

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-6 (Sub- No. 430X)

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

221884

ENTERED
Office of Proceedings

MAR 24 2008

**SECOND SUPPLEMENT TO
COMMENTS OF EDWIN KESSLER**

Part of
Public Record

1. Edwin Kessler ("Kessler"), herewith files this Second Supplement to Comments of Edwin Kessler, and says:

2. On February 7, 2008, Chairman Nottingham ordered BNSF not to consummate the abandonment of the Line of railroad which is the subject of the above entitled proceeding.

3. On February 14, 2008, Tom Elmore, a party to this proceeding, observed, photographed, and spoke with an individual who identified himself as "Wesley," who was the foreperson of a crew that was salvaging the Line, and who stated his salvaging activities were pursuant to a salvage contract with BNSF. Mr. Elmore also had a conversation with Corey Burkhart, the BNSF Oklahoma City Roadmaster, who stated to Mr. Elmore that the Line was being salvaged pursuant to a BNSF salvage contract.

4. On February 15, 2008, Kessler filed his initial Comments of Edwin Kessler, wherein he stated the J.B.F. Tie and Rail Company had been engaged to begin dismantling the line. He attached black and white photocopies of color photographs Mr. Elmore had taken on February 14, 2008.

5. On February 19, 2008, Kessler filed color photocopies of the color photographs Mr. Elmore had taken on February 14, 2008, and filed a Verified Affidavit of Thomas Elmore, wherein Mr. Elmore testified that he had taken the photographs and had spoken with Wesley and Corey Burghart.

6. On February 19, 2008, BNSF filed its Reply to February 15, 2008 Edwin Kessler Comments. BNSF attached to its Reply, a Verified Statement of Susan L. Odom, Manager – Network Strategy. In her Verified Statement, Ms. Odom stated “to her **current actual knowledge, information, and belief:**”

- A. A portion of the Line “was cut by BNSF forces on January 25, 2008.”
- B. No additional salvage work has since been performed by BNSF or any BNSF authorized contractor.
- C. BNSF has not issued a signed contract for the salvage work.
- D. “Any salvage activity performed on the subject line on February 14, 2008 was done so without the permission of and without direction from this office, which is responsible for doing so. Further, this office has no knowledge of or information on a company by the name of J.B.F. Tie and Rail Co. Mr. Kessler’s speculative statement that BNSF has engaged J.B.F. Tie and Rail Co. to begin dismantling the line is false.”

7. On February 20, 2008, Kessler filed a Supplement to his Initial February 15, 2008 Comments, wherein he provided the Board with the telephone numbers of the individuals who were actually cutting the Line, and the telephone number of Jason Shaw, who stated he had a salvage contract with BNSF to salvage the Line.

SECOND SUPPLEMENT TO KESSLER’S COMMENTS

8. On the afternoon of February 26, 2008, Tom Elmore observed and photographed a newly constructed cantilevered railway crossing signal at the S. Agnew Avenue crossing of the Chickasha / former Frisco Line, near MP 542.8, which is about 600 feet from the end of the portion of the Line that BNSF proposes to abandon (at MP 542.91). A copy of Mr. Elmore’s

February 26, 2008 photograph of the signal pole in the middle of the Frisco tracks, is reproduced below. Mr. Elmore spoke with Don R. Moad of Ram Products, Inc., which is located at 1731 S. Agnew Avenue, Oklahoma City, Ok. Ram Products' business is located about 200 feet north of the Frisco Line / S. Agnew crossing. Mr. Moad told Mr. Elmore that he witnessed the erection of the signal pole in the middle of the tracks on February 22, 2008, or just 8 days after Mr. Elmore observed a salvage crew salvaging the Line near MP 540.4.

9. On February 26, 2008, Mr. Elmore also photographed the Frisco / Chickasha Line at MP 540.2. [The signal box in the photograph is clearly labeled "Santa Fe MP 540.20."] This photograph, which is reproduced below, clearly shows a portion of the Frisco / Chickasha Line had been removed prior to the date the photograph was taken. This photograph also clearly shows that on February 26, 2008, the turnout to the Shields Spur [on the right of the photograph] was still in place, as was about 100 feet of Frisco Line.

