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March 11, 2009

Hon Anne K Quinlan, Acting Secretary  
Surface Transportation Board  
395 E Street S W  
Washington, D C 20423-0001

By overnight FEDEX

224658

Re STB Docket No FD-35206

Dear Acting Secretary Quinlan,

Enclosed for filing and consideration are originals and ten copies of my Motion to Strike, Petition for Injunctive Relief, and Response to Reply of BNSF Railway Company to my earlier Petition for Injunctive Relief

Service upon Karl Morell has been effected as noted in the Certificates of Service

If there are any questions concerning these documents or if I can be of assistance otherwise, please don't hesitate to get in touch with me

Thank you

Sincerely,

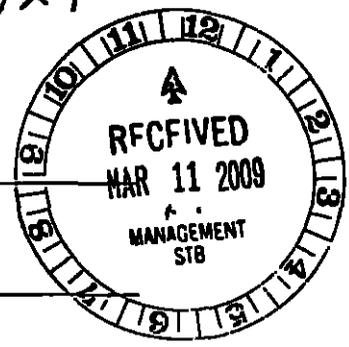
A handwritten signature in cursive script that reads 'Edwin Kessler'.

cc Karl Morell

ENTERED  
Office of Proceedings  
MAR 11 2009  
Part of  
Public Record

224658

BEFORE THE  
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 35206

PART 1117

PETITION FOR INJUNCTIVE RELIEF

RESPONSE OF EDWIN KESSLER TO  
REPLY OF BNSF RAILWAY COMPANY TO  
KESSLER'S PETITION FOR INJUNCTIVE RELIEF

ENTERED  
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Public Record

1 49 CFR 1104.13 (c) states "A reply to a reply is not permitted." This Response of Edwin Kessler ("Kessler"), may constitute a prohibited "reply to a reply."

2 Occasionally, the Surface Transportation Board ("STB") has accepted a "reply to a reply," particularly when the "reply to a reply" would provide the STB with a more complete record.

3 Kessler asks that the STB accept this Response in order to provide the STB with a more accurate, more complete record.

4 The BNSF Railway Company has been attempting to abandon that portion of the Chickasha Line that lies between MP 539.96 and MP 542.91 for more than 4 years. BNSF has provided the STB with "false and misleading information." In the STB's June 5, 2008 decision in *BNSF Railway Company - Abandonment Exemption - In Oklahoma County, OK*, STB Docket No. AB-6 (Sub-No. 430X) ("Abandonment Exemption"), the STB rejected BNSF's Abandonment Exemption and declared BNSF's Abandonment Exemption to be void *ab initio*, since from BNSF's own documents, it was clear that BNSF had provided the STB with material false and misleading information.

5 BNSF has continued to make material misrepresentations to the STB.

- A Ms Susan Odom declared BNSF had not removed the Shields Spur turnout, when a photograph submitted to the STB by BNSF, clearly showed the turnout had been removed.
- B On page 12 of BNSF's August 25, 2008 Amendment to Petition for Declaratory Order, filed in: *BNSF Railway Company – Petition for Declaratory Order*, STB Finance Docket No 35164, BNSF acknowledged that a signal mast had been erected in the middle of where the Chickasha tracks had been near MP 542 (at Agnew Avenue). then declared "The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced "
- C On p 4 of BNSF's April 8, 2008 Reply to Kessler's Motion for Cease and Desist Order, filed in Abandonment Exemption, 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 "
- D In the STB's June 5, 2008 decision in Abandonment Exemption, the STB declared BNSF's Abandonment Exemption to be void *ab initio*, thereby denying BNSF authority to abandon the Line Even though BNSF was denied authority to abandon the Line, it still has made no effort to replace "any rail that has been or will be removed as a result of ongoing construction in the vicinity "

