

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35206

EDWIN KESSLER—PETITION FOR INJUNCTIVE RELIEF

Decided: June 12, 2009

Edwin Kessler seeks a temporary restraining order and preliminary injunction to enjoin BNSF Railway Company (BNSF) from selling at auction property that Kessler sought to have shipped from Arkansas to Oklahoma but that BNSF was unable or unwilling to deliver to a spur owned by Boardman, Inc. (Boardman), or to Kessler's nearby real estate on BNSF's Chickasha Line in Oklahoma City, OK. Kessler also seeks to permanently enjoin BNSF from: (1) refusing to complete delivery of the property to Boardman; (2) attempting to charge Kessler for demurrage, storage or any other charges associated with the undelivered property; (3) selling or otherwise disposing of the property; and (4) refusing to pay to Kessler \$50 per day for each day the property has not been delivered to Kessler, care of Boardman, commencing on August 20, 2008. This decision denies Kessler's petition and motion for injunctive relief but affords Kessler the opportunity to file a complaint against BNSF. The decision also rejects a number of the parties' filings and motions, and denies other requests for relief.

PRELIMINARY ISSUES

On January 26, 2009, Kessler filed with the Board his motion for temporary restraining order and preliminary injunction (motion) to enjoin BNSF from selling at auction, or in any other way attempting to sell, convey title to, dispose of, or exercise any dominion or control over what Kessler describes as his personal property—a locomotive transported on railcar HTTX 93507 (the railcar)—other than to deliver that property to the Boardman spur near milepost 541.75 on the Chickasha Line or to Kessler's property near milepost 542.0 on that line. On the same date, Kessler filed a petition for injunctive relief (petition) seeking the further relief described in the previous paragraph.

On February 17, 2009, BNSF filed a reply, arguing that Kessler's motion and petition should be denied because he has failed to meet any of the criteria for granting an injunction. Kessler responded to BNSF's reply on March 11, 2009. BNSF also contended that James Riffin is the true owner of the locomotive<sup>1</sup> and, based on its analysis of various other pleadings, that Riffin improperly prepared Kessler's pleadings and signed Kessler's name to them.

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<sup>1</sup> In another proceeding, Riffin has described a "blue-carded" locomotive that he says he owns in similar terms to those that Kessler uses to describe the locomotive involved in this

On March 11, 2009, Kessler filed a motion to strike all references to Riffin in BNSF's reply, pursuant to 49 CFR 1104.8, arguing that the references amount to offensive personal attacks on Riffin and are irrelevant, immaterial, impertinent and scandalous. Kessler also requests that the Board impose sanctions on BNSF and BNSF's attorney for violating 49 CFR 1103.25 by its references to Riffin. On March 17, 2009, Riffin filed a notice of intent to participate in this proceeding and a motion to impose sanctions on BNSF and BNSF's attorney for the same reasons argued by Kessler.

On March 30, 2009, BNSF filed a reply to Kessler's motion to strike and to Kessler's and Riffin's motions to impose sanctions. That same filing contained a response to Kessler's March 11 response, and a motion to impose sanctions on Kessler and Riffin. BNSF argues that Kessler's motion to strike and Kessler's and Riffin's respective motions to impose sanctions should be rejected as late-filed under 49 CFR 1104.13(a). BNSF also argues that the motions to impose sanctions should be rejected because they are not verified as required under 49 CFR 1104.4(b).

In its sanctions request, BNSF argues that the Board should reject all of the pleadings filed by Riffin and Kessler in this proceeding (and in BNSF Railway Company—Petition for Declaratory Order, STB Finance Docket No. 35164), for failing to comply with Board rules prohibiting the filing of false information and fraudulent documents. Additionally, BNSF states that the Board would be "more than justified" in declaring Riffin a frivolous litigant and imposing sanctions on him, and in submitting records to the United States Department of Justice for investigation and possible criminal prosecution.<sup>2</sup> BNSF also requests that the Board award attorneys' fees to BNSF in both this proceeding and in STB Finance Docket No. 35164.

On May 18, 2009, BNSF filed a letter with the Board stating that it would proceed with the auction to sell Kessler's locomotive. On June 2, 2009, Kessler filed a request that the Board issue an immediate order in this proceeding enjoining BNSF from auctioning off the locomotive and directing BNSF to deliver it to the Boardman spur. On June 8, 2009, Kessler filed a motion to dismiss his petition for injunctive relief, indicating that because the Board had not moved quickly enough, he now wished to pursue whatever legal remedies he may have in court to stop the sale of the locomotive. Because issuance of this decision was imminent when the motion was received, the Board is denying the motion and issuing this decision.

