

223919

LAW OFFICE
THOMAS F. MCFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

November 6, 2008

By e-filing

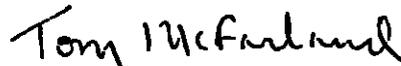
Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re: Finance Docket No. 35164, *BNSF Railway Company* -- *Petition For Declaratory Order*

Dear Ms. Quinlan

Hereby transmitted is a Reply To BNSF's Supplemental Comments for filing with the Board in the above referenced matter

Very truly yours,



Thomas F. McFarland
Attorney for JOHN KESSLER

TMcF kl enc wp8 011344\trstb1

BEFORE THE
SURFACE TRANSPORTATION BOARD

BNSF RAILWAY COMPANY --) FINANCE DOCKET
PETITION FOR DECLARATORY) NO 35164
ORDER)

REPLY TO BNSF'S SUPPLEMENTAL COMMENTS

JOHN KESSLER
P.O Box 251
Wilmette, IL 60091

By: THOMAS F. McFARLAND
THOMAS F McFARLAND, P.C
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for JOHN KESSLER

DUE DATE. November 6, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

BNSF RAILWAY COMPANY --)	FINANCE DOCKET
PETITION FOR DECLARATORY)	NO. 35164
ORDER)	

REPLY TO BNSF'S SUPPLEMENTAL COMMENTS

Pursuant to the Board's procedural decision served October 2, 2008, JOHN KESSLER hereby replies to the Supplemental Comments ("Supp Comments") filed by BNSF Railway Company ("BNSF") on October 17, 2008

STATEMENT OF INTEREST

Jointly with his brother, Edwin Kessler, JOHN KESSLER filed a notice of intent to file an offer of financial assistance when BNSF filed for authority to abandon the rail lines involved in this proceeding. That notice of intent became moot when the Board rejected BNSF's abandonment filing. An intent to acquire the involved rail lines constitutes a valid interest in this proceeding on the part of JOHN KESSLER.

SCOPE OF REPLY

As directed in the Board's procedural decision (at 3), the focus of JOHN KESSLER's Reply is the issue of whether BNSF's proposed removal of trackage to the east of the plant of Boardman, Incorporated (Boardman) would be a track relocation that does not require Board approval, or whether such track removal would adversely affect the ability of BNSF to serve Boardman, in which case abandonment authority would be required for such removal.

JOHN KESSLER has reviewed Comments filed in this proceeding on November 3, 2008 in behalf of Bio-Energy Wellness Center and North American Transportation Institute ("Bio-Energy et al.") to the effect that BNSF's proposed track removal would not be a track relocation at all because the proposal is merely to reroute overhead traffic over an existing nearby BNSF rail line rather than to construct track to replace the track proposed to be removed. JOHN KESSLER agrees with, and endorses those Comments.

JOHN KESSLER's Reply will establish that even if the proposed track removal were considered to be a track relocation, such track removal would be subject to the Board's abandonment jurisdiction under 49 U.S.C. § 10903 because it would adversely affect rail service to Boardman by isolating the track segment on which Boardman is located from the national rail system. That being the case, authority to abandon (remove) the trackage east of Boardman's plant would be required to be denied because the Board will not allow a common carrier track segment to become isolated from the national rail system.

REPLY

The Board has abandonment jurisdiction over removal of track in conjunction with a track relocation project where, as here pertinent, rail service to a shipper would be adversely affected thereby. See, e.g., *Denver & R G W R. Co. -- Jt. Proj -- Relocation Over BN*, 4 I.C.C. 2d 95, 97-98 (1987), and decisions there cited.

It is well settled that so long as there is a common carrier obligation attached to a particular segment of track, the Board will not allow that segment to become isolated from the national rail system as a result of abandonment of an adjoining segment. *Central Oreg & Pac RR, Inc -- Aban. & Discon. of Serv. -- in Coos, Douglas, and Lane Counties, OR*, Docket No.

AB-515 (Sub-No 2), decision served October 31, 2008, citing *Buffalo & Pittsburgh RR, Inc -- Aban Exempt -- in Erie and Cattaraugus Counties, NY*, Docket No. AB-369 (Sub-No. 3X), decision served September 18, 2008.

Reading those principles together, it follows that the Board has abandonment jurisdiction over removal of track in conjunction with a track relocation project where a shipper would be adversely affected as a result of the track removal by becoming isolated from the national rail system. Such an abandonment is to be denied

Boardman is a shipper in interstate commerce who is located on trackage that BNSF refers to as the "Western Segment" of BNSF's Chickasha Subdivision. (Supp. Comments at 5) BNSF has a common carrier obligation in regard to the Western Segment. The Western Segment is a line of railroad that has not been abandoned.