6 And now, in BNSF's Reply to Kessler's Petition for Injunction, BNSF has falsely stated Kessler's "waybill was fraudulent," Reply at 3. 8, 10, falsely stated "Boardman is refusing to

accept the shipment.” Reply at 12. falsely stated “the signatures on the affirmations were forged by Riffin,” Reply at 3, 7, falsely stated “the shipment cannot be delivered as consigned,” Reply at 12, falsely stated Kessler’s locomotive “is not unique,” Reply at 13, falsely stated that the harm Kessler has suffered “is self-inflicted,” Reply at 14. falsely stated that Kessler does not have title to the locomotive. Reply at 3, 7, 12. and falsely stated that the I-40 highway traversing Oklahoma City “poses an imminent and serious safety hazard for the traveling public, Reply at 6

## THE TRUTH

7 Kessler has a strong desire to preserve rail service. For the past ten years, Kessler has been trying to preserve that portion of the Chickasha Line that lies between MP 539.96 and MP 542.91 for continued rail service. His desire to preserve rail service is so strong, he filed an offer of financial assistance (“OFA”) to purchase the portion of the Chickasha Line that BNSF desired to abandon. When BNSF’s Abandonment Exemption was declared to be void *ab initio* because it contained false and misleading statements, Kessler’s OFA offer was rendered moot.

8 BNSF has represented that sometime in the near future, it will file another abandonment exemption to abandon that portion of the Chickasha Line that lies between MP 541.69 +/- and MP 542.91. When that occurs, Kessler intends to file another OFA to purchase that portion of the Chickasha Line.<sup>1</sup> Kessler knows that when he acquires that portion of the Chickasha Line, he will need a locomotive. Kessler’s movement will be short (about a mile), and his consist will have only a few rail cars at a time. During the summer of 2008, diesel prices reached \$5 per gallon. At \$5 per gallon, fuel efficiency becomes extremely important. The ideal locomotive would weigh about 50 tons (tractive effort sufficient to pull 8 cars or so on a 0.5% grade). Since Kessler’s move would only be a mile, there would be no need to have a locomotive capable of attaining

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<sup>1</sup> In a filing by BNSF on July 15, 2008 in the United States District Court for the Western District of Oklahoma, Case No. 08-CV-00358-R, a footnote on page 15 reads in its entirety as follows: “The Western Segment of the Line does not need to be removed for the Highway Project and currently serves no customers. In fact, in settlement negotiations ordered by this Court, BNSF offered to give the Western Segment to Plaintiff Kessler for free—an offer turned down by Kessler. This only underscored the fact that Kessler has no real interest in owning the Line in question, and therefore his claim of being injured by BNSF’s proposal to remove portions of the Line is a mere sham.” However, Kessler has no documents concerning an offer of the rail line or settlement negotiations, and apart from the absence of documentation, no memory whatsoever of any offer having been made.

speeds of 40 mph. The ideal locomotive would have a much lower gear ratio than typically found on switcher or line-haul locomotives, so that it would reach peak performance / efficiency somewhere around 15-18 mph, rather than 45 or 60 mph respectively. When operated continuously at 10 - 15 mph, the traction motors in typical locomotives overheat. Due to the gearing, these locomotives require engines of 900 - 1500 HP, in order to attain top speeds of 45 mph. If a locomotive is geared so that it's top speed is 20 mph, then it can operate continuously at 10-15 mph without the traction motors overheating. The diesel engine in a locomotive with a top speed of 20 mph, when operated at 15 mph, will be developing 80% of its peak HP. Diesel engines are most efficient (approaching 40% efficiency<sup>2</sup>) when operated at 80-95 % of peak horsepower. Diesel engines operated at 20-50% of peak horsepower, typically are only 25% efficient, and experience accelerated wear. Four-cycle diesel engines (Cummins / GE) typically are a few percentage points more efficient, and emit fewer particulate emissions, than do two-cycle diesel engines (EMD), and use much less lubricating oil. A 300 HP diesel engine operating at 80% power, would develop 240 HP, more than enough to pull 8 railcars at 15 mph on a 0.5% grade. Since engines stop running without notice, and since an immobile train consist presents serious public safety concerns, all consists should be powered by either two locomotives, or one locomotive with two engines. One locomotive with two engines reduces capital outlay by 50%, with no loss in reliability. So for Kessler's proposed operation, the ideal locomotive would weigh about 50 tons, would have two 150 HP four-cycle diesel engines, and would be geared for a top speed of 20 mph.