Kessler's motion to strike and Kessler's and Riffin's respective motions to impose sanctions will be rejected as untimely under 49 CFR 1104.13(a). Kessler's March 11 response to BNSF's February 17 reply will also be rejected as untimely under 49 CFR 1104.13(a) and as an impermissible reply to a reply under 49 CFR 1104.13(c). We will also reject BNSF's March 30 reply to Kessler's response because the pleadings it addresses will be rejected.

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( . . . continued)

matter. See Riffin's Motion for Administrative Stay, at 4 n.3 in James Riffin—Petition for Declaratory Order, STB Finance Docket No. 34997.

<sup>2</sup> BNSF's March 30, 2009 Sanctions Request, at 9, 11.

Even if we were to accept for consideration Kessler's motion to strike, we would deny it. Kessler argues that BNSF violated 49 CFR 1104.8 and asks the Board to strike all references to Riffin from BNSF's reply. Section 1104.8 states that "[t]he Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document." But Kessler offers no concrete support for his allegation that the objected-to references violate section 1104.8 and, indeed, he does not specifically refute any of BNSF's charges.

Kessler's argument that BNSF and its attorney violated 49 CFR 1103.25 is also unpersuasive. Because Riffin has not been a witness, litigant or counsel of record in this proceeding, section 1103.25, Treatment of witnesses, litigants or other counsel, does not apply. Finally, because Riffin offers the same arguments for imposing sanctions on BNSF and BNSF's attorney as does Kessler, Riffin's motion is also deficient.

While we find Kessler's and Riffin's arguments unpersuasive, we will not reject their filings as fraudulent or impose sanctions on them, as sought by BNSF. We find an insufficient basis on this record to take those extreme actions. BNSF has also requested attorneys' fees from Riffin. The Board does not typically award attorneys' fees, and BNSF has provided insufficient basis to depart from that precedent here.

#### BACKGROUND

Prior to July 17, 2008, Kessler contracted with BNSF to move a locomotive by railcar from Wilson, AR, to Boardman's spur, located near milepost 541.75 on BNSF's Chickasha Line in Oklahoma City, OK.<sup>3</sup> Kessler states that on August 19, 2008, after the railcar arrived in Oklahoma City, he was informed that it could not be delivered to Boardman because the tracks leading to Boardman's spur had been removed.

On September 5, 2008, in a declaratory order proceeding brought by BNSF involving a nearby portion of the Chickasha Line, Kessler filed a motion to compel BNSF to deliver the locomotive to the Boardman spur.<sup>4</sup> In opposing BNSF's declaratory order request on the merits, Kessler indicated that Boardman was essentially "testing" BNSF's claim that rail service remained available on the portion of the Chickasha Line where Boardman is located.<sup>5</sup> The Board denied Kessler's motion to compel, noting that Boardman was not before the Board complaining that the locomotive had not been delivered, that Kessler had provided no evidence to support his claims, and that, according to BNSF, Boardman had refused delivery of the shipment by

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<sup>3</sup> The status of a nearby portion of the Chickasha Line was the subject of a recent Board decision. BNSF Railway Company—Petition for Declaratory Order, STB Finance Docket No. 35164, et al. (Chickasha Declaratory Order) (STB served May 20, 2009), pet. for rev. pending sub nom. Kessler v. STB, No. 09-1161 (D.C. Cir. filed June 11, 2009).

<sup>4</sup> See Chickasha Declaratory Order, slip op. at 3 (STB served Oct. 2, 2008).

<sup>5</sup> Id.

transload.<sup>6</sup> The Board stated that any aggrieved party may file a complaint and seek appropriate relief.<sup>7</sup> Kessler did not file a complaint.

In October 2008, BNSF asked Boardman's Chief Financial Officer whether Boardman still wished to have the locomotive delivered to its Oklahoma City facility. The CFO responded by saying that "Boardman has no need for a locomotive."<sup>8</sup> Still, at this point Kessler did not file a complaint.

