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January 18, 2008

ENTERED  
Office of Proceedings

JAN 18 2008

Part of  
Public Record

Anne K. Quinlan, Acting Secretary  
Surface Transportation Board  
395 E. Street N.W.  
Washington, DC 20423-0001

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

Dear Acting Secretary Quinlan:

Enclosed for filing in the above referenced docket are an original and ten copies of a Reply to Edwin Kessler's Opposition to BNSF's Request for Extension of Time to Consummate Abandonment.

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,

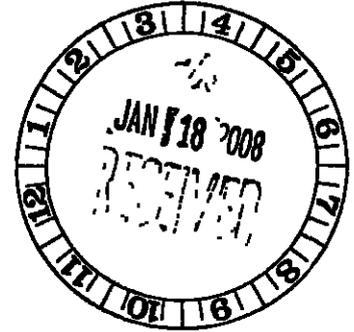
Sidney L. Strickland, Jr.

SLS/cew  
Encs.

cc: John Sims

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

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**REPLY TO EDWIN KESSLER'S OPPOSITION TO BNSF'S REQUEST FOR  
EXTENSION OF TIME TO CONSUMMATE ABANDONMENT**

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**Attorneys for BNSF Railway Company**

**DATED: January 18, 2008**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**BNSF RAILWAY COMPANY --  
ABANDONMENT EXEMPTION --  
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**REPLY TO EDWIN KESSLER'S OPPOSITION TO BNSF'S REQUEST FOR  
EXTENSION OF TIME TO CONSUMMATE ABANDONMENT**

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**BNSF RAILWAY COMPANY ("BNSF") hereby replies to Edwin Kessler's January 14, 2008 opposition to BNSF's request for an extension of time to consummate the proposed abandonment ("Kessler Opposition"). BNSF further moves the Board accept the present filing for the singular purpose of having a complete record, as recently permitted in a full Board decision served December 12, 2007, in STB Docket No. AB-103 (Sub-No. 21X), STB Docket No. AB-1016X, The Kansas City Southern Railway Company Abandonment Exemption – Line in Warren County, MS, Vicksburg Southern Railroad, Inc. – Discontinuance of Service Exemption – Line in Warrant County, MS. 2007 STB LEXIS 724.**

## **BACKGROUND**

**Throughout the present proceeding, Edwin Kessler has sought to prevent or delay the consummation of the proposed abandonment. Now, Kessler seeks to restart the entire process – which, of course, is consistent with preventing or delaying the proposed abandonment.**

**The present proceeding has been long, arduous and contentious. Beginning in late September 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).**

**In early November 2005, opposition surfaced, with Oklahoma State Representative Al Lindley (“Representative Lindley”), Bio-Energy Wellness Center (“Wellness Center or the Center”), and North American Transportation Institute (“NATI”) seeking to have the Notices of exemptions rejected. After BNSF and SLWC replied to those filings, the BNSF abandonment Notice became effective on November 12, 2005.**

**Subsequently, the parties filed various pleadings through early 2007 that continued to seek a rejection of the Notices or interjection of the OFA processes.**

**In late January 2007, the Board served a 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.**

**Interestingly, on February 5, 2007, Common Cause Oklahoma ("CCO") filed a Request for Extension of Time to File an Offer of Financial Assistance, requesting a two week extension of time to "obtain additional information" related to a possible "offer for purchase of the two and a half mile segment of railroad" and "the prospect of obtaining sufficient money from interested investors."**

**BNSF and SLWC jointly filed a Motion to Reject Request For Extension of Time to File an OFA, arguing, among other things, that CCO missed the October 24, 2005 deadline to submit a formal expression of intent to file an OFA and failed to file an OFA before the Notice of Exemption became effective in STB Docket No. AB-6 (Sub-No. 430X).**

**Beginning in early February 2007, Mr. Kessler began to file a series of petitions, including a "Petition to Toll Date an Offer of Financial Assistance Must Be Filed By;" a Notice of Intent to File an Offer of Financial Assistance to purchase from BNSF the 2.95 miles of rail line between milepost 539.96 and milepost 542.91—the subject of BNSF's abandonment proceeding—all to stop a highway project.**

Mr. Kessler has now filed his present opposition to BNSF's consummation extension request; and, for all intents and purposes, this has the same overall objective as his prior filings—to stop the highway project.