<sup>9</sup> There are a number of Internet sites that advertise locomotives for sale or lease. Extremely rarely (once every 10-15 years), a 50-ton locomotive with a top operating speed of 20 mph, powered by two 150 HP Cummins diesel engines in good operating condition, is advertised. In 2007, Jeremy Funderburk of Golden, MS advertised on his web site that he had just such a locomotive for sale. When Kessler became aware of Mr. Funderburk's locomotive, it had already been sold to James Riffin of Timonium, MD. A telephone conversation with Mr. Riffin revealed that he had purchased the locomotive in anticipation of providing rail service on the Vicksburg Industrial Lead. When Mr. Riffin's efforts to acquire the Vicksburg Industrial Lead were thwarted,<sup>3</sup> he no longer had an immediate use for his 50-ton locomotive. He indicated that he

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<sup>2</sup> BTU output divided by BTU input = efficiency

<sup>3</sup> Mr. Riffin and Raymond English had jointly made an offer of financial assistance to purchase the Vicksburg Industrial Lead from the Kansas City Southern Railway Company. On May 20, 2008 Mr. English abruptly withdrew his offer. See *The Kansas City Southern Railway Company - Abandonment Exemption - Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X) Served June 16, 2008.

had made plans to have his 50-ton locomotive moved by rail car to Maryland. BNSF was to move the locomotive from Wilson, Arkansas to Memphis, TN. CSX was to move the railcar from Memphis, TN to Maryland. Mr. Riffin had already prepaid BNSF (on **June 12, 2008**) \$1,634.52 to move the locomotive from Wilson, Arkansas to Memphis, TN. See **BNSF's Exhibit 15**. Mr. Riffin had also prepaid CSX for the freight charges to move the locomotive from Memphis, TN to Maryland. After some discussions, Mr. Riffin leased his locomotive to Kessler.

11. Kessler had a locomotive. Now he needed a place in Oklahoma City to ship the locomotive to. After conversations with Joseph Merry, General Manager of Boardman, Mr. Merry granted Kessler permission to use Boardman's Spur for delivery of Kessler's locomotive. Boardman's Spur was the ideal place to send the locomotive, since it was where Kessler ultimately planned to use the locomotive.

12. When Mr. Riffin was getting a rate quote from a BNSF representative to move his locomotive from Wilson, Arkansas to Memphis, TN, he revealed the load was a locomotive, and indicated that he had been unable to find a STIC code for shipping a locomotive on a rail car. A BNSF representative suggested using STIC code 4021137, which Mr. Riffin used.

13. The lease agreement between Kessler and Mr. Riffin stipulated that Kessler would be responsible for all transportation charges. Since Mr. Riffin had already prepaid the freight charges to ship the locomotive from Wilson, Arkansas to Memphis, TN, there was a desire to use that prepayment as a credit toward the cost to ship the locomotive from Wilson, Arkansas to Oklahoma City. Telephone calls were made to BNSF representatives. After a number of telephone calls, BNSF agreed to ship the locomotive on a railroad-supplied railcar, from Wilson, Arkansas to Oklahoma City, for a total of \$4,403.00, including fuel surcharge, and further agreed to credit Mr. Riffin's \$1,634.52 prepayment toward the total cost of \$4,403.00. Kessler sent a check to Mr. Riffin. Mr. Riffin used a portion of the check to reimburse himself for his \$1,634.52 prepayment, and used a portion of the check to obtain a cashier's check in the amount of \$2,768.48, the balance due. On **August 4, 2008**, Mr. Riffin sent a second cashier's check in the amount of \$2,768.48 to BNSF's bank in Wood Dale, Illinois. Mr. Riffin clearly indicated on the cashier's check that the Remitter was Kessler, not Mr. Riffin. See **BNSF's Exhibit 16**.