On November 26, 2008, BNSF sent a letter to Kessler stating, "Boardman has advised BNSF that they have no use for the locomotive," and that the railcar "remains in the possession of BNSF's handling carrier . . . where it is accruing daily demurrage charges."<sup>9</sup> In the letter, BNSF went on to request that Kessler arrange for a viable alternate delivery location.<sup>10</sup> Kessler did not respond or arrange for an alternative location. BNSF sent another letter on December 18, 2008, stating that because Kessler failed to provide disposition instructions, the locomotive would be sold at public auction unless Kessler contacted BNSF by December 29, 2008, to arrange for disposition of the locomotive.<sup>11</sup> Kessler did not respond. On January 8, 2009, BNSF sent a similar letter, extending the deadline by which Kessler needed to respond until January 17, 2009.<sup>12</sup> Finally, Kessler took action: he filed the subject petition for injunctive relief and motion for temporary restraining order and preliminary injunction on January 26, 2009.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 721(b)(4), the Board may, "when necessary to prevent irreparable harm, issue an appropriate order without regard to" the procedural requirements of 5 U.S.C. 551-559. To obtain an injunction under this provision, the requesting party must show: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. See DeBruce Grain, Inc. v. Union Pacific RR, 2 S.T.B. 773, 775 n.3 (1997) (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours). Because Kessler essentially seeks the same relief in both of his January 26 filings and his June 2 filing, and because the relief sought is based on identical facts, the merits of those filings will be considered concurrently under the Holiday Tours standard described above.

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<sup>6</sup> Id. at 3-4.

<sup>7</sup> Id. at 4.

<sup>8</sup> BNSF's Feb. 17 Reply, at Exh. 8.

<sup>9</sup> Kessler's Pet., at Exh. 2.

<sup>10</sup> Id.

<sup>11</sup> Id., at Exh. 3.

<sup>12</sup> Id., at Exh. 4.

Sale of the Locomotive. First, Kessler argues that he is likely to prevail on the merits because, he says, the Chickasha Line where Boardman is located is an active line and BNSF has violated its common carrier obligation by failing to deliver the railcar either to Boardman or to property adjacent to Boardman, as requested by Kessler. Second, Kessler argues that he will suffer irreparable harm if BNSF sells the locomotive at auction because the locomotive is “blue-carded,”<sup>13</sup> one-of-a-kind, and historic and unreplacable. Third, Kessler argues that BNSF would incur no harm by not selling the locomotive; however, if BNSF does incur harm, that harm would be self-inflicted because BNSF agreed to transport the locomotive and failed to replace the previously removed track or to complete delivery through alternative means by transloading the locomotive. Lastly, Kessler argues that it would be in the public interest to require BNSF to deliver the locomotive by rail to Boardman or to Kessler’s property adjacent to Boardman, including replacing the tracks leading to Boardman’s spur.

Kessler has failed to show that he would be irreparably harmed if BNSF were to sell the locomotive at auction or otherwise. Kessler’s assertions about the qualities of the locomotive are rebutted by the verified statement of BNSF’s expert witness Jerry A. Pinkepank, a consultant and former railroad officer who authored the Diesel Spotter’s Guide series of locomotive identification books.<sup>14</sup> Witness Pinkepank is also the founder of the locomotive publication Extra 2200 South, which he describes as a standard research reference for specialists in locomotive history, a description that has not been challenged.<sup>15</sup> Witness Pinkepank testified that the particular type of locomotive involved here “is not a collector’s item as the general type was common and regarded as uninteresting,” that this type of locomotive has been largely replaced commercially with “rubber-tired switchers such as the Trackmobile,” and that it is “unlikely that this locomotive should be valued at anything above scrap value.”<sup>16</sup>

We find no irreparable harm. BNSF’s expert witness demonstrates that the locomotive is not unique or irreplaceable, or even particularly valuable. And although the record here is not sufficiently developed to permit us to divine the likelihood of success on the merits, if BNSF sells the locomotive and Kessler’s legal arguments are found to be meritorious, Kessler can be made whole through reparations. Thus, as the Board has consistently held in the past, “monetary or ‘economic loss by itself does not constitute irreparable harm.’”<sup>17</sup> Kessler’s request to enjoin BNSF from selling his locomotive may be denied solely on that basis.

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<sup>13</sup> Kessler implies that the term “blue-carded” denotes a particularly high-end or valuable locomotive. But in fact, the term “blue card” simply refers to Federal Railroad Administration form F6180.49A. Inspection results are recorded on this form and the form must be displayed in a conspicuous place in the cab of each locomotive. 49 CFR 229.23(d).

<sup>14</sup> BNSF’s March 30, 2009 Filing, at Exh. 13.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., STB Docket No. 42110, slip op. at 4 (STB served Dec. 22, 2008) (quoting Consolidated Rail Corp.—Abandonment—Between Corry and Meadville, Docket No. AB-167 (Sub-No. 1129) (ICC served Oct. 5, 1995)).

Kessler likewise has not demonstrated why it is in the public interest to enjoin BNSF from selling the locomotive at auction. His public-interest argument is based on the general principle that rail carriers should carry out their common carrier obligation—a principle that we enforce in appropriate circumstances. But Kessler does not attempt to show how the public would benefit from the Board enjoining BNSF from selling the locomotive, which, according to Kessler’s explanation in Chickasha Declaratory Order, was shipped not for any commercial purpose, but simply to “test” BNSF. Therefore, Kessler has not demonstrated that granting an injunction would be in the public interest.

