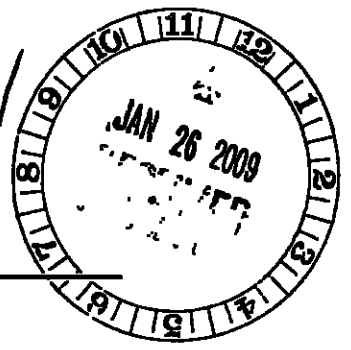


22 4401



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35206

PART 1117

PETITION FOR INJUNCTIVE RELIEF

ENTERED
Office of Proceedings

JAN 26 2009

Part of
Public Record

1. Edwin Kessler ("Kessler"), herewith files this Petition for Injunctive Relief, pursuant to 49 CFR Part 1117, asking the Board:

A. To enjoin the BNSF Railway Company ("BNSF"), its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist from refusing to complete delivery of railcar HTTX 93507 to the Boardman, Inc ("Boardman") spur, which is located near MP 541.75 on the Chickasha Line, and which is located in Oklahoma City, Oklahoma County, Oklahoma.

B. To enjoin BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist from attempting to charge Kessler for any demurrage, storage, or any other charges, associated with BNSF's failure to deliver railcar HTTX 93507 to the Boardman spur on August 19, 2008, the date Kessler was told railcar HTTX would be delivered to the Boardman spur.

C. To enjoin BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist from selling at auction, or in any other way, attempting to sell, convey title, dispose of, or in any other way exercising any dominion or control over Kessler's personal property that is on railcar HTTX 93507, other than to deliver Kessler's personal property that is on railcar HTTX 93507, to the Boardman spur.

FILED

JAN 26 2009

**SURFACE
TRANSPORTATION BOARD**

FEE RECEIVED

JAN 26 2009

**SURFACE
TRANSPORTATION BOARD**

D To enjoin BNSF from refusing to pay to Kessler \$50 00 per day for each day, commencing on August 20, 2008, (the day after a BNSF representative / agent informed Kessler railcar HTTX 93507 was scheduled to be delivered to Kessler c/o Boardman's spur), and ending on the day railcar HTTX 93507 is delivered to Kessler c/o Boardman's spur, as partial compensation for Kessler's loss of use of the locomotive that is on railcar HTTX 93507

2 In support of this Part 1117 Petition for Injunctive Relief, Kessler states

STATEMENT OF FACTS

3. Prior to July 17, 2008, Kessler contracted with BNSF to move Kessler's 'blue carded' locomotive from Wilson, Arkansas to Boardman's spur, which is located near MP 541.75 on the Chickasha Line in Oklahoma City, Oklahoma County, Oklahoma.

4. Prior to July 17, 2008, the full freight charges to transport Kessler's locomotive, via rail, from Wilson, Arkansas to Boardman's spur, in Oklahoma City, OK, were remitted to BNSF

5. Prior to July 17, 2008, BNSF shipped an empty flat car, HTTX 93507, to Wilson, Arkansas, to be used by Kessler to transport Kessler's locomotive from Wilson, Arkansas to Oklahoma City, Oklahoma BNSF placed the empty flat car on the BNSF / Delta Valley and Southern Railway Company's interchange track.

6. Prior to July 17, 2008, the Delta Valley and Southern Railway Company placed railcar HTTX 93507 in a position on the Delta Valley and Southern Railway Company's line of railroad, where Kessler's locomotive could be placed onto railcar HTTX 93507 by two cranes.

7. On July 17, 2008, Kessler's locomotive was hoisted up with two cranes, placed onto railcar HTTX 93507, then secured.

8 On July 17, 2008, two BNSF employees inspected the load (Kessler's locomotive) on railcar HTTX 93507, while the railcar was still on the Delta Valley and Southern Railway Company's line of railroad in Wilson, Arkansas, then stated certain additional steps had to be taken to secure the load onto the railcar. The same two BNSF employees returned on or about July 21, 2008, reinspected railcar HTTX 93507 and its load, determined that the load on railcar

HTTX 93507 was properly secured, then granted the Delta Valley and Southern Railway Company authority to move railcar HTTX 93507 onto the Delta Valley and Southern Railway Company / BNSF interchange track in Wilson, Arkansas

9. On Monday, July 28, 2008, rail car HTTX 93507, with Kessler's "blue-carded" locomotive on it, was delivered by the Delta Valley and Southern Railway Company, to BNSF's interchange track in Wilson, Arkansas. This rail car was way-billed [BNSF waybill # 603761, dated July 29, 2008] to Kessler, care of Boardman, 1135 S. McKinley Avenue, Oklahoma City, OK. The BNSF freight charges were pre-paid. BNSF's web site indicates the transit time from Wilson, Arkansas to Oklahoma City, is 3-4 days.

10. BNSF elected to route the car to Oklahoma City via Blytheville, Arkansas, Memphis, TN, Springfield, MO, and Tulsa, OK. BNSF elected to transport the car to Tulsa, OK using BNSF's trains. BNSF elected to deliver the car to the Stillwater Central Railroad, Inc. (SLWC) in Tulsa, OK. BNSF's routing instructions stated SLWC was to transport the car from Tulsa, OK to Oklahoma City, then SLWC was to place the car on Boardman's spur track.

11. On Tuesday, July 29, 2008, a local BNSF crew took possession of railcar HTTX 93507, then moved it to Blytheville, Ark. On Thursday, July 31, 2008, a BNSF south-bound crew delivered railcar HTTX 93507 to Memphis, TN. On Monday, August 4, 2008, railcar HTTX 93507 was placed in a train that was going to Tulsa, OK. The car arrived in Tulsa, OK on Tuesday, August 5, 2008, where it languished in BNSF's rail yard for nine days, despite daily telephone calls asking when the car would be interchanged with the Stillwater Central Railway Company. Finally, on Thursday, August 14, 2008, the car was placed on SLWC's Tulsa, OK interchange track.

12. On Thursday, August 14, 2008, the SLWC consist that had car HTTX 93507 in it, moved from Tulsa, OK to Bristow, OK, or about 20 miles. (The train crew ran out of operating time.) On Friday, August 15, 2008, the SLWC consist made it to Hibsaw, OK, which is about 40 miles west of Bristow. On Saturday, August 16, 2008, the SLWC consist with railcar HTTX 93507, arrived in Oklahoma City, OK. (Oklahoma City is about 20 miles from Hibsaw, OK.)

13. On Friday, August 15, 2008, John Spawn, SLWC's customer service representative, stated that the car should be delivered to Boardman on Tuesday, August 19, 2008. Mr. Spawn

further stated that on Thursday, August 14, 2008, Mr. Spawn had e-mailed Corey Burkhart, SLWC's roadmaster, asking Mr. Burkhart to inspect Boardman's spur to verify that it was in proper working order. On Monday, August 18, 2008, Brad Hays, the SLWC Oklahoma City Trainmaster, stated the car should be delivered to Boardman on Tuesday, August 19, 2008.

14. On Tuesday, August 19, 2008, Mr. Hays informed Kessler that SLWC could not deliver the car to Boardman, since the tracks leading to Boardman, had been removed.

15. On Friday, August 22, 2008, Ray Pena, General Manager of SLWC, stated in an e-mail:

"After our phone conversation I checked with our General Counsel [Craig Richey] and he has informed me that Stillwater Central RR does not have STB authority to serve the Boardman facility in Oklahoma City. We therefore cannot legally deliver that shipment to Boardman."