Appendix 1 attached to this Reply is an overhead photograph of a connection between the Western Segment of the Chickasha Subdivision and BNSF's Packingtown Lead track west of the crossing of those Tracks and South Agnew Avenue, which also are depicted. Boardman's plant is located on the Chickasha Subdivision approximately one mile east of that track connection. Boardman cannot access that track connection, and thus cannot access the national rail system, by going west over the Western Segment of the Chickasha Subdivision because BNSF has taken the following actions.

- (1) BNSF has permanently located a large traffic signal mast for South Agnew Avenue in the center of the right-of-way of the Chickasha Subdivision west of South Agnew Street; and**

- (2) **BNSF has removed the diamond that permitted BNSF's Chickasha Subdivision trackage to cross BNSF's Packingtown Lead trackage, thereby preventing operation over the Chickasha Subdivision west of the Packingtown Lead; and**
- (3) **BNSF has removed trackage from the Western Segment of the Chickasha Subdivision between the point at which that diamond was located and the western boundary of South Agnew Avenue**

Attached to this Reply as Appendix 2 is a photograph of the location at which those BNSF actions occurred. The photograph looks east over the Western Segment of the Chickasha Subdivision. The Packingtown Lead trackage goes across in the photograph. The South Agnew Street traffic signal mast clearly blocks trains from operating west to connection of the Chickasha Subdivision and Packingtown Lead. The traffic signal mast is approximately 16 feet in height. It is permanently affixed to the ground. The photograph shows the point at which the crossing diamond was removed. Removal of that diamond prevents trains on the Western Segment of the Chickasha Subdivision from crossing the Packingtown Lead track to access the connection between the Chickasha and Packingtown tracks west of the location shown in the photograph. That is true regardless of the barricading effect of the traffic signal mast. The photograph also clearly depicts removal of trackage from the Western Segment of the Chickasha Subdivision between the traffic signal mast and the western edge of South Agnew Avenue.

Without question, those multiple actions taken by BNSF combine to make it impossible for Boardman traffic to access the national rail system by being transported west over the Western Segment of the Chickasha Subdivision

That being the case, it necessarily follows that removal of trackage east of Boardman's plant (i.e., the "Middle Segment" and "Eastern Segment") in conjunction with the proposed BNSF track relocation project would adversely affect rail service to Boardman by isolating the rail line on which Boardman is located from the national rail system. As set forth in the Board decisions cited earlier, the Board has abandonment jurisdiction over the proposed track removal in that circumstance, and the resulting abandonment is required to be denied.

Nothing in BNSF's Supp. Comments detracts from application of the foregoing legal principles in this matter. At page 6 of its Supp. Comments, BNSF alleges the following.

. . . BNSF has reached a tentative arrangement with Stillwater Central Railroad, Inc. ("Stillwater") for Stillwater to relocate the signal mast at the intersection of the Chickasha Subdivision and the Packingtown Lead, repair the tracks leading to Boardman, and provide service to Boardman . . .²

² Stillwater would need to obtain approval from the Board prior to serving the Boardman facility

That allegation is not entitled to any weight. BNSF has not explained the nature of its alleged "tentative arrangement" with Stillwater. What makes the arrangement "tentative"? Stillwater has not filed or stated anything that would confirm its part in any such "arrangement". Does the "arrangement" to "repair the tracks" include installation of a crossing diamond and replacement of removed trackage? For all that appears in BNSF's Supp. Comments, the arrangement may be tentative because it is contingent on an event that is impossible to happen.

It follows that removal of the trackage in the Middle and Eastern Segments in conjunction with the proposed track relocation project would have a material adverse effect on Boardman by preventing Boardman from accessing the national rail system. That being the case, the Board has

abandonment jurisdiction over removal of that trackage and, inasmuch as the Board would not permit track removal that would isolate Boardman from the national rail system, abandonment authority for removal of such trackage surely would be denied.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should declare that if BNSF were to remove the trackage in the Middle and Eastern Segments, such action would constitute an abandonment under 49 U.S.C. § 10903, which would be denied because it would isolate Boardman and the Western Segment from that national rail system.