14. Since on June 12, 2008, Mr. Riffin had prepaid the tariff to Memphis, TN, BNSF agreed

to ship empty railcar HTTX 93507 to Wilson, Arkansas. On July 17, 2008, Mr. Riffin supervised the loading of Kessler's newly-leased locomotive onto railcar HTTX 93507. Two BNSF car inspectors, inspected the manner in which the locomotive had been secured to railcar HTTX 93507, then gave additional securing instructions. A few days later, the two BNSF car inspectors returned, approved the manner in which the locomotive had been secured, then gave permission to move railcar HTTX 93507 onto the BNSF interchange track in Wilson, Arkansas.

15. On July 29, 2008, BNSF generated waybill 603761. The waybill indicated the shipper was Kessler, and the consignee was Kessler. The origin was Wilson, Arkansas. The destination was Boardman's Spur in Oklahoma City. BNSF assigned STIC code 4021125 to the movement (Riffin had used STIC code 4021137, the STIC code number suggested by a BNSF representative.) See **BNSF's Exhibit 14**.

16. On July 29, 2008, a local BNSF train crew took possession of railcar HTTX 93507 at Wilson, Arkansas, and delivered the railcar to Blytheville, Arkansas. Another BNSF train crew delivered railcar HTTX 93507 to Memphis, TN, where railcar HTTX 93507 was placed into a BNSF consist bound for Tulsa, OK. At Tulsa, railcar HTTX 93507 was interchanged to the Stillwater Central Railroad, for delivery to Oklahoma City, and to Boardman's Spur. Railcar HTTX 93507 arrived in Oklahoma City on Saturday, August 16, 2008. On Monday, August 18, 2008, Brad Hays, the Stillwater Central Trainmaster, stated railcar HTTX 93507 should be delivered to Boardman's Spur on Tuesday, August 19, 2008. On Tuesday, August 19, 2008, Mr. Hays told Kessler that Stillwater Central could not deliver railcar HTTX 93507 to Boardman's Spur due to the fact that BNSF had removed some of the tracks leading to Boardman's Spur.

17. Railcar HTTX 93507 was consigned to Kessler, care of Boardman's Spur. See BNSF's Exhibit 14, Straight Bill of Lading, Dated July 29, 2008. Kessler's locomotive was never consigned to Boardman.

18. When, on October 17, 2008, BNSF's Susan Odom contacted Mr. Hagemann, the Chief Financial Officer of Boardman, and asked Mr. Hagemann "Does Boardman still wish to have the locomotive delivered to their facility," Mr. Hagemann replied, "Boardman has no need for a locomotive." Since Kessler has never had a conversation with Mr. Hagemann (Kessler's sole contact at Boardman was with Mr. Merry, the General Manager), it is not surprising that Mr.

Hagemann responded as he did. Mr. Hagemann, as the Chief Financial Officer, knew he had never ordered a locomotive, and knew that Boardman did not have a need for a locomotive. Boardman had no railcars that needed to be moved. As General Manager, Mr. Merry had total responsibility for all activities occurring within the plant area of Boardman. Mr. Hagemann's responsibility was to monitor Boardman's finances, not to supervise activities on the plant floor.

19 Mr. Merry is responsible for transporting Boardman's finished goods to Boardman's customers. Mr. Merry arranges with highly specialized motor carriers, to transport large (12' diameter by 200' long) heavy (up to 100 tons) fabricated pressure vessels to distant (as far away as Los Angeles and Philadelphia) locations. Mr. Merry indicated that it typically costs as much as \$150,000 to transport via motor carrier, one pressure vessel to Houston. Boardman fabricates and ships 10+ very large pressure vessels a year, plus numerous smaller pressure vessels. Because of the abysmal rail service that BNSF offered in the past, Boardman stopped using rail service. As Mr. Merry clearly stated in his Verified Statement<sup>4</sup> if reliable rail service were available, Boardman would utilize it.

#### **BNSF'S FALSE AND MISLEADING STATEMENTS**

20 **Kessler's waybill was fraudulent:** BNSF did not state in what way it felt that Kessler's waybill was fraudulent. BNSF prepared the waybill, not Kessler. Kessler fully and truthfully disclosed all pertinent information: Origin, destination, shipper, consignee, type of commodity and total weight. Kessler prepaid the freight charges. Since all information provided to BNSF was truthful, there is no basis for BNSF's statement that Kessler's waybill was fraudulent.