16. Joseph Merry, General Manager of Boardman, stated that on Friday, August 22, 2009, he received a telephone call from a BNSF representative in Fort Worth, Texas, who asked "where he wanted them to deliver the locomotive." Mr. Merry stated he replied: "Right here, at Boardman's plant at 1135 S. McKinley, via the rail line adjacent to Boardman."

17. On p.12 of an August 25, 2008 BNSF pleading entitled Amendment to Petition for Declaratory Order, filed in *BNSF Railway Company – Petition for Declaratory Order*, STB Finance Docket No. 35164, BNSF stated that rail access to Boardman had not been permanently severed from the west. BNSF acknowledged that a signal mast has been erected in the middle of where the Chickasha tracks had been, and acknowledged that a portion of the Chickasha rail line had been removed. Particularly significant, is BNSF's statement:

"The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced."

18. In STB Docket No. AB-103 (Sub No. 21X), *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to Set Terms and Conditions*, Served February 22, 2008, on p.9, the Board stated.

".. a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service."

19 In the instant case, a shipper, Kessler, has sought service, has paid for service, and has made a demand that the service sought and paid for, be provided. On August 19, 2008, 22 days after BNSF accepted railcar HTTX 93507, then had it transported from Wilson, Arkansas to Oklahoma City, OK, and some three days after the rail car arrived in Oklahoma City, BNSF and SLWC refused to deliver the car the last 2 miles of its journey

20. On November 26, 2008, Susan Odom, BNSF Manager Network Strategy, sent Kessler a letter, see **Exhibit 2**, stating in relevant part:

“The shipping instructions you provided show that the locomotive was moved for your account, in care of Boardman, however, Boardman has advised BNSF that they have no use for the locomotive.”

“Please arrange for a viable alternate delivery location by logging on to the BNSF Web site ...”

21. On December 18, 2008, Ms Odom sent Kessler a second letter, see **Exhibit 3**, stating in relevant part

“Re: Consignee. Edwin Kessler
Locomotive (D.V.&S. No. 50) on flatcar (HTTX 93507)
Shipped 07/30/2008 from Wilson, AR.

“BNSF waybill #603761, dated July 29, 2008, identifies you as the consignee for the locomotive referenced above that was shipped from Wilson, AR to Oklahoma City, OK. BNSF made numerous attempts to deliver the locomotive to Boardman, per your instructions, however, Boardman has refused to accept delivery of the locomotive and further advises BNSF that they have no use for the same.”

“Because you failed to provide disposition instructions to BNSF, the locomotive is subject to sale at public auction.”

“You . have until the close of business on 12/29/2008 to arrange for disposition of the locomotive or the locomotive will be sold at public auction Your disposition arrangements must include payment of all outstanding charges as well as pre-payment of freight charges for delivery ”

22. On January 8, 2009, Ms. Odom sent Kessler a third letter, see **Exhibit 4**, which reiterated what Ms. Odom had said in her December 18, 2008 letter. On January 15, 2009, Ms. Odom telephone Kessler and informed him that he owed BNSF \$33,000.00 in additional charges

On January 16, 2009, Ms. Odom telephoned Kessler and said Kessler owed BNSF \$6,080.00, rather than \$33,000 Ms Odom said that if Kessler did not send BNSF \$6,080.00 by close of business on January 16, 2009, BNSF would auction off Kessler's locomotive Ms Odom did not state what the \$6,080 charge was for.

23. Kessler has a long-term leasehold interest in a parcel of land which is immediately adjacent to, and on the south side of, the Chickasha Line. This parcel of land is approximately 700 feet west of Boardman's western-most property line. The parcel of land has 300 feet of frontage on the south-side of the Chickasha Line, between MP 542.05 and MP 542.10. Kessler's lease commenced on July 1, 2008. The lease's initial term is for two years Kessler has the right to renew the lease for five additional two-year terms, meaning Kessler has the right to use the leased property for up to 12 years.

24. Kessler owns, in fee simple, a parcel of land that is also on the south side of the Chickasha Line, which parcel lies east of, and immediately adjacent to Kessler's leasehold parcel This fee simple parcel of land lies between MP 541.92 and MP 542.05. Kessler presently has a property interest in land with nearly 1,000 feet of frontage on the south side of the Chickasha Line, between MP 541.92 and MP 542.10. Kessler intends to use this land to store rail cars and to transload rail cars

25 Ms. Odom stated in her letters that Boardman, "has no use for the [locomotive]" That is a truthful statement, **but highly misleading.** Kessler's locomotive was **not** consigned to Boardman's spur **for Boardman's use.** It was consigned to Boardman's spur **for Kessler's use, on Kessler's property.** Kessler intends to use his locomotive to move railcars **on Kessler's property**

26 Ms Odom stated in her letters that Boardman "refused to accept delivery of the locomotive" There have been a number of conversations with Joe Merry, General Manager of Boardman, regarding Kessler's locomotive. I have been advised that **at no time has Mr. Merry ever refused to accept deliver of railcar HTTX 93507.** BNSF offered to transload Kessler's locomotive onto a truck at a distant location, then truck Kessler's locomotive to

Boardman's site. Mr. Merry was told to tell the BNSF representative, that trucking Kessler's locomotive to Boardman's site would be acceptable, **providing that BNSF agreed, in writing,** to pay the expenses associated with trucking Kessler's locomotive from a transload site to Boardman, and to pay the expenses associated with trucking Kessler's locomotive back to a transload site, in the event Kessler desired to ship his locomotive by rail to another location. BNSF never offered, **in writing,** to pay the cost of trucking Kessler's locomotive via motor carrier from a transload site to Boardman, nor has BNSF ever offered, **in writing,** to pay the cost of shipping Kessler's locomotive, via motor carrier, from Boardman's spur to a transload site, in the event that Kessler wants to ship his locomotive via rail to a different location.

27 Kessler paid BNSF to ship his locomotive from Wilson, Arkansas to Boardman's spur. How BNSF gets Kessler's locomotive to Boardman's spur [or to Kessler's adjacent property], is at BNSF's discretion. Since the Chickasha line presently is an active line of railroad, and was not embargoed at the time BNSF contractually agreed to ship Kessler's locomotive to Boardman's spur, Kessler has demanded, and further demands pursuant to this Petition, that BNSF fulfill its common carrier obligation to deliver Kessler's locomotive to Boardman's spur. [In the alternative, Kessler would accept delivery adjacent to Kessler's property.] Kessler would further demand that BNSF agree to pay any trucking charges associated with trucking Kessler's locomotive back to a transload site if, at the time Kessler decides to ship his locomotive via rail to another location, BNSF has not received authority to abandon the portion of the Chickasha Line that is adjacent to Kessler's property.

28. In July, 2008, Mr. Merry gave Kessler permission to use Boardman's spur for the purpose of unloading Kessler's locomotive from a railcar. Kessler intended to remove his locomotive from the railcar, then transport his locomotive to his own property. Having secured permission from Mr. Merry to use Boardman's spur, Kessler contracted with BNSF to transport Kessler's locomotive from Wilson, Arkansas to Boardman's spur. BNSF agreed to provide a flatcar and agreed to transport Kessler's locomotive to Boardman's spur. BNSF quoted a price to Kessler for this service. The full amount of the freight charges were sent to BNSF in the form of bank cashier's checks, prior to BNSF taking possession, on July 29, 2008, in Wilson, Arkansas, of loaded railcar HTTX 93507. Kessler's locomotive was placed onto railcar HTTX 93507,

secured, inspected by BNSF personnel, then approved by BNSF personnel for shipment to Boardman's spur. BNSF in fact transported railcar HTTX 93507 from Wilson, Arkansas to Oklahoma City. At no time prior to the arrival of railcar HTTX 93507 in Oklahoma City, did BNSF ever state it would not complete delivery of railcar HTTX 93507 to Boardman's spur. During the 19 days it took to ship railcar HTTX 93507 from Wilson, Arkansas to Oklahoma City, Kessler had a number of communications with BNSF and Stillwater Central personnel, concerning railcar HTTX 93507.