Respectfully submitted,

JOHN KESSLER
P.O. Box 251
Wilmette, IL 60091



By: THOMAS F McFARLAND
THOMAS F. McFARLAND, P C
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for JOHN KESSLER

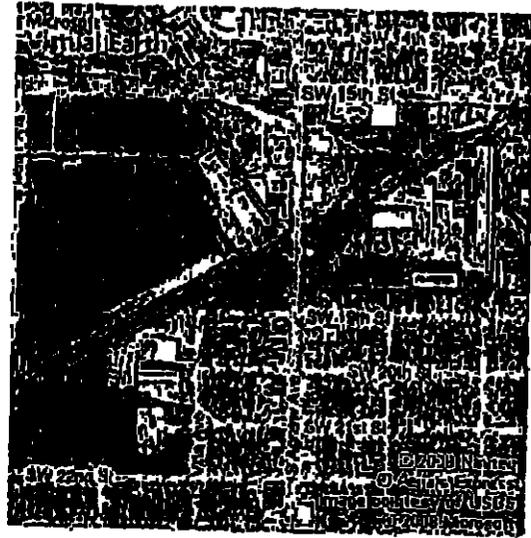
DUE DATE: November 6, 2008

APPENDIX 1

Live Search Maps

My Notes

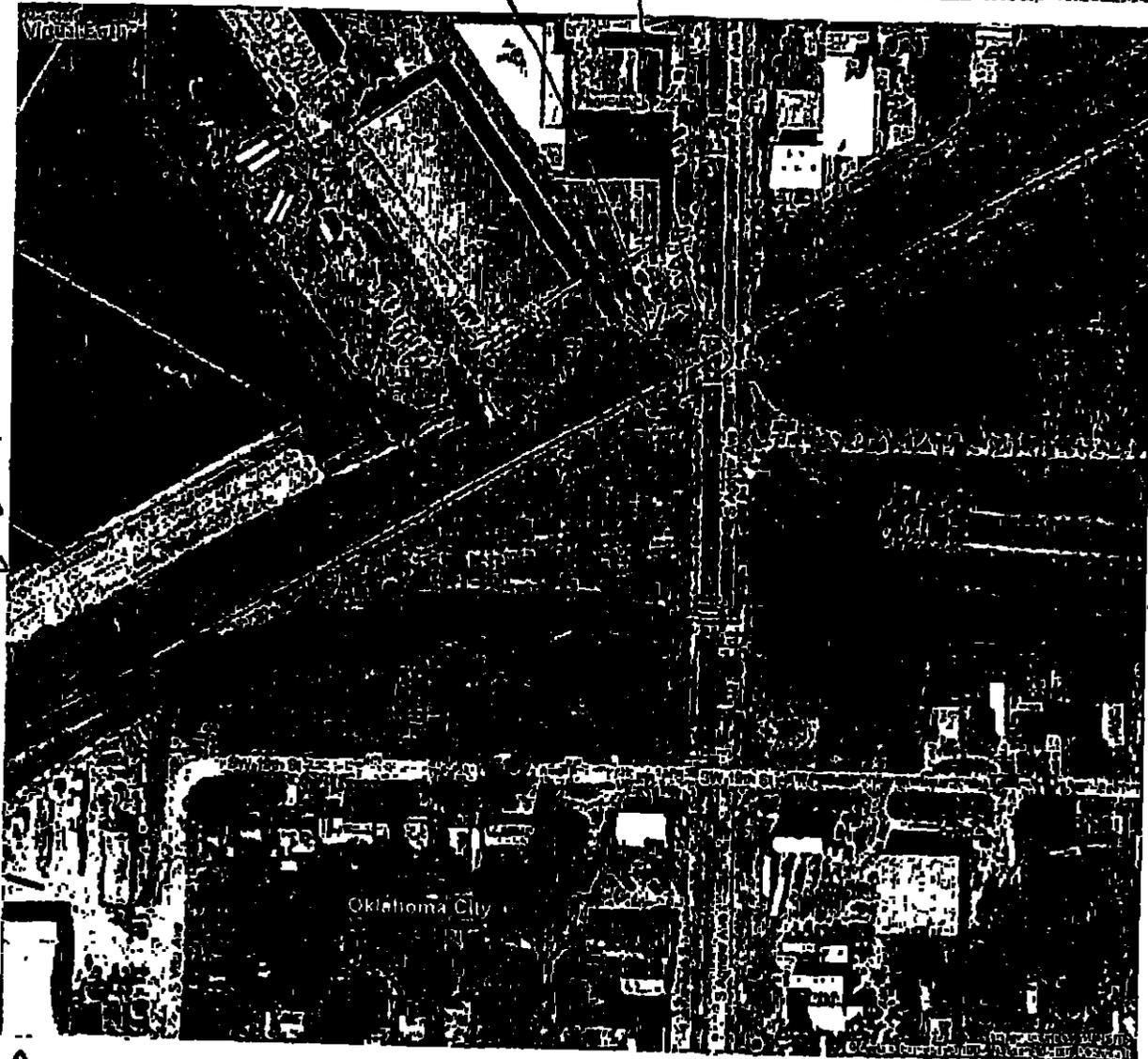
FREE! Use Live Search 411 to find movies, businesses & more. 800-CALL-411.