Because Kessler has failed to show irreparable harm absent the requested relief or that it would be in the public interest to grant the requested relief, it is unnecessary here to discuss the remaining elements for preliminary injunctive relief—likelihood of success on the merits and substantial harm to other parties. Kessler’s request that we immediately enjoin the sale of the locomotive will be denied.

Failure to Deliver Locomotive. Kessler argues that BNSF has a common carrier duty to deliver the locomotive to the Boardman spur and that the Board should order BNSF to deliver the railcar. But, as with his request that we enjoin the sale of the locomotive, Kessler has not shown that he would suffer irreparable harm in the absence of an order requiring BNSF to deliver the locomotive to the Boardman spur. Moreover, the circumstances surrounding this shipment—for example, Kessler’s earlier suggestion that it was a “test,” the indication by Boardman’s CFO in October 2008 that Boardman did not want the locomotive delivered to its Oklahoma City facility, and Boardman’s apparent refusal to enter into a new sidetrack agreement to facilitate the delivery<sup>18</sup>—raise questions about the true nature of this dispute, as well as Kessler’s likelihood of success on the merits. Accordingly, we will not issue an order under 49 U.S.C. 721(b)(4) directing BNSF to deliver the locomotive.

Despite the concerns noted above, Kessler may yet pursue his claim that BNSF violated its common carrier duty to deliver the locomotive. Under 49 U.S.C. 11701,<sup>19</sup> Kessler is entitled to file a complaint and seek either an order requiring BNSF to deliver the locomotive, or, if BNSF has auctioned off the locomotive prior to adjudication of the complaint, appropriate damages arising from the non-delivery and sale. Although, as explained previously, we decline to reject Kessler’s filings as fraudulent, we remind Kessler that if he chooses to file a complaint, the complaint and all subsequent filings must be prepared and signed (1) by an attorney, see 49 CFR 1103.2; (2) by a registered non-attorney practitioner who has successfully completed the

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<sup>18</sup> We note that the evidence regarding BNSF’s purported offer to enter into a sidetrack agreement with Boardman is sparse. BNSF asserts that, at some point (it does not say when), it offered to enter into such an agreement so that the locomotive could be delivered, but that Boardman declined the offer. BNSF’s Feb. 17 Reply, at 9. Although Kessler disputes this in his (now-rejected) March 11 reply (at 8), he does not present any statement from Boardman supporting his version of events.

<sup>19</sup> “If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.” 49 U.S.C. 11701(a).

practitioner's examination, see 49 CFR 1103.3; or (3) by Kessler himself. Only attorneys or non-attorney practitioners may represent others in Board proceedings. If Kessler files a complaint as provided under 49 CFR 1111.1, BNSF shall file an answer, see 49 CFR 1111.4, and the parties shall confer and submit a proposed procedural schedule, see 49 CFR 1111.10. The Board will then establish deadlines for discovery and the presentation of evidence and argument.

Under the more elaborate procedures available in a proceeding initiated by complaint, the parties might be able to present a more fully developed record on important questions, such as whether Boardman refused delivery of the locomotive or declined to enter into a new sidetrack agreement (and, if so, when). Further, in addition to the arguments that the parties might wish to advance regarding the common carrier obligation issue in their subsequent filings (if Kessler chooses to proceed), the parties should address whether the absence of a sidetrack agreement is relevant to the common carrier obligation when a railroad has accepted and received payment for a shipment and, if so, whose responsibility it is to ensure that a sidetrack agreement that would allow the desired delivery is in effect.

Other Relief. We will deny Kessler's requests (1) that we enjoin BNSF from charging him demurrage, storage or any other charges associated with BNSF's failure to deliver the railcar, and (2) that we enjoin BNSF from refusing to pay Kessler \$50 per day for each day since August 20, 2008, that the locomotive has not been delivered. These claims about money can be addressed if appropriately raised in a properly filed complaint proceeding. This record provides no basis for us to require BNSF to pay Kessler damages and to forgo attempting to collect charges it considers due.

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

It is ordered:

1. Kessler's March 11, 2009 filings are rejected.
2. Riffin's March 17, 2009 motion to impose sanctions is rejected.
3. BNSF's March 30, 2009 reply to response is rejected.
4. BNSF's sanctions request is denied.
5. Kessler's motion for temporary restraining order and preliminary injunction is denied.
6. Kessler's petition for injunction is denied.
7. Kessler's motion to dismiss his petition for injunctive relief is denied.
8. Kessler's other requests for relief are denied.

9. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan  
Acting Secretary