29. On August 19, 2008, three days after railcar HTTX 93507 arrived in Oklahoma City, Brad Hays a Stillwater Central trainmaster based in Oklahoma City, telephoned Kessler, informing Kessler that Stillwater Central could not complete delivery of railcar HTTX 93507 to Boardman's spur, because BNSF had removed some of the tracks that led to Boardman's spur.

30. On August 22, 2008, Ray Pena, General Manager of SLWC, sent an e-mail which stated SLWC could not effect delivery of railcar HTTX 93507 to Boardman since SLWC did not have authority to operate on the portion of the Chickasha line that served Boardman's spur.

31. Appended hereto as Exhibit 1, is a Google map which depicts the relative locations of Kessler's property, Boardman's property, and the Chickasha Line.

32. Appended hereto as Exhibit 8, is a copy of an Oklahoma City street map which depicts the relative locations of Kessler's property, Boardman's property, the Chickasha Line and other rail lines in Oklahoma City.

ARGUMENT SPECIFIC PERFORMANCE

33. In STB Docket No. AB-103 (Sub No. 21X), *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to Set Terms and Conditions*, Served February 22, 2008, on p. 9, the Board stated:

“... a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service.”

34. On p. 4 of BNSF's April 8, 2008 Reply to Kessler's Motion for Cease and Desist Order, filed in *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*, STB Docket No AB-6 (Sub-No. 430X) [*"BNSF Abandonment Exemption"*], which is incorporated by reference herein as if fully stated herein, BNSF made the following representations to the Board

- “1. BNSF acknowledges track was removed on January 25, 2008 and BNSF is prepared to reconstruct such track if BNSF is not permitted to consummate abandonment of the Line
2. Pursuant to the continuing construction activities in the area, small areas of track have been removed by unauthorized parties without BNSF's knowledge or authorization.
3. After being made aware of the activity described in 2. above, BNSF made concerted efforts to ensure there would be no other permanent track removal without BNSF authorization.
4. Any rail that has been or will be removed as a result of ongoing construction in the vicinity can and will be replaced by BNSF if BNSF is not permitted to consummate abandonment of the Line.”

35. The Board, in a decision served on June 5, 2008, after finding that BNSF's NOE to abandon the portion of the Chickasha line that serves Boardman, contained 'false and misleading statements,' declared BNSF's NOE to abandon the Line, to be void *ab initio*.

36. Kessler has sought service, has paid for service, and has made a demand that the service sought and paid for, be provided. BNSF has represented to the Board that “BNSF is prepared to reconstruct such track if BNSF is not permitted to consummate abandonment of the Line ” BNSF has not been permitted to abandon the Line that serves Kessler's property and Boardman's spur On August 19, 2008, 22 days after BNSF accepted railcar HTTX 93507, then had it transported from Wilson, Arkansas to Oklahoma City, OK, and some three days after the rail car arrived in Oklahoma City, BNSF and SLWC refused to deliver the car the last 2 miles of its journey.

37. Since BNSF has a common carrier obligation to provide rail service on the portion of the Chickasha Line that is adjacent to Kessler's and Boardman's property, Kessler has a right to demand rail service at that location BNSF's obligation to provide, and Kessler's right to

demand, rail service at that location, will remain in effect until BNSF is granted authority to abandon the Line that serves Kessler's / Boardman's properties. Transloading Kessler's property onto a railcar at a distant location, would be another way BNSF could fulfill its common carrier obligation. However, any expenses associated with trucking Kessler's property from / to a distant transload site, would be the sole responsibility of BNSF, since unloading / loading a railcar with Kessler's property at a distant transload site, would be for the convenience of BNSF, not Kessler.

ENJOINING SALE OF LOCOMOTIVE

38. The Board will enjoin threatened actions where (a) there is a substantial likelihood that the movant will prevail on the merits, (b) the movant will be irreparably harmed absent enjoinder of the threatened actions, (c) enjoining the threatened actions would not harm other parties, and (d) enjoining the threatened actions is in the public interest *Hilton v Braunskill*, 481 U.S. 770, 776 (1987), *Washington Metropolitan Area Transit Commission v Holiday Tours, Inc* 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Moreover, the Board's precedent has held that enjoining threatened actions is appropriate without such showings on the merits where additional time is needed to consider difficult issues presented in a case *City of Alameda - Acquisition Exemption - Alameda Belt Line*, STB Finance Docket No 34798 (served December 15, 2005) (stay granted).

CRITERIA FOR ENJOINING THREATENED ACTIONS [ENJOINING SALE OF KESSLER'S LOCOMOTIVE]

39 Kessler argues he has met the four criteria for enjoining the threatened actions , namely

40 **Movant will be irreparably harmed.** If BNSF's threatened action, **the sale of Kessler's locomotive**, is not enjoined, Kessler will be irreparably harmed, for BNSF will auction off Kessler's locomotive Monetary damages will not fully compensate Kessler for the loss of his locomotive, for Kessler's 'blue-carded' locomotive is one-of-a-kind, unique, historic, and cannot be replaced.

41 **Kessler is likely to prevail on the merits.** BNSF has a common carrier obligation to provide service on its active lines of railroad Kessler's and Boardman's properties are adjacent to the Chickasha line, which is an active BNSF line of railroad BNSF contractually agreed to transport Kessler's locomotive to Boardman's spur, and actually undertook performance of that service. BNSF's refusal to perform the last portion of the service it contracted to perform, is unlawful

42. **Balance of harm.** If BNSF auctions off Kessler's locomotive, **Kessler will be irreparable harmed**, since Kessler's locomotive is unique, it is one-of-a-kind, it is historic, and cannot be replaced. If BNSF is enjoined from auctioning off Kessler's locomotive, **BNSF will incur no harm.** Enjoining the sale by BNSF of Kessler's locomotive, will at most, deprive BNSF of potential revenue, revenue which BNSF has no legal right to receive In the unlikely event that BNSF is found to be entitled to additional revenue, Kessler will provide that additional revenue.

43. In addition, any harm that BNSF may suffer, **is self-inflicted** BNSF willingly agreed to transport Kessler's locomotive to Boardman's spur, and in fact transported Kessler's locomotive all the way to Oklahoma City without any objection If BNSF had not unauthorizdly removed portions of the track that services Boardman's spur, Kessler's locomotive would have been delivered without incident If BNSF replaced the track it removed, as it represented to the Board that it would, then BNSF could complete dclivery of Kessler's locomotive, and this issue would be resolved. If BNSF agreed to pay the additional costs associated with trucking Kessler's locomotive the final two miles (and agreed to pay the additional costs associated with trucking Kessler's locomotive back to a transload site), this issue would be resolved. At the time BNSF accepted Kessler's locomotive in Wilson, Arkansas, for delivery to Boardman's spur, BNSF knew it had, for BNSF's convenience, severed the line leading to Boardman's spur, knew it had represented to the Board that the removal of track was 'temporary,' and knew that it had represented to the Board that it would replace any track that had been removed, if a shipper demanded service. In spite of knowing BNSF had severed the line, and knowing the track material BNSF had removed needed to be replaced prior to being able to complete delivery of railcar HTTX 93507 to Boardman's spur, BNSF knowingly, willingly, and voluntarily not only

agreed to transport Kessler's locomotive to Boardman's spur, but also accepted payment for providing this service. Any harm BNSF may incur due to its failure to timely deliver railcar HTTX 93507 to Boardman's spur, and any harm BNSF may incur if it is enjoined from auctioning off Kessler's locomotive, is strictly self-inflicted.

