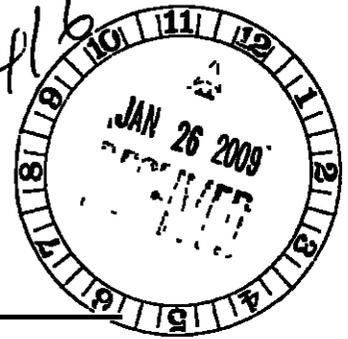


**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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**FINANCE DOCKET NO. 35206**

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**PART 1117**

**PETITION FOR INJUNCTIVE RELIEF**

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**ENTERED  
Office of Proceedings  
JAN 26 2009  
Part of  
Public Record**

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**MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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1. Edwin Kessler (“Kessler”), herewith files this Motion for Temporary Restraining Order and Preliminary Injunction, to accompany his Petition for Injunctive Relief.
2. As set forth more particularly in the accompanying Petition for Injunctive Relief, which is incorporated by reference herein as if fully stated herein, Kessler seeks injunctive relief, asking that the Board enjoin BNSF from selling at auction Kessler’s locomotive, enjoin BNSF from refusing to deliver railcar HTTX 93507 to Boardman Inc.’s (“Boardman”) spur, enjoin BNSF from charging Kessler any demurrage, storage or any other charges, and enjoin BNSF from refusing to pay to Kessler \$50.00 for each day following August 19, 2008, BNSF refuses to deliver railcar HTTX 93507 to Boardman’s spur.
3. In this Motion for Temporary Restraining Order and Preliminary Injunction, Kessler asks that the Board issue a Temporary Restraining Order and a Preliminary Injunction **enjoining BNSF from selling at auction Kessler’s locomotive prior to a ruling on the merits of Kessler’s Petition for Injunctive Relief.**

**CONDENSED STATEMENT OF FACTS**

4. Following is a condensed statement of facts. A more complete statement of facts is contained in Kessler's Petition for Injunctive Relief.

5. On July 29, 2008, pursuant to BNSF waybill # 603761, BNSF contracted with Kessler to transport Kessler's locomotive, using railcar HTTX 93507, which railcar was provided by BNSF, from Wilson, Arkansas to Boardman's spur, which is located on BNSF's Chickasha line, near MP 541.75, in Oklahoma City, Oklahoma. **BNSF's freight bill was prepaid.** BNSF took possession of railcar HTTX 93507, which had Kessler's locomotive secured on it, on **July 29, 2008.** On August 16, 2008, railcar HTTX 93507 arrived in Oklahoma City. Kessler was told railcar HTTX 93507 would be delivered to Boardman's spur on **August 19, 2008.** On August 19, 2008, Kessler received a telephone call from Brad Hays, the Stillwater Central Railroad ("SLWC") trainmaster in Oklahoma City. During the ensuing telephone conversation, Mr. Hays informed Kessler that SLWC could not deliver railcar HTTX 93507 to Boardman's spur, due to BNSF's removal of track leading to Boardman's spur. Kessler has made several demands that his locomotive be delivered to Boardman's spur, including filing, on September 3, 2008, in *Petition of BNSF for Declaratory Order*, STB Finance Docket No. 35164, a *Motion to Compel* delivery of railcar HTTX 93507 to Boardman's spur, all to no avail. Railcar HTTX 93507 has been languishing in SLWC's Oklahoma City rail yard since it arrived on August 16, 2008.

6. In a series of letters dated November 26 and December 18, 2008, and January 8, 2009, Susan Odom, BNSF's Manager Network Strategy, demanded Kessler consign railcar HTTX 93507 to a site other than Boardman's spur, demanded Kessler send an additional \$6,080.00 to BNSF, and **threatened to sell at auction Kessler's locomotive**, then use the proceeds of the auction sale to offset the \$6,080 BNSF claims Kessler owes BNSF.

7. Kessler has a property interest in two adjacent parcels of land, which parcels have a total frontage of approximately 1,000 feet on the south side of the Chickasha line between MP 541.92 and 542.10.

8. The Chickasha line adjacent to Boardman's spur and Kessler's property, is an active BNSF line of railroad.

9. Auctioning off Kessler's locomotive would cause Kessler irreparable harm, since Kessler's locomotive is 'blue-carded' (it is ready to be placed into service), is unique, is one-of-

a-kind, is historic, and cannot be replaced. Monetary damages cannot fully compensate Kessler if BNSF auctions off Kessler's locomotive.

### **SUBSTANTIAL, IMMEDIATE, CERTAIN AND IRREPARABLE HARM**

10. If BNSF is not enjoined from selling Kessler's locomotive at auction, Kessler will suffer substantial, immediate, certain and irreparable harm, to wit:

11 **Irreparable harm.** Kessler's locomotive is unique, one-of-a-kind, and is historic. Monetary damages cannot fully compensate Kessler, since a replacement locomotive identical to Kessler's locomotive (or even similar), cannot be had for any price. Consequently, if BNSF sells Kessler's locomotive, Kessler will suffer irreparable harm.