#### REPLY

As Kessler notes, on December 26, 2007, BNSF filed a second request for extension of time to file its Notice of Consummation until June 30, 2008. Kessler ridicules the basis for the extension, claiming that "weather delays and scheduling difficulties with various construction projects" is a "lame" excuse for the extension request. See Kessler p. 2.

Mr. Kessler even calls into question BNSF's credibility by emphasizing that the summer of 2007 was one of the driest on record for Oklahoma, the line is only 2.95 miles long, is on flat ground, has no vegetative growth, and is easily accessible. Thus, Kessler claims this is a two (2) – week job and not one which should take 27 months.

The Oklahoma City abandonment (AB-6 (Sub-No. 430X)) was initiated at the request of the Oklahoma Department of Transportation to make way for the relocation of Interstate 40 through downtown Oklahoma City. The relocation project is a comprehensive undertaking, involving multiple phases, each predicated on another. As such, there have been numerous delays on predecessor phases that have affected BNSF's ability to salvage the line for which BNSF has received STB permission to abandon. These are the weather delays and scheduling difficulties to which BNSF refers in its request for an extension of time to file its Notice of Consummation.

Moreover, Kessler's ridicule and remarks simply highlight Kessler's continuing quest to delay and postpone the consummation of the present abandonment and the highway project as a whole. Indeed, what is particularly illuminating is that Kessler suggests BNSF is unduly lengthening the time to consummate; then, contradactorily turns to a suggested remedy that only would attenuate the time for finalizing the abandonment, requiring BNSF to institute a new abandonment proceeding.

Finally, Kessler argues that BNSF's request for an extension of time to file its notice of consummation was not filed "sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing." Kessler suggests the BNSF filing was purposely scheduled to occur when Board employees would be out and unable to process the request in a timely manner.

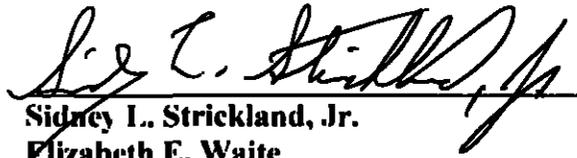
Kessler's arguments are specious. The timing of the filing had to do with coordinating the related projects as noted above, not with keeping track of Board holiday schedules, vacations, closures and Board employee presence. Indeed, Kessler underestimates the know-how and commitment of Board employees to get work done.

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**CONCLUSION**

**BNSF respectfully urges the Board to accept the present reply for the purpose of having a complete record as to the status of the proposed abandonment and to grant the requested extension.**

**Respectfully submitted,**



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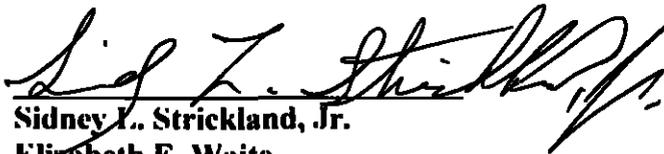
**(202) 338-1325**

**(202) 672-5399 FAX**

**ATTORNEYS FOR BNSF RAILWAY  
COMPANY**

**CERTIFICATE OF SERVICE**

**BNSF Railway Company by and through its counsel, Sidney L. Strickland, Jr., certifies that on January 18, 2008, BNSF served a copy of the foregoing "Reply to Edwin Kessler's Opposition to BNSF's Request for Extension of Time to Consummate Abandonment" by mailing copies thereof by first-class mail to Edwin Kessler at: Common Cause Oklahoma, 1510 Rosemont Drive, Norman, Oklahoma, 73072, and to Karl Morell at: Ball Janik LLP, 1455 F Street N.W., Suite 225, Washington, D.C. 20005, and to Fritz Kahn, 8<sup>th</sup> Floor 1920 N Street, NW, Washington, DC 20036-1601.**



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