44. It should be noted that BNSF has been providing transload services to the Mid-States Lumber Company for the past several years, at no cost to Mid-States Lumber Company, due to BNSF's removal, for BNSF's convenience, of the track leading to Mid-States Lumber Company, and BNSF's removal of the diamond which carried the Mid-States Lumber Company's spur over the Union Pacific line. See *BNSF Abandonment Exemption*, *op cit* ¶34.

45. **Public interest.** When the Board permitted BNSF to acquire the Chickasha line, the Board found as a condition precedent, that it was pursuant to the public's convenience and necessity. When BNSF acquired the Chickasha line, it voluntarily assumed the common carrier obligation to provide rail service to all locations adjacent to that line. The public has the right to demand rail service at all locations adjacent to the Chickasha line. It is in the public's interest that BNSF provide the common carrier rail service that BNSF has voluntarily agreed to provide.

46. It is also in the public's interest that BNSF be made to follow through with the representations BNSF made to the Board regarding replacing the track material BNSF unauthorizably removed from the Chickasha line. In addition, if BNSF is permitted to ignore the representations it made to the Board regarding replacing track material it removed from the Chickasha line, BNSF will have abused the Board's processes. Permitting BNSF to absolve itself of its common carrier obligations over portions of its lines (by permitting BNSF to remove portions of its line track material, resulting in a *de facto* abandonment of a line), will set a precedent, which will invite other rail carriers to remove track material from lines they no longer desire to service, resulting in *de facto*, rather than authorized, abandonment of rail lines. Permitting BNSF to make false representations to the Board (regarding its intent to replace track material it unauthorizably removed), also will set a bad precedent. Discouraging false representations to the Board is decidedly in the public's interest.

47 In *Central Oregon & Pacific Railroad, Inc – Coos Bay Rail Line*, STB Finance Docket No. 35130, in a decision served on April 11, 2008, the Board ordered RailAmerica, Inc and the Central Oregon & Pacific Railroad, Inc. (“CORP”) to Show Cause why the Board should not consider CORP’s September 21, 2007 embargo of its line between Coquille and Richardson, OR to be an unlawful abandonment and why CORP should not be required either to promptly repair the tunnels on the line and resume rail service or to seek abandonment authority. Since the Board found that it was in the public’s interest to compel CORP to either repair its line or to seek abandonment authority, Kessler argues that it is in the public’s interest to compel BNSF to either repair its line or to seek abandonment authority. And in the event that BNSF elects to seek abandonment authority, it is in the public’s interest to compel BNSF to provide, at its own expense, alternate means of completing delivery of a shipment of goods left stranded by BNSF’s unauthorized activities.

48. In *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty LLC*, STB Finance Docket No 35036, (STB served October 12, 2007), the Board enjoined a rail carrier (U.S Rail Corp.) from engaging in any further activities pending resolution of the issues before the Board. This decision demonstrates that the Board has the authority to enjoin a rail carrier from engaging in certain activities while a matter is before the Board for its consideration

COUNT ONE – SPECIFIC PERFORMANCE

49 Paragraphs 1 to 48 are incorporated by reference herein as if fully stated herein.

50. WHEREFORE, Kessler prays that the Board

Enjoin the BNSF Railway Company (“BNSF”), its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist from refusing to complete delivery of railcar HTTX 93507 to the Boardman spur, which is located near MP 541 75 on the Chickasha Line, and is located in Oklahoma City, Oklahoma County, Oklahoma.

COUNT TWO – ENJOINING ADDITIONAL CHARGES

51. Paragraphs 1 to 50 are incorporated by reference herein as if fully stated herein.

52. WHEREFORE, Kessler prays that the Board:

Enjoin BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist from attempting to charge Kessler for any demurrage, storage, or any other charges, associated with BNSF's failure to deliver railcar HTTX 93507 to Boardman's spur on **August 19, 2008**, the date Kessler was told railcar HTTX would be delivered to Boardman's spur.

COUNT THREE – ENJOINING SALE OF LOCOMOTIVE

53 Paragraphs 1 to 52 are incorporated by reference herein as if fully stated herein.

54 WHEREFORE, Kessler prays that the Board:

Enjoin BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist from selling at auction, or in any other way, attempting to sell, convey title, dispose of, or in any other way exercising any dominion or control over Kessler's personal property that is on railcar HTTX 93507, other than to deliver Kessler's personal property that is on railcar HTTX 93507, to the Boardman spur.

COUNT FOUR – COMPENSATORY DAMAGES

55. Paragraphs 1 to 54 are incorporated by reference herein as if fully stated herein.

56 WHEREFORE, Kessler prays that the Board.

Enjoin BNSF from refusing to pay to Kessler \$50.00 per day for each day, commencing

on August 20, 2008, (the day after Brad Hays, a BNSF trainmaster, informed Kessler railcar HTTX 93507 was scheduled to be delivered to Kessler c/o Boardman's spur), and ending on the day railcar HTTX 93507 is delivered to Kessler c/o Boardman's spur, as partial compensation for Kessler's loss of use of the locomotive that is on railcar HTTX 93507.

57. And for such other and further relief as would be appropriate.

58. I, Edwin Kessler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the above pleading

Executed on: January 26, 2009

Respectfully submitted,


Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2009, a copy of the foregoing Petition for Injunctive Relief, was mailed by first class mail, postage prepaid, to Kristy Clark, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828, and to Fritz Kahn, 8th Floor, 1920 N Street, N.W., Washington, DC 20036-1601.