10. On March 17, 2008, when Mr. Elmore revisited the Frisco / Chickasha Line at MP 540.20, he observed, and photographed, that portion of the Frisco Line that he had photographed on February 26, 2008. Mr. Elmore's March 17, 2008 photograph clearly shows the turnout to the Shields Spur, and an additional 100 feet of the Frisco / Chickasha Line had been removed sometime between February 26, 2008 and March 17, 2008, contrary to Chairman Nottingham's February 7, 2008 Order directing BNSF to stop salvaging the Frisco / Chickasha Line.

REPLY TO BNSF'S MARCH 12, 2008 REPLY

11. Normally, a reply to a reply is not permitted by the Board's rules. Occasionally, a Reply to a Reply is permitted in order to provide the Board with a more complete record. Kessler would argue what follows should be included in the record, in order to provide the Board with a more complete record, and in order to answer the questions poised by BNSF in its March 12, 2008 Reply.

12. In its March 12, 2008 Reply, BNSF indicated it was not convinced the green BN box car depicted in three of Mr. Elmore's photographs, was the same box car. What BNSF did not fully

comprehend, was that the photographs were of both sides of the same car. If BNSF truly wanted to verify that BN box car number 249525 had been delivered to the Mid-States Co-Op on February 27, 2007, as Mr. Elmore's photographs depict, BNSF could have checked its way bills.

13. Since BNSF indicated the photographic evidence that Kessler presented did not prove, at least to BNSF's satisfaction, that a BNSF freight train operated on the Frisco / Chickasha line on February 27, 2007, in the process of delivering a string of rail cars to the Producer's Co-Op, Kessler has attached hereto two additional photographs that Mr. Elmore took on February 27, 2007. The first photograph depicts BNSF locomotive # 3828 immediately adjacent to the signal box at Santa Fe MP 540.20. This photograph has "#8A" stamped on the back of this photograph, indicating this was the eighth photograph taken on that roll of film. The second photograph depicts BNSF locomotive # 3828 on the Co-Op spur, as it was exiting the Co-Op. The Santa Fe signal box at MP 540.20 is clearly depicted in this photograph. This photograph has "#22" stamped on the back of this photograph, indicating this was the 22nd photograph taken on that roll of film. The sequence of events went thus: The train used the Shields Spur to access the Frisco Line near MP 540.10. The train backed west on the Frisco Line, unhooked a string of cars, moved east past the Co-Op spur, then backed onto the Co-Op spur with a string of cars [photographic Exhibits 14-3 and 14-4]. The locomotive and 'slug,' exited the Co-Op without any cars attached, [photograph #22, followed by the Exhibit 14-5 photograph, then followed by the Exhibit 14-6 photograph], pulled east on the Frisco Line past the Co-Op turnout, paused, then backed west on the Frisco Line a second time, [where the locomotive was photographed adjacent to the Signal Box, photograph #8A], coupled to the string of cars that had been left on the Frisco Line about 20 minutes earlier, then pulled east on the Frisco Line.

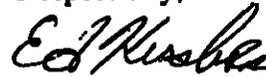
14. BNSF attached to its March 12, 2008 reply a graphic showing the Red Rock and Frisco / Chickasha Line where they intersect. The graphic clearly shows a BNSF crew accesses the Frisco / Chickasha Line at MP 540.09 via the Shields Spur, pulls east on the Frisco / Chickasha Line until it clears the Co-Op spur turnout at MP 540.05, thereby using a portion of the Frisco / Chickasha Line that BNSF proposes to abandon [the abandonment begins at MP 539.96 and continues to MP 542.91], then backs its train into the Co-Op spur from the Frisco / Chickasha Line.

15. On the graphic is a Note, which clearly states “Near-future track construction plans call for: (2) Producers Coop and Mid-States Lumber industry tracks will be realigned [some time in the future]. The Note is in the future tense, indicating the only way BNSF has been able to provide local service to the Co-Op, has been to utilize a portion of the Frisco / Chickasha Line that is the subject of this abandonment proceeding. And therein lies the “false or misleading statement” which appears in BNSF’s Notice of Exemption (“NOE”): BNSF falsely represented in its NOE that it had not used any portion of the Frisco / Chickasha Line that was the subject of its NOE, for two years prior to the date it filed its NOE. BNSF also has falsely represented to the Board that during the course of this proceeding, it has not operated on any portion of the Line that is the subject of this proceeding, in order to provide local service.

