

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 430X)<sup>1</sup>

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN OKLAHOMA  
COUNTY, OK

Decided: February 7, 2008

BNSF Railway Company (BNSF) and Stillwater Central Railroad, Inc. (SLWC) jointly filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service, for BNSF to abandon, and for SLWC to discontinue service over, approximately 2.95 miles of railroad between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK. Notice of the exemption was served and published in the Federal Register on October 13, 2005 (70 FR 59802). The exemption notice stated that, if consummation had not been effected by BNSF's filing of a notice of consummation by October 13, 2006, and there were no legal or regulatory barriers to consummation, the authority to abandon would automatically expire. By decisions served on October 6, 2006 and January 25, 2008, the Board granted requests by BNSF for extensions of time for consummating the abandonment and for filing a notice of consummation until June 30, 2008.

In a decision served on January 26, 2007, the Board, inter alia, denied a petition filed by Bio-Energy Wellness Center and the North American Transportation Institute to reject BNSF's notice of exemption. On February 21, 2007, Edwin Kessler filed a petition to reopen and reconsider that decision, and supplemented his petition on March 21, 2007.<sup>2</sup> Mr. Kessler contends that the BNSF notice of exemption is void ab initio because it contains false and misleading information. In support, he submits new evidence, including letters originating from BNSF and photographic evidence, allegedly demonstrating that BNSF, contrary to its September 2005 certification, served shippers on the line within the 2-year period prior to the filing of its notice, as well as more recently. In response, rather than addressing the substance of Mr. Kessler's allegations, BNSF merely argues that Mr. Kessler's evidence constitutes an impermissible reply to a reply and is hearsay and speculative.

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<sup>1</sup> The notice served and published on October 13, 2005, embraced STB Docket No. AB-1040X, Stillwater Central Railroad, Inc.—Discontinuance of Service Exemption—in Oklahoma County, OK.

<sup>2</sup> Mr. Kessler's March 21, 2007 filing also requested an ex parte emergency stay of the effective date of the abandonment exemption. The action taken here moots that request. A motion for a protective order by Mr. Kessler, also filed on March 21, 2007, will be handled, if appropriate, after the Board rules on Mr. Kessler's petition to reopen/reconsider.

To assist the Board in addressing the petition to reopen and reconsider, BNSF will be directed to respond, within 5 days of the service date of this decision, to Mr. Kessler's allegations that BNSF served shippers on the line during the 2-year period prior to the filing of its notice and thereafter. Because Mr. Kessler's petition remains pending and the abandonment has not been consummated, the Board has continuing jurisdiction over the line at issue here. Therefore, BNSF is directed not to consummate this abandonment until the Board receives BNSF's response to Mr. Kessler's charges and rules on the petition for reconsideration/reopening.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF is directed to respond to Mr. Kessler's allegations within 5 days of the service date of this decision.
2. BNSF may not consummate this abandonment until the Board rules on Mr. Kessler's petition for reopening/reconsideration.
3. This decision is effective on its date of service.

By the Board, Charles D. Nottingham, Chairman.

Anne K. Quinlan  
Acting Secretary