Edwin Kessler

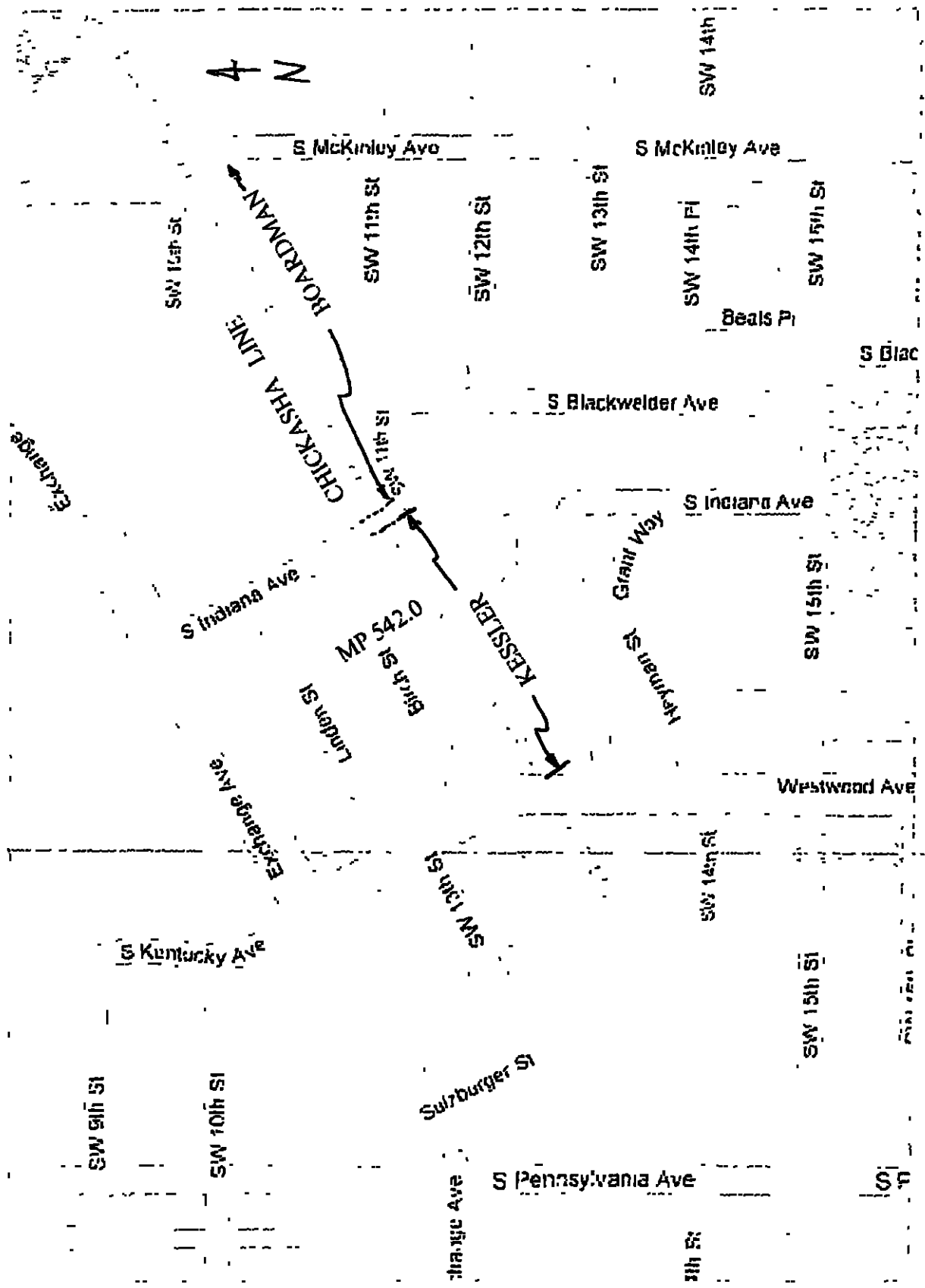


Exhibit 1



Susan Odum
Manager Network Strategy
BNSF Network Development

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Fort Worth, Texas 76131
tel: 817-352-6432
fax: 817-352-7154
email: susan.odum@bnsf.com

November 26, 2008

EXHIBIT 2

VIA OVERNIGHT MAIL

Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072

Re: Delivery instructions for locomotive loaded on car HTTX 93507 (BNSF waybill #603761)

Dear Mr. Kessler

To date, BNSF has been unable to deliver the above referenced locomotive that was shipped from Wilson, AR to Oklahoma City at your direction. The shipping instructions you provided show that the locomotive was moved for your account, in care of Boardman, Inc., however, Boardman has advised BNSF that they have no use for the locomotive. Meanwhile, car HTTX 93507 remains in the possession of BNSF's handling carrier, Stillwater Central Railroad, where it is accruing daily demurrage charges.

As consignee of the shipment, it is your legal responsibility to provide current, accurate information that will effect the shipment's prompt delivery and to arrange for the shipment's receipt in a reasonable period of time once notified that it is available for delivery.

The purpose of this letter is to inform you that BNSF demands disposition of this shipment within five (5) business days of the date you receive this letter. Please arrange for a viable alternate delivery location by logging on to the BNSF Web site (www.BNSF.com) and accessing our secured Internet application shipping instructions.

Be advised that BNSF will pursue all available remedies if this matter is not settled within the stipulated time.

Sincerely,

Susan Odum
Manager Network Strategy

cc: Boardman, Inc.
1136 South McKinley
Oklahoma City, OK 73108

Wetco Companies, Inc.
315 West 3rd Street
Pittsburg, KS 66762



Susan Odom
Manager Network Strategy
BNSF Network Development

BNSF Railway Company
2500 Lou Ment Drive – AOB-3
Fort Worth, Texas 76131
tel 817-352-6432
fax 817-352-7154
email susan.odom@bnsf.com

December 18, 2008

Exhibit 3

VIA OVERNIGHT MAIL (signature required)

Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072

Re Consignee Edwin Kessler
Locomotive (D V & S No 50) on flatcar (HTTX 93507)
Shipped 07/30/2008 from Wilson, AR

Dear Mr Kessler

BNSF waybill #603761, dated July 29, 2008, identifies you as the consignee for the locomotive referenced above that was shipped from Wilson, AR to Oklahoma City, OK BNSF made numerous attempts to deliver the locomotive to Boardman, Inc, per your instructions, however, Boardman has refused to accept delivery of the locomotive and further advises BNSF that they have no use for the same

BNSF demanded disposition of this shipment by letter to you dated 11/26/2008, delivered via UPS (Tracking Number 1Z FV2 495 01 9078 188 9) on 12/02/2008 at 9 34 a m To date we have received no response to our demand and the locomotive remains unclaimed and is in the possession of Stillwater Central Railroad Company Because you failed to provide disposition instructions to BNSF, the locomotive is subject to sale at public auction as provided in Section 4, Paragraph (b) of the Uniform Bill of Lading published in BNSF Tariff UFC 6000-Series

BNSF has reason to believe that James Riffin of Timonium, Maryland (copied on this letter) may be the owner of the locomotive You or Mr Riffin (upon providing proof of ownership) have until the close of business on 12/29/2008 to arrange for disposition of the locomotive or the locomotive will be sold at public auction Your disposition arrangements must include payment of all outstanding charges as well as pre-payment of freight charges for delivery Otherwise, BNSF will deduct all outstanding charges from the proceeds of the public auction and send any remaining balance to you Communication must also provide a specific acknowledgement that the consignee is prepared to receive the shipment and that it will be substantially received within 48 hours of notice of the shipment's arrival

Please feel free to contact me if you have any questions

Sincerely,

Susan Odom
Manager Network Strategy

cc James Riffin
1941 Greenspring Drive
Timonium, MD 21093
Boardman, Inc
Watco Companies Inc



Susan Odom
Manager Network Strategy
BNSF Network Development

BNSF Railway Company
2500 Lou Mark Drive - AOB-3
Fort Worth, Texas 76131
tel: 817-352-6432
fax: 817-352-7184
email: susan.odom@bnsf.com

January 8, 2008

Exhibit 4

VIA USPS CERTIFIED MAIL (signature required)

Edwin Kessler
1510 Rosemont Drive
Norman OK 73072

Re Consignee Edwin Kessler
Locomotive (D V. & S No 50) on flatcar (HTTX 93507)
Shipped 07/30/2008 from Wilson, AR

Dear Mr Kessler

This letter is being sent to you as a courtesy. It includes revised dates for your handling of the disposition of the above-referenced locomotive shipment.