16. Kessler’s photographic evidence, BNSF’s correspondence with the Oklahoma Department of Transportation, and BNSF’s own March 12, 2008 graphic, clearly show BNSF has used, and continues to use, that portion of the Line that lies between MP 539.96 and MP 540.40, in order to provide local service to the Producer’s Co-Op, and that as of this date, March 24, 2008, it still must use a portion of the Frisco / Chickasha Line to provide local service to the Producer’s Co-Op.

17. WHEREFORE, Kessler would respectfully request the Board revoke BNSF’s Notice of Exemption, then issue on its own motion, an Individual Exemption to BNSF, just as it did for Stillwater, then permit the Offer of Financial Assistance procedures to move forward.

Respectfully,



Edwin Kessler

CERTIFICATE OF SERVICE

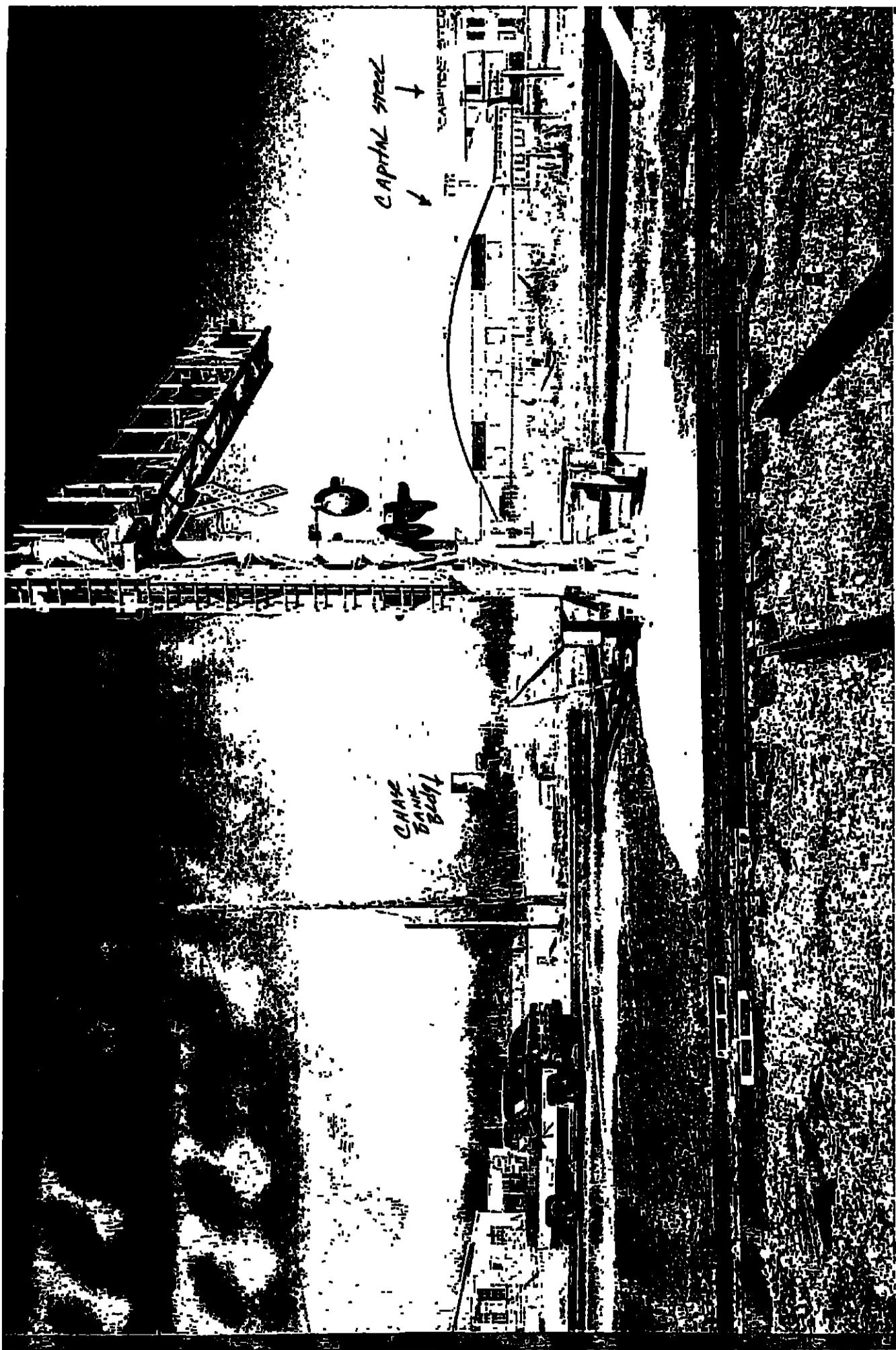
I hereby certify that on this 24th day of March, 2008, a copy of the foregoing Second Supplement to Comments of Edwin Kessler, was served by first class mail, postage prepaid, upon the parties of record noted below.


