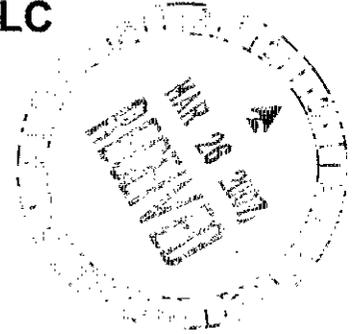


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SIDNEY L. STRICKLAND, JR. -
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March 26, 2007

Honorable Vernon A. Williams
Surface Transportation Board
395 E. Street N.W.
Washington, DC 20423

**Re: STB Docket No. AB-6 (Sub-No. 430X) BNSF Railway Company—
Abandonment Exemption—in Oklahoma County, OK**

Dear Secretary Williams:

Enclosed for filing in the above referenced docket are an original and ten copies of a Reply to Petition for Ex Parte Emergency Stay.

Please acknowledge receipt of this material by date stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

Sincerely,

Sidney L. Strickland, Jr.

SLS/eww
Encs.

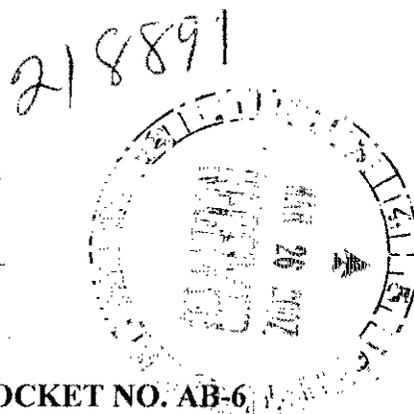
cc: Jake DeBoever
John Sims

ENTERED
Office of Proceedings

MAR 26 2007

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

STB DOCKET NO. AB-6
(SUB-NO. 430X)

REPLY TO PETITION FOR EX PARTE EMERGENCY STAY

BNSF RAILWAY COMPANY
2650 Lou Menk Drive
P.O. Box 96157
Fort Worth, TX 76161-0057

By: SIDNEY L. STRICKLAND, JR
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Attorneys for BNSF Railway Company

DATED: March 26, 2007

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**BNSF RAILWAY COMPANY --
ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK**

**STB DOCKET NO. AB-6
(SUB-NO. 430X)**

REPLY TO PETITION FOR EX PARTE EMERGENCY STAY

BNSF RAILWAY COMPANY (“BNSF”) hereby moves for denial of the Petition for Ex Parte Emergency Stay Supplement to Petition to Reopen/to Reconsider filed on March 21, 2007 by Edwin Kessler (“Petition”) and further moves for the Board to strike the filing as an impermissible reply to a reply.

The Petition should be denied because: (1) the Petition is untimely; (2) Mr. Kessler is not likely to prevail on the merits; (3) denial of the stay will not cause Mr. Kessler irreparable harm; (4) a stay will harm BNSF; (5) a stay is not in the public interest; and (6) Mr. Kessler, once again, seeks to file an impermissible reply to a reply.

BACKGROUND

On September 23, 2005, BNSF and SLWC jointly filed Notices seeking to invoke the class exemption under 49 C.F.R. § 1152, Subpart F 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 exemptions was served and published in the Federal Register on October 13, 2005 (70 FR 59802).

On November 7, 2005, Oklahoma State Representative Al Lindley (“Representative Lindley”) and Bio-Energy Wellness Center (“Wellness Center or the Center”) filed comments urging that the Notices be rejected. On November 9, 2005, petitioners Wellness Center and North American Transportation Institute (“NATI”) filed a joint petition to reject the Notices of exemption. BNSF and SLWC replied to those filings on November 10, 2005.

The BNSF abandonment Notice became effective on November 12, 2005.

Subsequently, the parties filed various pleadings through February 2006 related to a request to reject the Notices. Similarly, the parties filed various pleadings through February 2007 related to repeated dilatory filings.

On February 21, 2007, Mr. Kessler filed a Petition to Reopen/to Reconsider (“Petition to Reopen”) claiming the Board’s January 26, 2007 Decision in this proceeding should be reopened and then reconsidered, because the January 26, 2007 Decision contravenes precedent and was not persuasively distinguished.

On March 7, 2007, BNSF responded to the February 21, 2007 Petition to Reopen with a Reply to Petition to Reopen/to Reconsider (“Reply to Petition to Reopen”), arguing: (1) Mr. Kessler has not met the standards for reopening; (2) the Board’s January 26, 2007 decision does not contravene precedent; and (3) the Petition constitutes an impermissible reply to a reply.

The Board has issued various orders related to these filings. As pertinent here, on January 26, 2007, the Board served a decision (“January 26, 2007 Decision”) denying petitioners’ motion to reject the BNSF Notice and granting SLWC an exemption permitting it to discontinue service over the line. In that decision, the Board also ordered that an OFA to subsidize continued rail service in the SLWC discontinuance proceeding must be received by the railroads and the Board by February 5, 2007. On February 27, 2007, the Board served a decision (“February 27, 2007 Decision”) denying Common Cause Oklahoma’s February 5, 2007 request for an extension of time to file an OFA and for tolling the OFA due date. The Board noted in that decision, among other things, that BNSF’s abandonment in STB Docket No. AB-6 (Sub-No. 430X) became effective in November, 2005.

On March 21, 2007, Mr. Kessler has now filed his present Petition, requesting, among other things, that the Board stay the effective date of BNSF’s abandonment exemption. Mr. Kessler also seeks to supplement his February 21, 2007 Petition to Reopen.