BNSF waybill #803781, dated July 29, 2008, identifies you as the consignee for the locomotive referenced above that was shipped from Wilson, AR to Oklahoma City, OK. BNSF has made numerous attempts to deliver the locomotive to Boardman, Inc., per your instructions, however, Boardman has refused to accept delivery of the locomotive and further advises BNSF that they have no use for the same.

BNSF demanded disposition of this shipment by letter dated 11/26/2008, delivered via UPS (Tracking Number 1Z FV2 495 01 9078 188 9) on 12/02/2008 at 9:34 a.m. To date we have received no response to our demand and the locomotive remains unclaimed and is in the possession of Stillwater Central Railroad Company. Because you failed to provide disposition instructions to BNSF, the locomotive is subject to sale at public auction as provided in Section 4, Paragraph (b) of the Uniform Bill of Lading published in BNSF Tariff UFC 6000-Series.

BNSF has reason to believe that James Riffin of Timonium, Maryland (copied on this letter) may be the owner of the locomotive. You or Mr Riffin (upon providing proof of ownership) have until the close of business on 1/17/2008 to arrange for disposition of the locomotive or the locomotive will be sold at public auction. Your disposition arrangements must include payment of all outstanding charges as well as pre-payment of freight charges for delivery. Otherwise, BNSF will deduct all outstanding charges from the proceeds of the public auction and send any remaining balance to you. Communication must also provide a specific acknowledgement that the consignee is prepared to receive the shipment and that it will be substantially received within 48 hours of notice of the shipment's arrival.

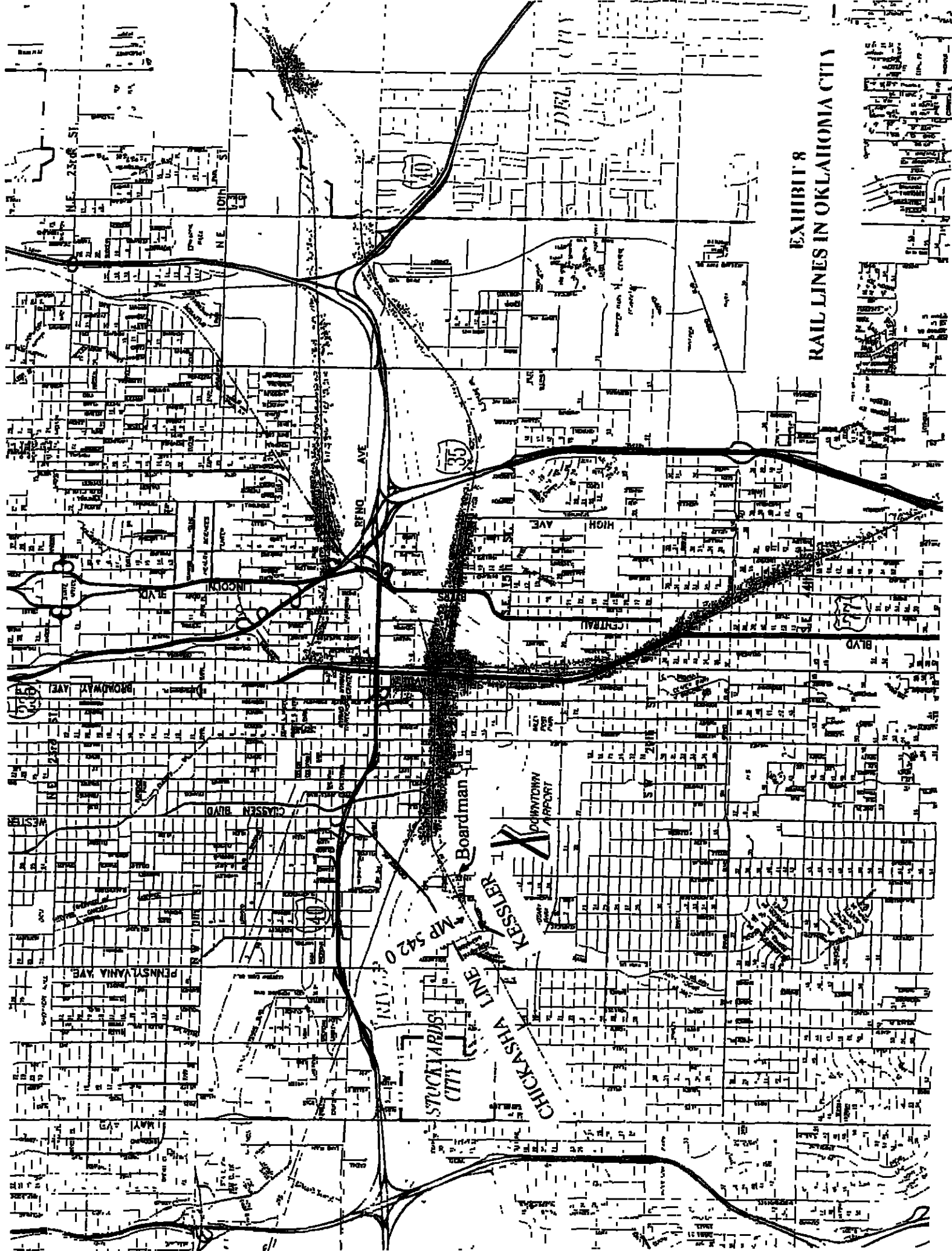
Please feel free to contact me if you have any questions.

Sincerely,

Susan Odom
Manager Network Strategy

cc James Riffin
1941 Greenspring Drive
Timonium, MD 21093

EXHIBIT 8
RAIL LINES IN OKLAHOMA CITY



CHICKASHA LINE
KESLER
Boardman

DOWNTOWN
APPORT

STUCKY ARIS
CITY
MP 542.0

Map labels include: Broadway Ave, Lincoln Ave, Reno Ave, Central Blvd, Chickasha Line, Kessler, Boardman, Downtown, Apport, Stucky Aris City, MP 542.0, Pennsylvania Ave, Classen Blvd, Wester, and various street names like N.E. 23rd St, N.E. 10th St, N.E. 11th St, N.E. 12th St, N.E. 13th St, N.E. 14th St, N.E. 15th St, N.E. 16th St, N.E. 17th St, N.E. 18th St, N.E. 19th St, N.E. 20th St, N.E. 21st St, N.E. 22nd St, N.E. 23rd St, N.E. 24th St, N.E. 25th St, N.E. 26th St, N.E. 27th St, N.E. 28th St, N.E. 29th St, N.E. 30th St, N.E. 31st St, N.E. 32nd St, N.E. 33rd St, N.E. 34th St, N.E. 35th St, N.E. 36th St, N.E. 37th St, N.E. 38th St, N.E. 39th St, N.E. 40th St, N.E. 41st St, N.E. 42nd St, N.E. 43rd St, N.E. 44th St, N.E. 45th St, N.E. 46th St, N.E. 47th St, N.E. 48th St, N.E. 49th St, N.E. 50th St, N.E. 51st St, N.E. 52nd St, N.E. 53rd St, N.E. 54th St, N.E. 55th St, N.E. 56th St, N.E. 57th St, N.E. 58th St, N.E. 59th St, N.E. 60th St, N.E. 61st St, N.E. 62nd St, N.E. 63rd St, N.E. 64th St, N.E. 65th St, N.E. 66th St, N.E. 67th St, N.E. 68th St, N.E. 69th St, N.E. 70th St, N.E. 71st St, N.E. 72nd St, N.E. 73rd St, N.E. 74th St, N.E. 75th St, N.E. 76th St, N.E. 77th St, N.E. 78th St, N.E. 79th St, N.E. 80th St, N.E. 81st St, N.E. 82nd St, N.E. 83rd St, N.E. 84th St, N.E. 85th St, N.E. 86th St, N.E. 87th St, N.E. 88th St, N.E. 89th St, N.E. 90th St, N.E. 91st St, N.E. 92nd St, N.E. 93rd St, N.E. 94th St, N.E. 95th St, N.E. 96th St, N.E. 97th St, N.E. 98th St, N.E. 99th St, N.E. 100th St.