Edwin Kessler

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Sidney Strickland & Associates
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Washington, DC
20036-1601
(202) 263-4152



CAPITAL STEEL



CHANG BANG Bldg

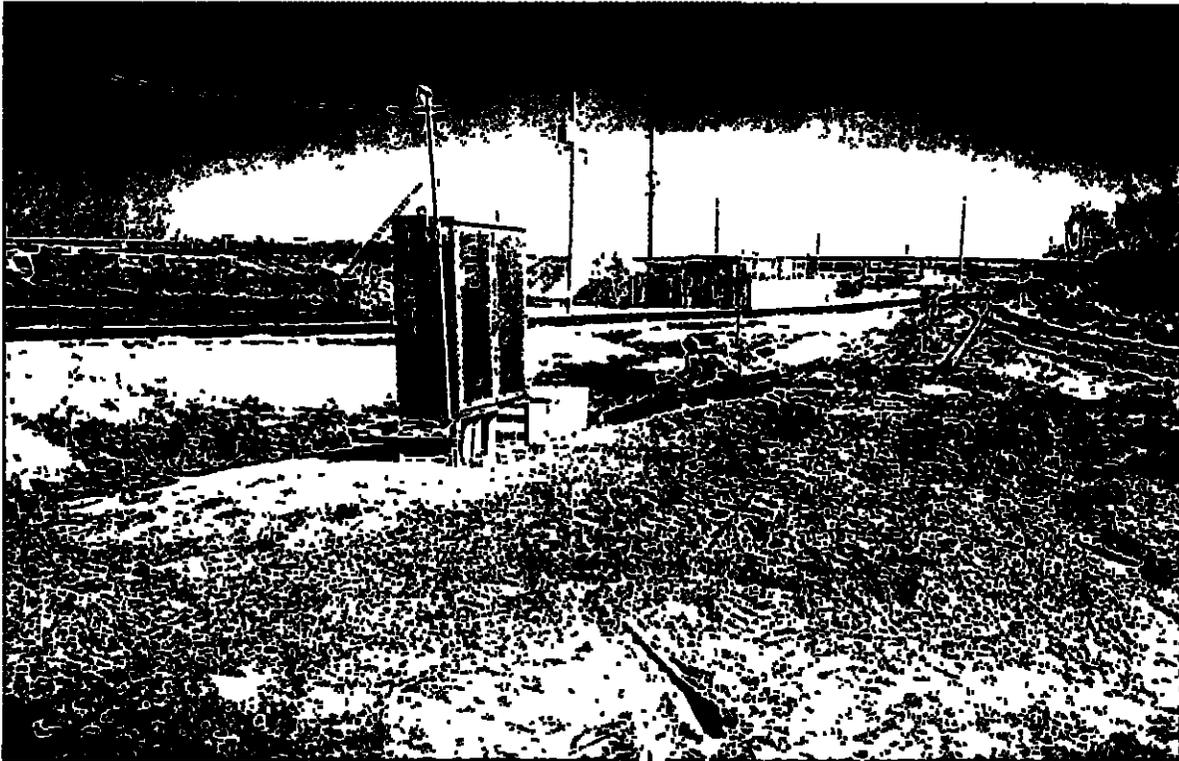
FRISID
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@ MP
@ Agnew