CROSSING DIAMOND REMOVED
ALSO TRACKAGE REMOVED

TRAFFIC SIGNAL MAINT
BLOCKING TRACKS

WESTERN
SEGMENT OF
CHICKASHA SUB

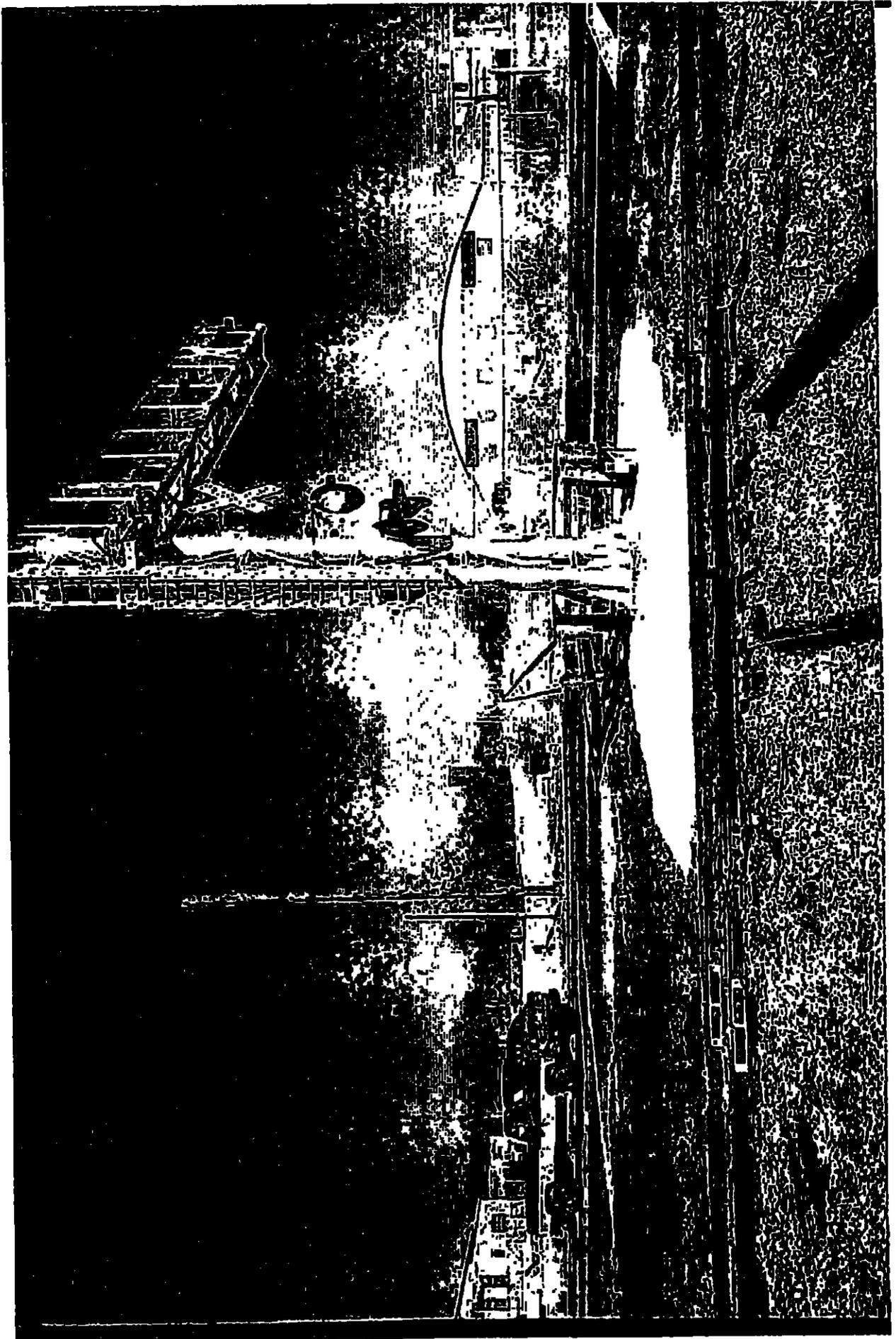


CHICKASHA
LEAD AND
PACKING TOWN

PACKING TOWN
LEAD

 Bird's eye view maps can't be printed, so another map view has been substituted

APPENDIX 2



CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2008, I served the foregoing document, Reply To BNSF's Supplemental Comments, by UPS overnight mail on David Rankin, Esq., and Kristy Clark, Esq., BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828; Fritz R Kahn, Esq , Fritz R. Kahn, P C , 1920 N Street, N.W., 8th fl., Washington, DC 20036-1601; and Edwin Kessler, 1510 Roscmont Drive, Norman, OK 73072.

Thomas F McFarland

Thomas F. McFarland