VERIFIED STATEMENT OF EDWIN KESSLER

1. My name is **Edwin Kessler** I am over the age of 18, and I am legally qualified to make this Statement. My contact information is: 1510 Rosemont Drive, Norman, OK 73072. Telephone: (405) 360-2194.

2. Prior to July 17, 2008, I contracted with BNSF to move my one-of-a-kind, unique, historic 'blue carded' locomotive, which has a value in excess of \$100,000.00, from Wilson, Arkansas to Boardman's spur, which is located near MP 541.75 on the Chickasha Line in Oklahoma City, Oklahoma County, Oklahoma.

3. Prior to July 17, 2008, the full freight charges to transport my locomotive, via rail, from Wilson, Arkansas to Boardman's spur, in Oklahoma City, OK, were remitted to BNSF

4 Prior to July 17, 2008, BNSF shipped an empty flat car, HTTX 93507, to Wilson, Arkansas, to be used by me to transport my locomotive from Wilson, Arkansas to Oklahoma City, Oklahoma. BNSF placed the empty flat car on the BNSF / Delta Valley and Southern Railway Company's interchange track.

5 Prior to July 17, 2008, the Delta Valley and Southern Railway Company placed railcar HTTX 93507 in a position on the Delta Valley and Southern Railway Company's line of railroad, where my locomotive could be placed onto railcar HTTX 93507 by two cranes.

6. On July 17, 2008, my locomotive was hoisted up with two cranes, placed onto railcar HTTX 93507, then secured.

7. On July 17, 2008, two BNSF employees inspected the load (my locomotive) on railcar HTTX 93507, while the railcar was still on the Delta Valley and Southern Railway Company's line of railroad in Wilson, Arkansas, then stated certain additional steps had to be taken to secure the load onto the railcar. The same two BNSF employees returned on or about July 21, 2008, reinspected railcar HTTX 93507 and its load, determined that the load on railcar HTTX 93507 was properly secured, then granted the Delta Valley and Southern Railway Company authority to move railcar HTTX 93507 onto the Delta Valley and Southern Railway Company / BNSF interchange track in Wilson, Arkansas.

8. On Monday, July 28, 2008, rail car HTTX 93507, with my "blue-carded" locomotive on it, was delivered by the Delta Valley and Southern Railway Company, to BNSF's interchange track in Wilson, Arkansas. This rail car was way-billed [BNSF waybill # 603761, dated July 29, 2008] to me, care of Boardman, 1135 S. McKinley Avenue, Oklahoma City, OK. The BNSF freight charges were pre-paid. BNSF's web site indicates the transit time from Wilson, Arkansas, to Oklahoma City, is 3-4 days

9. BNSF elected to route the car to Oklahoma City via Blytheville, Arkansas, Memphis, TN, Springfield, MO, and Tulsa, OK. BNSF elected to transport the car to Tulsa, OK using BNSF's trains. BNSF elected to deliver the car to the Stillwater Central Railroad, Inc (SLWC) in Tulsa, OK. BNSF's routing instructions stated SLWC was to transport the car from Tulsa, OK to Oklahoma City, then SLWC was to place the car on Boardman's spur track.

10. On Tuesday, July 29, 2008, a local BNSF crew took possession of railcar HTTX 93507, then moved it to Blytheville, Ark. On Thursday, July 31, 2008, a BNSF south-bound crew delivered railcar HTTX 93507 to Memphis, TN. On Monday, August 4, 2008, railcar HTTX 93507 was placed in a train that was going to Tulsa, OK. The car arrived in Tulsa, OK on Tuesday, August 5, 2008, where it languished in BNSF's rail yard for nine days, despite daily telephone calls asking when the car would be interchanged with the Stillwater Central Railway Company. Finally, on Thursday, August 14, 2008, the car was placed on SLWC's Tulsa, OK interchange track.

11. On Thursday, August 14, 2008, the SLWC consist that had car HTTX 93507 in it, moved from Tulsa, OK to Bristow, OK, or about 20 miles. (I was told the train crew ran out of operating time.) On Friday, August 15, 2008, the SLWC consist made it to Hibsaw, OK, which is about 40 miles west of Bristow. On Saturday, August 16, 2008, the SLWC consist with railcar HTTX 93507, arrived in Oklahoma City, OK. (Oklahoma City is about 20 miles from Hibsaw, OK.)

12. On Friday, August 15, 2008, John Spawn, SLWC's customer service representative, stated that the car should be delivered to Boardman on Tuesday, August 19, 2008. Mr. Spawn further stated that on Thursday, August 14, 2008, Mr. Spawn had e-mailed Corey Burkhardt, SLWC's roadmaster, asking Mr. Burkhardt to inspect Boardman's spur to verify that it was in proper working order. On Monday, August 18, 2008, Brad Hays, the SLWC Oklahoma City Trainmaster, stated the car should be delivered to Boardman on Tuesday, August 19, 2008.

13. On Tuesday, August 19, 2008, Mr. Hays informed me that SLWC could not deliver the car to Boardman, since some of the tracks leading to Boardman, had been removed.

14. On Friday, August 22, 2008, Ray Pena, General Manager of SLWC, stated in an e-mail:

"After our phone conversation I checked with our General Counsel [Craig Richey] and he has informed me that Stillwater Central RR does not have STB authority to serve the Boardman facility in Oklahoma City. We therefore cannot legally deliver that shipment to Boardman."

15. Joseph Merry, General Manager of Boardman, stated that on Friday, August 22, 2008, he received a telephone call from a BNSF representative in Fort Worth, Texas, who asked "where he wanted them to deliver the locomotive." Mr. Merry stated he replied: "Right here, at Boardman's plant at 1135 S. McKinley, via the rail line adjacent to Boardman."

16 On p.12 of an August 25, 2008 BNSF pleading entitled Amendment to Petition for Declaratory Order, filed in *BNSF Railway Company – Petition for Declaratory Order*, STB Finance Docket No. 35164, BNSF stated that rail access to Boardman had not been permanently severed from the west. BNSF acknowledged that a signal mast has been erected in the middle of where the Chickasha tracks had been, and acknowledged that a portion of the Chickasha rail line had been removed. Of particularly significance, is BNSF's statement

“The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced.”

17. In STB Docket No AB-103 (Sub No. 21X), *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to Set Terms and Conditions*, Served February 22, 2008, on p 9, the Board stated.

“ a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service.”

18. I am a shipper on the Chickasha Line. I sought rail service from BNSF I paid for rail service from BNSF. I have made a demand that the service I sought and paid for, be provided. On August 19, 2008, 22 days after BNSF accepted railcar HTTX 93507, then had it transported from Wilson, Arkansas to Oklahoma City, OK, and some three days after the rail car arrived in Oklahoma City, BNSF and SLWC refused to deliver railcar HTTX 93507 the last 2 miles of its journey.

