the establishment of a procedural schedule by the Board. Thereafter, the Board issued a decision instituting a declaratory order proceeding under the modified procedure rules, deemed AVRR's Petition to be its "opening statement" and specified that replies from Buncher or other interested parties would be due 20 days from the date of the Board's decision. *See* Finance Docket No. 35239, Allegheny Valley Railroad Company – Petition for Declaratory Order (STB served May 13, 2009).

Similarly, in STB Finance Docket No. 35324, Teck Metals Ltd. – Petition for Declaratory Order – Practices of the Wheeling & Lake Erie Railway Company, the Board instituted a declaratory order proceeding and established a procedural schedule for the filing of opening, reply and rebuttal statements before the defendant railroad in the underlying federal court litigation had filed any substantive response to the Petition for Declaratory Order. *See* Finance Docket No. 35324, Teck Metals Ltd. – Petition for Declaratory Order – Practices of the Wheeling & Lake Erie Railway Company (STB served Jan. 22, 2010); *see also* Finance Docket No. 35290, West Point Relocation, Inc. and Eli Cohen – Petition for Declaratory Order (STB served Oct. 26, 2009) (Board instituted proceeding and established procedural schedule after respondent filed reply stating that it did not oppose the commencement of a proceeding). In the foregoing and other referral cases, the Board routinely exercises its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to institute a proceeding when the matters are referred by courts of competent jurisdiction and appear to be within the Board's primary jurisdiction.

The Board's need to institute a proceeding under the modified procedure rules and establish a schedule for the filing of evidence and argument is of particular importance here because the Petition for Declaratory Order filed by V&S contains no verified evidence, only the barest of factual allegations by V&S' counsel and no mention of numerous critical facts that are indispensable to the Board's evaluation of the questions referred by the district court.² For example, V&S fails to mention that Hutchinson Salt Company, Inc. and Hutchinson Transportation Company, Inc. (collectively, "Hutchinson") own all of the land at issue and (in the view of the Respondents) all of the improvements at issue. In addition, V&S fails to inform the Board about any of the relevant facts relating to historical ownership of the facilities at issue or the fact that

¹ The Respondents acknowledge that there have been situations where the Board, after receipt of evidence and argument from interested parties, issues or declines to issue a declaratory order without instituting a proceeding under the modified procedure rules. However, we are not aware of any situation in which the Board issued a contested declaratory order by default based on a respondent's failure to submit its evidence and argument within 20 days after filing of the petition.

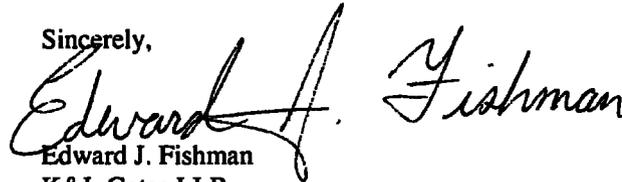
² We strongly disagree with V&S' assertion in its February 8th letter that the federal district court's referral order "recites all of the evidence" that the Board needs to answer the three questions referred to the Board. The referral order does not contain any findings of fact. Many of the relevant facts are disputed by the parties and have been the subject of extensive discovery during the district court proceeding.

the predecessor to V&S entered into an Operating Rights Agreement which provided Hutchinson with the track usage rights that V&S now complains about in its Petition for Declaratory Order.

The Board cannot rule on the questions referred by the district court in the abstract, as V&S suggests. The Board must understand the underlying facts, some of which have been disputed by the parties in the underlying district court litigation. To the extent these facts are in contention, the Board should weigh the credibility of verified evidence submitted by the parties. The Respondents also dispute the legal conclusions set forth in the Petition for Declaratory Order and will provide their interpretation of the relevant statutes and precedent with their opening evidentiary statement.

We presume that, in light of its February 8th letter, V&S wants the Board to treat its Petition for Declaratory Order as its opening statement in this proceeding. This was not at all clear to us, given the lack of evidentiary material in the Petition, until we received the February 8th letter from V&S urging the Board to rule without further submissions. The Respondents stand ready to submit their opening statement containing verified evidence and argument within any time period that may be established by the Board, and therefore respectfully urge the Board to institute a proceeding under the modified procedure rules as soon as possible.

Sincerely,



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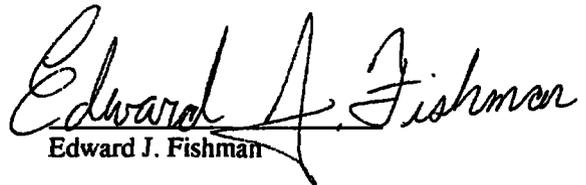
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CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing letter on V&S Railway, LLC, by e-mailing a copy to its counsel Fritz R. Kahn, Esq., at xiccgc@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 11th Day of February 2011.


Edward J. Fishman