BALL JANIK LLP

ATTORNEYS

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

KARL MORELL

kmorell@dc.bjllp.com

June 26, 2009

E-File

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

Re: STB Finance Docket No. 35164, BNSF Railway Company – Petition For Declaratory Order 225277
STB Docket No. AB-6 (Sub-No. 430X), BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK 225278

Dear Acting Secretary Quinlan:

Attached for e-filing is the Reply of BNSF Railway Company to the Petition For Reconsideration.

If you have any questions, please contact me.

Sincerely yours,

Karl Morell

Karl Morell

Enclosure

PORTLAND, OREGON WASHINGTON, D.C. BEND, OREGON

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

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

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

REPLY OF BNSF RAILWAY COMPANY TO PETITION FOR RECONSIDERATION

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 78131

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: June 26, 2009

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

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

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

REPLY OF BNSF RAILWAY COMPANY TO PETITION FOR RECONSIDERATION

BNSF Railway Company ("**BNSF**") hereby replies in opposition to the Petition for Reconsideration ("**Petition**"), filed with the Surface Transportation Board ("**Board**") on June 8, 2009, by John Kessler ("**J Kessler**"). J Kessler seeks reconsideration of the Board's decision in these proceeding served May 20, 2009 ("**May Decision**").

The Petition is one of the latest filings in the seemingly never ending saga of a highway project in Oklahoma City, OK.[1] Since September 2005, BNSF has attempted to relocate

[1] On June 12, 2009, Edwin Kessler (brother of J Kessler) and James Riffin filed a Petition for stay of the Board's May Decision with the United States Court of Appeals for the District of Columbia.

approximately 1.73 miles of BNSF-owned track that lies in the path of the highway project.[2] Various individuals are vehemently opposed to the highway project and apparently will stop at nothing to thwart that project. They have made countless filings with the Board and the courts. When the facts are inconvenient, they simply file false or misleading information. The record in these proceedings is riddled with fraudulent documents and forged signatures. The conduct of these narcisstic individuals has not been without its consequences. The highway project has been delayed and the costs have increased. The safety of the traveling public has been jeopardized by the needless delays as the existing highway continues to deteriorate. BNSF employees have had to waste their time searching for unidentified shippers that do not exist and alleged "missing" track that never existed in the first place.

The Petition is simply another disingenuous attempt further to delay the highway project. J Kessler fails to identify his true motivation in filing the Petition. Instead, he purports to advance the cause of Boardman, Inc. ("**Boardman**"), a company located on the Western Segment. J Kessler fails to explain the basis on which he has standing to seek reconsideration of the May Decision. He cannot possibly be a party aggrieved by the May Decision since he does not ship from, to or over the tracks at issue. J Kessler also fails to explain by what authority he can advance the position of Boardman. Most importantly, J Kessler fails to acknowledge the evidence submitted by Boardman in Finance Docket No. 35164, which is in complete contravention of the arguments raised by J Kessler in the Petition.

---

[2] In STB Docket No. AB-6 (Sub-No. 430X), BNSF filed a Notice under the Board's class exemption to abandon 2.95 miles of the Chickasha Subdivision consisting of: (1) the 0.19-mile segment on the eastern end ("**Eastern Segment**"); (2) the 1.54-mile segment in the middle of the line ("**Middle Segment**"); and (3) the 1.22-mile segment on the western end ("**Western Segment**"). Only the tracks on the Eastern and Middle Segments lie in the path of the highway project. Subsequently, in STB Finance Docket No. 35164, BNSF sought a ruling from the Board that the relocation of the Eastern and Middle Segments are outside of the Board's jurisdiction.

REPLY

J Kessler's arguments regarding the administrative finality of the May Decision have already been fully addressed and properly refuted by the Board in its decision in these proceedings served June 12, 2009 ("**June Decision**"). As the Board correctly noted, abandonment decisions issued by the Board are administratively final on the date they are served. 49 C.F.R. § 1152(e)(2).[3]

The Board is authorized to grant an exemption on its own initiative. 49 U.S.C. § 10502(b). Neither the governing statute nor the Board's regulations treat exemptions granted at the request of a party differently than exemptions granted on the Board's own initiative.

J Kessler's argument that parties should be given "their first opportunity to address the issues associated with" the abandonment of the Middle Segment (Petition at 4) is absurd. Issues regarding the abandonment or relocation of the Middle Segment have been before the Board for nearly four years. Not a single party with standing (i.e., an actual shipper) has come forward to object to either the abandonment or relocation of the Middle Segment. Boardman, the company J Kessler claims will be harmed, has submitted evidence in the Finance Docket No. 35164, that it would be unaffected by the relocation of the Middle Segment.

