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November 3, 2008

VIA ELECTRONIC FILING

Hon. Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Dear Secretary Quinlan:

Attached for filing in STB Finance Docket No. 35164, BNSF Railway Company--  
Petition for Declaratory Order, are the Comments of Bio-Energy Wellness Center and  
North American Transportation Institute.

Service upon the parties has been effected as noted in the Certificate of Service.

If you have any questions concerning the Comments or if I otherwise can be of  
assistance, please get back to me.

Sincerely yours,

Fritz R. Kahn

atl.  
cc: Kristy D. Clark, Esq.  
Mr. Edwin Kessler

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

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SIB Finance Docket No. 35164

BNSF RAILWAY COMPANY -- PETITION FOR DECLARATORY ORDER

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COMMENTS  
OF  
BIO-ENERGY WELLNESS CENTER and  
NORTH AMERICAN TRANSPORTATION INSTITUTE

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BIO-ENERGY WELLNESS CENTER and  
NORTH AMERICAN TRANSPORTATION INSTITUTE

Dated: November 3, 2008

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

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COMMENTS  
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By its Decision, served October 2, 2008, the Board invited public comments whether what BNSF Railway Company ("BNSF") in its Petition for Declaratory Order, filed July 15, 2008, characterized as track relocation projects in Oklahoma City, OK, are subject to the Board's jurisdiction and require prior Board approval..

Bio-Energy Wellness Center and North American Transportation Institute heretofore have not participated in the instant proceeding. They, however, were parties to the earlier proceeding involving the same railroad line which BNSF again seeks to abandon, STB Docket No. AB-6 (Sub-No.430X), BNSF Railway Company--Abandonment Exemption--In Oklahoma County, OK. In that proceeding BNSF's Notice of Exemption was rejected by the Board, by its Decision, served June 5, 2008, for having been false and misleading, as Bio-Energy Wellness Center and North American Transportation Institute had maintained from the very beginning.

In the instant proceeding, BNSF contends that its filing of the Notice of Exemption to effect the abandonment was a mistake on its part, because all that BNSF is doing, at least as it involves the 1.54-mile segment of its Chickasha Subdivision, between

Milepost 540.15 and Milepost 541.69, referred to by BNSF as the Middle Segment, is simply a relocation of its railroad line, requiring no Board approval.

BNSF's proposal, however, is not one of relocating a line of railroad. Rather it is nothing more than the rerouting of traffic from one line to another of the BNSF's lines. The traffic which heretofore has moved over the Chickasha Subdivision, observed to be two trains each way each day,<sup>1</sup> has been shifted by BNSF to its Packingtown Lead, an existing, unabandoned line of railroad.<sup>2</sup>

There is no mystery about what is a line relocation. In STB Finance Docket No. 33796, Sacramento Regional Transit District--Petition for Declaratory Order Regarding Carrier Status, served July 5, 2000, the Board succinctly stated, "The replacement of an existing track with a substituted track constructed nearby is not subject to the prior approval requirement of 49 U.S.C. 10901 . . ."

In City of Detroit v. Canadian National Ry., et al., 9 I.C.C.2d 1208 (1993), aff'd sub nom., Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995), the ICC concluded it did not need to approve the railroad's construction of a new railroad tunnel paralleling and adjacent to an exiting tunnel which had outlived its usefulness.

In Missouri Pac. R. Co. Trustee Construction, 282 I.C.C. 388 (1952), the railroad proposed to shift its line of railroad to a new railroad line constructed by the city of St. Louis generally two blocks south of its existing line of railroad which would be taken up to permit the improvement of a levee in St. Louis. The ICC, 282 I.C.C. at 392.

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<sup>1</sup> See the attached Verified Statement of Thomas Elmore.

<sup>2</sup> BNSF's claim that the 1.54-mile segment of the Chickasha Subdivision to be abandoned by it has not been used to serve local customers for at least ten years, even if true, nevertheless would be altogether irrelevant. There were no shippers on the Philadelphia and St. Louis railroad lines which were relocated in the P., N. & N. Y. R.R. and Missouri Pac. R. Co. proceedings, infra.

concluded, "[W]e are of the opinion that the proposed construction, abandonment, and acquisition of trackage rights over the tracks owned by the city of St. Louis, Mo., constitute a relocation of a track not within our jurisdiction under section 1 (18)-(20) of the act."

In Public Convenience Application of Pearl Riv. V. R.R., 67 I.C.C. 748 (1921), the railroad's construction of a new line, shorter and with fewer curvatures and lower grades than the old rail line, located not more than one mile from the former location was held by the ICC not to "constitute an abandonment of a line of railroad within the meaning of paragraph (18) of section 1, of the interstate commerce act, and no certificate of authorization from us is necessary."

Nor is there anything unusual in relocating a line of railroad to permit the construction of a highway. In STB Finance Docket No. 33889, State of Texas (Acting by and Through the Texas Department of Transportation)--Acquisition Exemption--West Texas & Lubbock Railroad Company, Inc., served March 16, 2001, the City of Lubbock agreed to obtain a new right-of-way and to take all actions to relocate the railroad's operations from the old rail line the right-of-way of which was sought for highway construction to the new rail line. The Board observed, "The State notes that, upon completion of the construction of the new rail line by the City and State, SWKR's successor, WTLR, will relocate its operations to the new rail line. WTLR's easement over the old rail line will terminate, and the old rail line will become surplus and be deemed abandoned."