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East

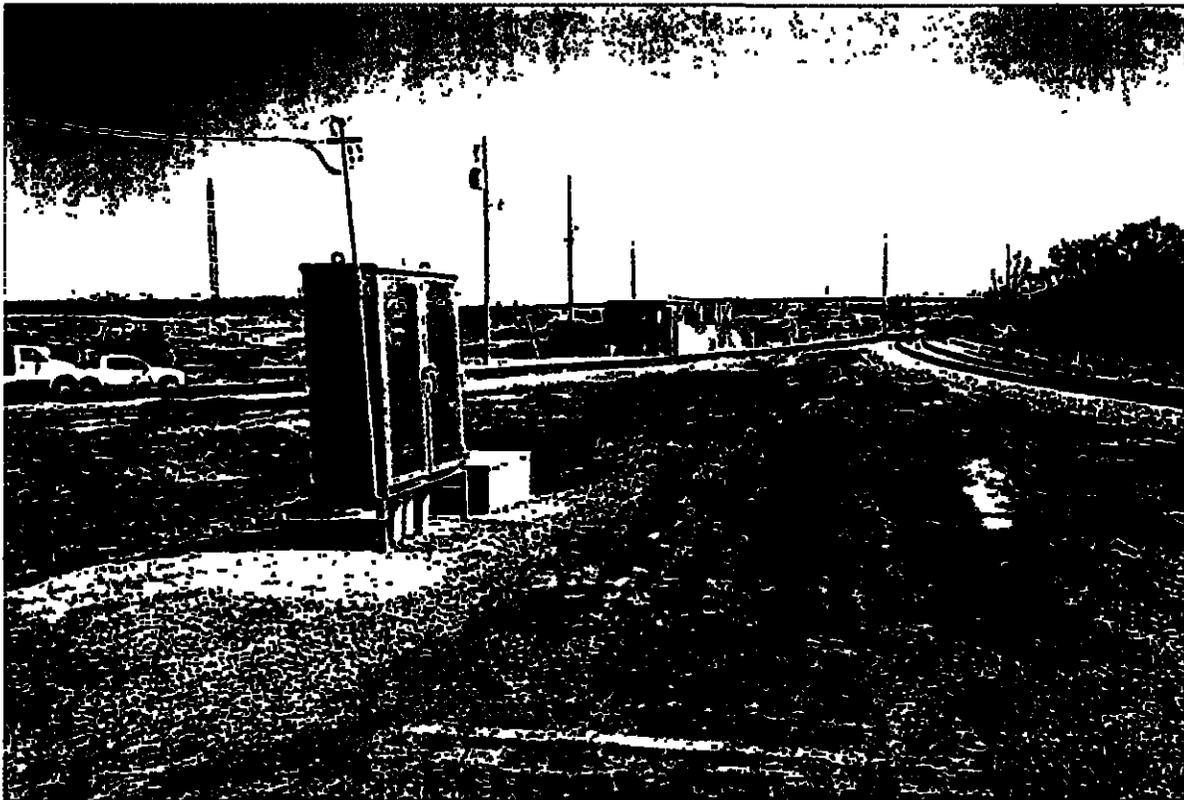
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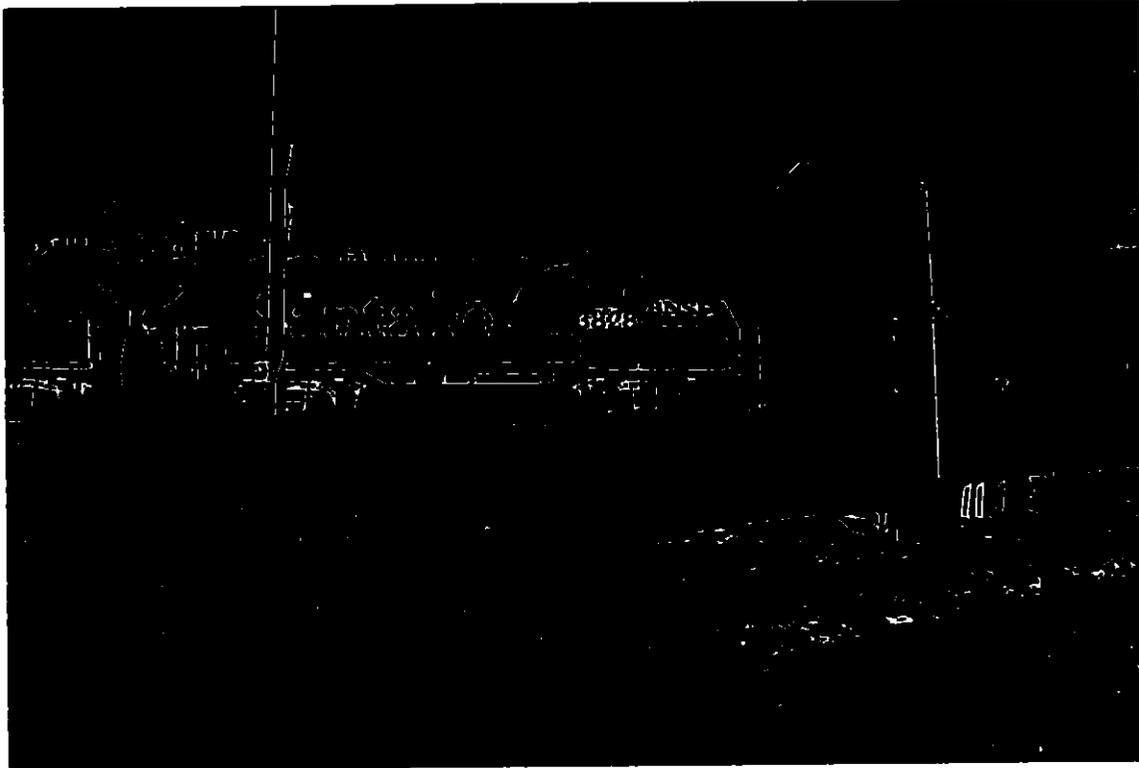
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Chickasha / Frisco Line at MP 540.20 – Looking East – Photo by T. Elmore
TURNOUT IN PLACE ON FEBRUARY 26, 2008
100+ feet of Chickasa Line still in place.