Moreover, the Board, in instituting the declaratory order proceeding specifically solicited comments as to whether the relocation of the Middle Segment would adversely affect rail service to Boardman. Consequently, J Kessler and the other individuals seeking to delay the highway project have had more than adequate opportunity to address this issue.

---

[3] In the June Decision, the Board noted that the Petition would be treated as a petition to reopen under 49 C.F.R. § 1152.25(e)(4).

Countless filings have already been made in these proceedings by individuals opposed to the highway project. J Kessler fails to explain what additional misinformation, distorted facts and fraudulent documents he and the other individuals would like to file in these proceedings.

An individual seeking to reopen an administratively final decision must demonstrate that the "proceeding involves material error, new evidence, or substantially changed circumstances." Section 1152.25(e)(4). J Kessler introduces no new evidence nor does he allege changed circumstances. Rather, J Kessler argues that the May Decision contains material error because, in his opinion, the abandonment of the Middle Segment may adversely impact service to Boardman.[4]

J Kessler's contention is misguided in three fundamental respects. Boardman is not an active rail customer. Boardman's last shipment was in June 2003, when it shipped two cars. In February 2002, Boardman received one inbound car. In other words, since 2000, Boardman shipped or received by rail a total of three cars. Thus, in lieu of granting the exemption on its own motion, the Board could have reopened the proceeding in AB-6 (Sub-No. 430X) and granted BNSF's Notice of Exemption as to the Middle Segment and Western Segment since no local traffic had moved over those two Segments during the requisite two year period. As it turns out, the relocation of the Eastern Segment, which was the reason the Board voided BNSF's Notice of Exemption, is not subject to the Board's abandonment jurisdiction.

Moreover, Boardman, the party whose interest J Kessler purportedly seeks to protect, filed a letter in Finance Docket No. 35164, stating that Boardman "would be unaffected by the relocation of" the Middle Segment. In other words, Boardman has expressly refuted the

---

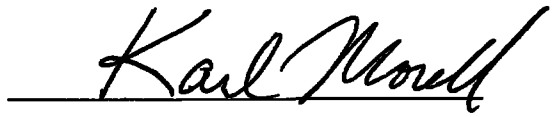
[4] J Kessler also refers to other shippers located on the Western Segment or shippers who may locate on that Segment in the future. There are, however, no other customers on the Western Segment who have shipped in at least the past 10 years and the Board does not, and cannot, take into account possible future customers in the context of an abandonment proceeding.

allegation that J Kessler claims constitute material error. A copy of that letter is attached for the convenience of the Board. Boardman, which is located on the Western Segment and is familiar with the track conditions on the Western Segment, is surely in a better position to assess its transportation needs and whether BNSF can meet those needs from the west than an individual residing in Illinois who likely has never seen the Western Segment or the Boardman facility.[5]

Finally, BNSF has had discussions with Boardman and stands ready to provide rail service to Boardman by direct route from the Western Segment or transload, whichever is most economically viable should such rail service be requested by Boardman.

In summary, BNSF respectfully urges the Board to deny the Petition.

Respectfully submitted,



Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 78131

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: June 26, 2009

[5] It is, of course, not surprising that J Kessler would consider himself more knowledgeable about Boardman's transportation needs than Boardman itself. After all, J Kessler and his cohorts believe they are more knowledgeable about designing and constructing highways than all of the Federal, State and local agencies that approved the construction of the highway project in Oklahoma City.

BOARDMAN INC.
1135 S. McKinley
Oklahoma City, OK 73108
PHONE 405-634-5434
FAX 405-632-6948 www.boardmaninc.com
E-Mail: boardman@boardmaninc.com

November 6, 2008

FD 35164

TO: WHOM IT MAY CONCERN

RE: BNSF REQUEST FOR DECLARATORY ORDER

Upon review of the benefits and costs to our organization, I believe that Boardman, Inc. would be unaffected by the relocation of the section of rail service that runs along the north edge of our facility, between McKinley Avenue and Shield Boulevard, in Oklahoma City.

This is with the understanding that the rail line will be available to Boardman, Inc. from the west; and in the event Boardman, Inc. is in need of rail service, that BNSF will be able to insure us pick-up and delivery directly to our siding or via trans-load.

Respectfully submitted,
BOARDMAN, INC.

James W. Hagemann

James W. Hagemann, CPA
Chief Financial Officer

CC:
BNSF – Ft Worth, Tx
Ed Kessler – Norman, OK

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served on all parties of record by first class mail this 26th day of June, 2009.

Karl Morell