Similarly, in Finance Docket No. 32589, The State of Texas, Department of Transportation--Petition for Declaratory Order Regarding Highway Construction in

Tarrant County, TX, served February 1, 1995. the State agreed to obtain the right-of-way for the new rail line to replace the rail line sought for highway construction purposes and to pay for the construction of the replacement track. The proposal, the ICC found, came within its prior holdings "that carrier actions replacing existing track with substitute track constructed nearby is not within the reach of 49 U.S.C. 10901 and 10903 . . ."

In Public Convenience Certificate to P., N. & N. Y. R. R., 67 I.C.C. 252 (1921), the railroad proposed to construct a new line to permit the widening of the city street on which its old line was located. The ICC, 67 I.C.C. at 253, held. "[I]t is evident that the removal of the present tracks between Pike street and Erie avenue can not be said to constitute an abandonment of a line of railroad within the meaning of paragraph (18) of section 1 of the interstate commerce act, since the applicant's whole line will still be in service as before, and will render exactly the same service in the new location."

In each of the foregoing relocation proceedings the removal of the existing line of railroad would have required the Board's abandonment authorization, pursuant to 49 U.S.C. 10903, but for the fact that a new railroad line had been constructed to replace the railroad line being abandoned. Similarly, in each of the relocation proceedings a new line of railroad was built which would have required the Board's construction authorization, pursuant to 49 U.S.C. 10901, but for the fact that the newly installed railroad line simply was a replacement for the railroad line being abandoned.<sup>3</sup>

In sharp contrast with the foregoing line of cases, neither the Oklahoma Department of Transportation, which wants the right-of-way of the 154-mile segment of

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<sup>3</sup> BNSF's present proposal involves no other railroad, and, therefore, BNSF's reference, at pages 12 and 14 of its Petition, to Railroad Consolidation Procedures, 363 I.C.C. 200 (1980), and to the several the joint relocation projects undertaken pursuant to exemption of 49 C.F.R. 1180.2(d)(5) is inapposite.

BNSF's Chickasha Subdivision for the rerouting of I-40, nor BNSF has constructed a new line of railroad to replace the railroad line being abandoned. Rather, BNSF merely has rerouted the traffic which it formerly handled over its Chickasha Subdivision to its existing, unabandoned Packingtwn Lead. BNSF claims to have refurbished its Packingtwn Lead so as to be able to handle the additional traffic diverted from the Chickasha Subdivision. BNSF, however, conceded, at page 7 of its Supplemental Comments, that no authority was required from the Board to perform the work it undertook on the Packingtwn Lead regardless of whatever its plans might have been for the 1.54-mile segment of its Chickasha Subdivision. BNSF may have upgraded its Packingtwn Lead, but it is altogether false and transparently self-serving for BNSF to have asserted, as it did at page 15 of its Petition, that "a totally new rail line was constructed" albeit in the right-of-way of the old Packingtwn Lead. At best, as BNSF has the candor to acknowledge elsewhere in its Petition, as well as in its Supplemental Comments, it merely reconstructed its Packingtwn Lead.

BNSF cites not a single authority in support of its proposition that a railroad's rerouting of traffic from a line being abandoned to another of the railroad's lines, even one that required restructuring to handle the additional volume of the diverted traffic, is a line relocation which can be effected without Board authorization.

That no new railroad line has been constructed to replace the 1.54-mile segment of BNSF's Chickasha Subdivision being abandoned distinguishes BNSF's present proposal from the line of cases in which the projects were found to be line relocations.

If, as BNSF suggests, a railroad can abandon a line of railroad merely by rerouting the traffic which had be handled over that line to another of the railroad's lines

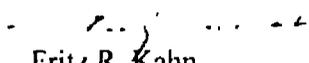
would make a mockery of the Board's abandonment process. Simply by diverting the traffic which had been moving over a railroad line to another of its lines does not give a railroad the license to abandon the line no longer being used. The Board is insistent that a railroad line be not abandoned until the Board authorizes its abandonment and the abandonment grant is exercised by the railroad. See, Finance Docket No. 32518. The Phillips Company--Petition for Declaratory Order, served February 25, 1997; 49 C.F.R. 1152.29(e)(2).

WHEREFORE, Bio Energy Wellness Center and North American Transportation Institute ask that the Board to find that the BNSF Railway Company's rerouting of traffic from the 1.54-mile segment of its Chickasha Subdivision to its Packingtown Lead is not a line relocation but a means of seeking to effect an abandonment of a railroad line without the Board's authorization.

Respectfully submitted,

BIO ENERGY WELLNESS CENTER and  
NORTH AMERICAN TRANSPORTATION INSTITUTE

By their attorney,

  
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Dated: November 3, 2008

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

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VERIFIED STATEMENT OF THOMAS ELMORE

I am Thomas Elmore, and I am the Executive Director of North American Transportation Institute of Oklahoma City, Oklahoma

Before BNSF Railway Company began its efforts to dismantle its Chickasha Subdivision in Oklahoma City in the fall of 2005, I was able to observe without trespassing on the railroad's property that the 1.54-mile of railroad line, between Milepost 540.15 and Milepost 541.69, carried a minimum of two westbound trains and two eastbound trains each day.

I, Thomas Elmore, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection. I certify that I am qualified and authorized to file this Verified Statement on behalf of the North American Transport Institute.

Dated in Oklahoma City this 30th day of October 2008.

  
Thomas Elmore

CERTIFICATE OF SERVICE

I certify that I this day have served BNSF Railway Company by e-mailing a copy of the foregoing Comments to its attorney, Kristy D. Clark, Esq., and Mr. Edwin Kessler by e-mailing a copy of the foregoing Comments to him.

Dated at Washington, DC, this 3rd day of November, 2008.

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Fritz R. Kahn