12. **Immediate, certain harm.** The harm Kessler would suffer is immediate and certain, for BNSF has stated in a January 16, 2009 telephone call that it will sell Kessler's locomotive at auction if Kessler does not (1) remit \$6,080.00 to BNSF and (2) reconsign railcar HTTX 93507, which has Kessler's locomotive on it, to a location other than Boardman's spur, by close of business, **January 16, 2009**. January 16, 2009 has passed. Kessler has not remitted \$6,080.00 to BNSF, nor has Kessler reconsigned railcar HTTX 93507 to a location other than Boardman's spur. BNSF has indicated in no uncertain terms that it will sell at auction Kessler's locomotive imminently, if not enjoined by the Board.

13. **Substantial harm.** The harm Kessler would suffer if BNSF sells Kessler's locomotive is substantial, since the locomotive has a value in excess of \$100,000.00.

### **BALANCE-OF-HARM, MERITS, PUBLIC-INTEREST**

14. **Balance of harm.** If BNSF sells at auction Kessler's locomotive, Kessler will be irreparably 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 BNSF from selling 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

15. 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 unauthorizedly 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 delivery 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.

16. **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.

17 **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

18. 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 unauthorizedly 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 unauthorizedly removed), also will set a bad precedent. Discouraging false representations to the Board is decidedly in the public's interest.

## **SECURITY**

19 **Security.** In the event the Board finds it appropriate for Kessler to post security prior to the Board granting a preliminary injunction or a Temporary Restraining Order, Kessler is prepared to do so. Kessler would propose to place \$7,000.00 in a certificate of deposit (which is greater than the \$6,080 BNSF claims Kessler owes BNSF), then give possession of that certificate of deposit to an escrow agent (Michael Salem, an attorney in Norman, Oklahoma), with instructions to redeem the certificate of deposit, then transmit the proceeds of that certificate of deposit to BNSF if Kessler is ultimately found to be liable to BNSF for any additional charges

20 **WHEREFORE,** Kessler prays that the Board issue a **Temporary Restraining Order, enjoining** BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, pending further order of the Board, 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, or to Kessler's property near MP 542.0 on the BNSF Chickasha Line.

21. WHEREFORE, Kessler prays that the Board issue a **Preliminary Injunction, enjoining** BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, pending a determination of the merits of Kessler's Petition for Injunctive Relief, 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, or to Kessler's property near MP 542.0 on the BNSF Chickasha Line.

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

23. Proposed Orders are appended hereto.

24 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.

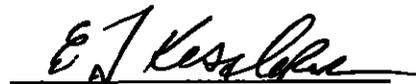
Executed on: January 26, 2009

Respectfully submitted,

  
Edwin Kessler

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of January, 2009, a copy of the foregoing Motion for Temporary Restraining Order and Preliminary Injunction, 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, 8<sup>th</sup> Floor, 1920 N Street, N.W., Washington, DC 20036-1601.

  
Edwin Kessler

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35206**

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**TEMPORARY RESTRAINING ORDER**

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Having considered the Petition for Injunctive Relief, Motion for Temporary Restraining Order and Preliminary Injunction, and any opposition thereto, the testimony presented, and the argument of counsel, this Board finds that the issuance of a temporary restraining order will prevent further harm to Edwin Kessler by actions of the BNSF Railway Company. That harm, the Board further finds, is irreparable because the locomotive which is the subject of this Temporary Restraining Order, is unique, is one-of-a-kind, is historic, and monetary damages cannot fully compensate Mr. Kessler if the locomotive is sold. Accordingly, it is at \_\_\_\_\_ o'clock a.m. / p.m. on this \_\_\_\_\_ day of \_\_\_\_\_, 2009

**ORDERED** that, pending a determination of Mr. Kessler's Motion for Preliminary Injunction, the BNSF Railway Company, their agents, servants, and employees, and all persons acting in concert with them be, and hereby:

**ARE ENJOINED** 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 delivering said railcar either to Boardman Inc.'s spur, or to Mr. Kessler's property, both of which are located, respectively, at or near MP 541.75 and MP 542.0 on the BNSF Chickasha line in Oklahoma City, Oklahoma,

It is further **ORDERED** that this temporary restraining order shall expire at \_\_\_\_\_ o'clock p.m. on the \_\_\_\_\_ day of \_\_\_\_\_, 2009 unless it is further extended by order of this Board. Any party or person affected by the order may apply for a modification or dissolution of the order on two days' notice, or such shorter notice as this Board may prescribe, to the party who obtained the order

This temporary restraining order will be effective as of the date and time it is placed on the Board's Web Site

Dated: \_\_\_\_\_

By the Board

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35206**

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**PRELIMINARY INJUNCTION**

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Having considered the Petition for Injunctive Relief, Motion for Temporary Restraining Order and Preliminary Injunction, filed by Edwin Kessler, and any opposition thereto, the testimony presented, and the argument of counsel, it is on this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, **ORDERED** that Edwin Kessler's Motion for Preliminary Injunction is hereby **GRANTED**

Accordingly, it is further **ORDERED** that, pending a determination of the merits of the Petition for Injunctive Relief, BNSF Railway Company, its agents, servants, and employees, and all persons acting in concert with them be, and hereby

**ARE ENJOINED** 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 delivering said railcar either to Boardman Inc.'s spur, or to Mr Kessler's property, both of which are located, respectively, at or near MP 541.75 and MP 542.0 on the BNSF Chickasha line in Oklahoma City, Oklahoma;

By the Board.