19 On November 26, 2008, Susan Odom, BNSF Manager Network Strategy, sent me a letter, see **Exhibit 2**, stating in relevant part:

“The shipping instructions you provided show that the locomotive was moved for your account, in care of Boardman, however, Boardman has advised BNSF that they have no use for the locomotive.”

“Please arrange for a viable alternate delivery location by logging on to the BNSF Web site ..”

20 On December 18, 2008, Ms Odom sent me a second letter, see **Exhibit 3**, stating in relevant part:

“Re. Consignee Edwin Kessler
Locomotive (D.V.&S. No. 50) on flatcar (HTTX 93507)
Shipped 07/30/2008 from Wilson, AR.

“BNSF waybill #603761, dated July 29, 2008, identifies you as the consignee for the locomotive referenced above that was shipped from Wilson, AR to Oklahoma City, OK.

BNSF made numerous attempts to deliver the locomotive to Boardman, per your instructions, however, Boardman has refused to accept delivery of the locomotive and further advises BNSF that they have no use for the same.”

“Because you failed to provide disposition instructions to BNSF, the locomotive is subject to sale at public auction.”

“You ... have until the close of business on 12/29/2008 to arrange for disposition of the locomotive or the locomotive will be sold at public auction. Your disposition arrangements must include payment of all outstanding charges as well as pre-payment of freight charges for delivery.”

21. On January 8, 2009, Ms. Odom sent me a third letter, see **Exhibit 4**, which reiterated what Ms. Odom had said in her December 18, 2008 letter.

22 On January 15, 2009, Ms. Odom telephone me and informed me that I owed BNSF \$33,000 00 in additional charges. On January 16, 2009, Ms. Odom telephoned me and said that I owed BNSF \$6,080 00, rather than \$33,000. Ms Odom said that if I did not send BNSF \$6,080.00 by close of business on January 16, 2009, BNSF would auction off my locomotive. Ms Odom did not state what the \$6,080 charge was for

23 I leased a parcel of land which is immediately adjacent to, and on the south side of, the Chickasha Line This parcel of land is approximately 700 feet west of Boardman’s western-most property line. The parcel of land has 300 feet of frontage on the south-side of the Chickasha Line, between MP 542.05 and MP 542.10. My lease commenced on July 1, 2008 The lease’s initial term is for two years I have the right to renew the lease for five additional two-year terms, meaning I have the right to use the leased property for up to 12 years.

24. I own, in fee simple, a parcel of land that is also on the south side of the Chickasha Line, which parcel lies east of, and immediately adjacent to my leased parcel. This fee simple parcel of land lies between MP 541.92 and MP 542 05. I presently have a property interest in land with nearly 1,000 feet of frontage on the south side of the Chickasha Line, between MP 541 92 and MP 542.10 I intend to use this land to store rail cars and to transload rail cars

25. Ms. Odom stated in her letters that Boardman, “has no use for the [locomotive].” That is a truthful statement, but **highly misleading**. My locomotive was not consigned to

Boardman's spur for Boardman's use. It was consigned to Boardman's spur for MY use, on MY property. I intend to use my locomotive to move railcars on my property.

26. Ms Odom stated in her letters that Boardman "refused to accept delivery of the locomotive." There have been a number of conversations with Joe Merry, General Manager of Boardman, regarding my locomotive. I have been advised that **at no time has Mr. Merry ever refused to accept delivery of railcar HTTX 93507** BNSF offered to transload my locomotive onto a truck at a distant location, then truck my locomotive to Boardman's site. Mr. Merry was told to tell the BNSF representative, that trucking my locomotive to Boardman's site would be acceptable, **providing that BNSF agreed, in writing, to pay the expenses associated with trucking my locomotive from a transload site to Boardman, and to pay the expenses associated with trucking my locomotive back to a transload site, in the event I desire to ship my locomotive by rail to another location. BNSF never offered, in writing, to pay the cost of trucking my locomotive via motor carrier from a transload site to Boardman, nor has BNSF ever offered, in writing, to pay the cost of shipping my locomotive, via motor carrier, from Boardman's spur to a transload site, in the event that I want to ship my locomotive via rail to a different location.**

27. I paid BNSF to ship my locomotive from Wilson, Arkansas to Boardman's spur. How BNSF gets my locomotive to Boardman's spur [or to my adjacent property], is at BNSF's discretion. Since the Chickasha line presently is an active line of railroad, and was not embargoed at the time BNSF contractually agreed to ship my locomotive to Boardman's spur, I have demanded, and further demand pursuant to the Petition accompanying this Verified Statement, that BNSF fulfill its common carrier obligation to deliver my locomotive to Boardman's spur. [In the alternative, I would accept delivery adjacent to my property] I would further demand that BNSF agree to pay any trucking charges associated with trucking my locomotive back to a transload site if, at the time I decide to ship my locomotive via rail to another location, BNSF has not received authority to abandon the portion of the Chickasha Line that is adjacent to my property.

28. In July, 2008, Mr. Merry gave me permission to use Boardman's spur for the purpose of unloading my locomotive from a railcar. I intended to remove my locomotive from the railcar,

then transport my locomotive to my own property. Having secured permission from Mr Merry to use Boardman's spur, I contracted with BNSF to transport my locomotive from Wilson, Arkansas to Boardman's spur. BNSF agreed to provide a flatcar and agreed to transport my locomotive to Boardman's spur. BNSF quoted a price to me for this service. The full amount of the freight charges were sent to BNSF in the form of bank cashier's checks, prior to BNSF taking possession, on July 29, 2008, in Wilson, Arkansas, of loaded railcar HTTX 93507. My locomotive was placed onto railcar HTTX 93507, secured, inspected by BNSF personnel, then approved by BNSF personnel for shipment to Boardman's spur. BNSF in fact transported railcar HTTX 93507 from Wilson, Arkansas to Oklahoma City. At no time prior to the arrival of railcar HTTX 93507 in Oklahoma City, did BNSF ever state it would not complete delivery of railcar HTTX 93507 to Boardman's spur. During the 19 days it took to ship railcar HTTX 93507 from Wilson, Arkansas to Oklahoma City, I had a number of communications with BNSF and Stillwater Central personnel, concerning railcar HTTX 93507.

29. On August 19, 2008, three days after railcar HTTX 93507 arrived in Oklahoma City, Brad Hays a Stillwater Central trainmaster based in Oklahoma City, telephoned me, informing me that Stillwater Central could not complete delivery of railcar HTTX 93507 to Boardman's spur, because BNSF had removed some of the tracks that led to Boardman's spur

30. On August 22, 2008, Ray Pena, General Manager of SLWC, sent an e-mail which stated SLWC could not effect delivery of railcar HTTX 93507 to Boardman since SLWC did not have authority to operate on the portion of the Chickasha line that served Boardman's spur

31. Appended hereto as Exhibit 1, is a Google map which depicts the relative locations of my property, Boardman's property, and the Chickasha Line

32. Appended hereto as Exhibit 8, is a copy of an Oklahoma City street map which depicts the relative locations of my property, Boardman's property, the Chickasha Line and other rail lines in Oklahoma City.

Respectfully

Edwin Kessler
Edwin Kessler

VERIFICATION

STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

Subscribed and sworn before me by **EDWIN KESSLER**, on 24th day of January, 2009

[Signature]

NOTARY PUBLIC

My Commission Expires 12/03/2011

(SEAL)