Chickasha / Frisco Line at MP 540.20 – Looking East – Photo by T. Elmore
TURNOUT UNLAWFULLY REMOVED – Date Photo Taken: March 17, 2008
100+ feet of Additional Chickasa Line Unlawfully Removed.



**BNSF Locomotive # 3828 on BNSF Chickasha Line at MP 540.20
Photograph taken by T. Elmore on February 27, 2007**



**BNSF Locomotive #3828 on Producer's Co-Op Spur after delivering string of cars to Co-Op.
BNSF Signal box at MP 540.20 in foreground.
Photograph taken by T. Elmore on February 27, 2007.**

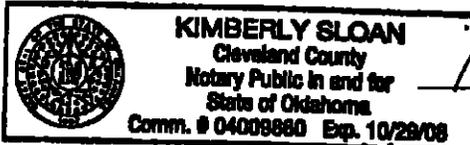
VERIFIED AFFIDAVIT OF THOMAS ELMORE
March 5, 2008

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On the afternoon of February 26, 2008, I observed and photographed a newly constructed cantilevered railway crossing signal at the S. Agnew Avenue crossing of the BNSF, former Frisco line in Oklahoma City, Oklahoma. The base of the structure of this signal was placed directly in the path of the BNSF, former Frisco rail line MP 542.8, as the photos accompanying this affidavit will show. *This rail line is the subject of Surface Transportation Board case: BNSF Railway Company – Abandonment Exemption -- In Oklahoma County, OK, AB-6 (Sub-No. 430 X)*

3. The newly constructed crossing signal was not present at my last visit to this location on January 28, 2008. I spoke on the afternoon of February 26, 2008 with Mr. Don R. Moad of Ram Products, Incorporated, at 1731 S. Agnew Avenue, Oklahoma City, OK 73108 Mr Moad told me he and others at his business had observed the erection of the new signal mast by work crews on Friday, February 22, 2008.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.



Thomas Elmore 3-06-08
Thomas Elmore Date

STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

I HEREBY CERTIFY, that on this 6th day of March, 2008 before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal.

My commission expires: 10-29-08 Kimberly Sloan
Notary Public

**VERIFIED AFFIDAVIT OF THOMAS ELMORE
March 20, 2008**

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On the afternoon of March 19, 2008, in Oklahoma City, Oklahoma, I observed that the switch and turnout at approximately MP 540.15 on the BNSF, former Frisco rail line, connecting that line to the BNSF Red Rock Subdivision interchange ramp, had been recently removed. At a previous visit to this site on February 26, 2008, I had observed the switch and turnout still in place on the BNSF, former Frisco line. I made photographs of this line segment on both occasions, some of which accompany this affidavit. *This rail line is the subject of Surface Transportation Board case BNSF Railway Company -- Abandonment Exemption -- In Oklahoma County, OK, AB-6 (Sub-No. 430 X).*

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.

	KIMBERLY SLOAN		
	Cleveland County Notary Public in and for State of Oklahoma Comm. # 04008860 Exp. 10/29/08	<u>Thomas Elmore</u>	<u>3-20-08</u>
		Thomas Elmore	Date

STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

I HEREBY CERTIFY, that on this 20th day of March 2008, before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained

AS WITNESS my hand and notarial seal.

My commission expires: 10-29-08

Kimberly Sloan
Notary Public