REPLY

The Ex Parte Emergency Stay Petition should be rejected because it is untimely as the Notice of Exemption became effective in November 2005.

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Petroleum Jobbers*”). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla. V. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As is demonstrated below, Mr. Kessler has failed to meet his burden under each of the four criteria.

Mr. Kessler Is Not Likely To Prevail On the Merits

Mr. Kessler does not have a substantial likelihood of success on the merits of his Ex Parte Emergency Stay Petition to stay the effective date of BNSF’s abandonment exemption because BNSF’s abandonment exemption already became effective as of November 12, 2005.

In addition, in his latest filing, Mr. Kessler once again argues that the Board’s Decisions in this proceeding contravene precedent established in: *Consolidated Rail Corp.—Abandonment Exemption—In Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (Served January 22, 2007) (“*Mercer County*”) and *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004), citing to *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir 1999). The Board has already found that these cases are not precedent because they are distinguishable. See the Board’s February 27, 2007 Decision.

As noted, Mr. Kessler seeks to supplement his February 21, 2007 Petition to Reopen. BNSF filed a verified statement in support of the two year out of service provision. Mr. Kessler, however, files hearsay and speculative evidence that should not delay this proceeding any further.

Denial of the Stay Will Not Cause Mr. Kessler Irreparable Harm

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). Mr. Kessler has failed to demonstrate that he will suffer irreparable harm in the absence of a stay. Mr. Kessler claims he expects to file an Offer of Financial Assistance (“OFA”) to purchase the subject Line. However, Mr. Kessler missed the deadline to file an OFA to purchase the Line. Furthermore, Mr. Kessler is not seeking to acquire the line to provide continued rail service, but is instead seeking to stop a highway project.

A Stay Would Harm BNSF

A stay would harm BNSF. BNSF needs to abandon the subject Line to facilitate the Oklahoma highway project. BNSF has expended considerable time and expense in relocating the Line to aid in continued progression of the highway project. Finally, BNSF’s request for an extension of time to consummate its abandonment until December 31, 2007 does not support Mr. Kessler’s assertion that BNSF does not intend to consummate until December 31, 2007. The consummation extension simply provides BNSF the flexibility to consummate its abandonment at any time between now and the December 31, 2007 date.

A Stay Is Not In the Public Interest

Mr. Kessler has failed to demonstrate how issuance of a stay would further the public interest. Indeed, Mr. Kessler's filing is another attempt to create delay and is yet another backdoor attempt to thwart the Board's procedural processes. Mr. Kessler's Petition is not in the public interest.

Impermissible Reply to a Reply

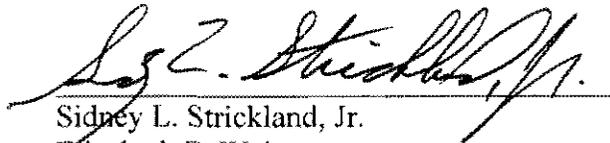
Mr. Kessler's Petition is in violation of 49 CFR 1104.13(c), which provides: "[a] reply to a reply is not permitted." Mr. Kessler admits that his Petition is an impermissible reply to a reply. See Petition at 11. Mr. Kessler claims the Board has permitted an impermissible reply to a reply where the reply responds to a new issue that provides the Board with a more complete record. Here, however, Mr. Kessler clearly reasserts arguments that he has made repeatedly in his previous filings. As such, his present filing is an impermissible reply to a reply.

The Board and its predecessor have routinely held that the filing of a reply to a reply is impermissible and violates Section 1104.13. See, e.g., Northeast Interchange Ry., LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY, STB Docket No. 34734 (STB served November 18, 2005); CSX Transp., Inc.—Abandonment Exemption—in Franklin County, PA, STB Docket No. AB-55 (Sub-No. 568X) (STB served July 28, 2005); CSX Corp.—Control—Chessie System, Inc., 2 S.T.B. 554 (1997); St. Louis S.W. Ry. Co.—Trackage Rights Over Missouri Pac. R.R. Co.—Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C.2d 668 (1987). Mr. Kessler's repeated delay tactics are clearly an abuse of the Board's processes and should discontinue.

CONCLUSION

BNSF respectfully urges that the Board deny Mr. Kessler's Ex Parte Emergency Stay request. The request is untimely, clearly without merit, and should be rejected. Mr. Kessler's request to supplement his February 21, 2007 filing simply adds speculation and hearsay to his February 21, 2007 filing and is again tantamount to a reply to a reply that should be stricken or rejected.

Respectfully submitted,



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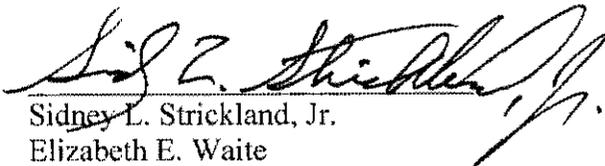
(202) 338-1325

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ATTORNEYS FOR BNSF RAILWAY
COMPANY

CERTIFICATE OF SERVICE

BNSF Railway Company by and through its counsel, Sidney L. Strickland, Jr., certifies that on March 26, 2007, BNSF served a copy of the foregoing "Reply to Petition for Ex Parte Emergency Stay" by facsimile transmission and by mailing copies thereof by first-class mail to Edwin Kessler at: Common Cause *Oklahoma*, 1510 Rosemont Drive, Norman, Oklahoma, 73072, to Karl Morell at: Ball Janik LLP, 1455 F Street N.W., Suite 225, Washington, D.C. 20005, and to Fritz Kahn at: 8th Floor, 1920 N. Street, N.W., Washington DC 20036-1601.



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