21 **Boardman is refusing to accept the shipment:** Railcar HTTX 93507 was consigned to Kessler, not Boardman. The only party with the legal right to accept, or reject, railcar HTTX 93507, was Kessler. At no time has Boardman ever refused to accept railcar HTTX 93507. The only statement offered by BNSF, is Mr. Hagemann's statement to Ms. Odom: "Boardman has no need for a locomotive." Boardman having no need for a locomotive is not the equivalent of "Boardman refuses to accept delivery of railcar HTTX 93507." Kessler has requested that BNSF deliver railcar HTTX 93507 to Boardman's Spur, so that Kessler can offload his locomotive from

See Kessler's Exhibit 1 appended to Comments of Edwin Kessler filed August 4, 2008 in *Petition of BNSF for Declaratory Order*, SIB Finance Docket No. 35164 incorporated by reference herein.

the railcar, than transport the locomotive to Kessler's adjacent property. Kessler has offered to accept delivery adjacent to his property, which is adjacent to the Chickasha Line at MP 541.95.

**22 The signatures on the affirmations were forged by Riffin:** The signatures that appear on all of Kessler's pleadings are Kessler's authorized signatures.

**23 The shipment cannot be delivered as consigned:** BNSF has declared that delivering railcar HTTX 93507 to Boardman's Spur would be unlawful, but cites no statute to substantiate that declaration. BNSF states that it will not deliver a railcar onto a private siding unless there is a current sidetrack agreement. BNSF then states that the existence (or non-existence) of a sidetrack agreement cannot be ascertained by BNSF prior to accepting a railcar for delivery, and further states that it is the burden of the shipper to verify that a current sidetrack agreement exists, but fails to indicate how a shipper is to verify that a current sidetrack agreement exists. (BNSF fails to explain how a shipper is to ascertain this information, particularly in light of BNSF's statement that BNSF itself cannot ascertain whether a current sidetrack agreement exists.) Mr. Merry informed Kessler that Boardman had been paying a sidetrack agreement fee to BNSF. Kessler had no way to verify whether Boardman's sidetrack agreement was current or not. If Boardman's sidetrack agreement is not current, BNSF has made no offer to reinstate the sidetrack agreement. Nor has BNSF offered to enter into a sidetrack agreement with Kessler, even though Kessler owns property adjacent to BNSF's Chickasha Line, and has made it known to BNSF that Kessler desires rail service at his property. Sidetrack agreements are prepared by the rail carrier, then presented to the shipper, not vice versa.

**24 Kessler's locomotive is not unique:** As discussed in ¶¶8 and 9, Kessler's locomotive is quite unique. It is geared down so that its top operating speed is 20 mph. It has two Cummins diesel engines in it. It is in great operating condition. To Kessler's knowledge, no one in the entire United States or Canada has a similar locomotive available for sale or lease. Since a similar replacement locomotive is not available, Kessler's locomotive would meet the standard for "uniqueness." It is one of a kind. It cannot be readily replaced for any amount of money. GE stopped making this locomotive 40 years ago.

**25 Kessler's harm is self-inflicted:** Kessler justifiably relied upon, to Kessler's detriment,

BNSF's representations that BNSF was willing and able to deliver railcar HTTX 93507 from Wilson, Arkansas to Boardman's Spur in Oklahoma City. Based on BNSF's representations, Kessler justifiably agreed to lease the locomotive, pay the considerable expense of having the locomotive placed on and secured to railcar HTTX 93507, and prepaid the considerable transportation expense of \$4,403.00 to BNSF. Two days after railcar HTTX 93507 was delivered to Oklahoma City, Brad Hays told Kessler that railcar HTTX 93507 would be delivered to Boardman's Spur on the following day. It was not until the day of delivery that BNSF informed Kessler that BNSF would not deliver railcar HTTX 93507 to Boardman's Spur. The portion of the Chickasha Line that serves Boardman's Spur was not, nor is it presently, embargoed. How BNSF can state with a straight face that Kessler is to blame for BNSF's failure to deliver railcar HTTX 93507 to Boardman's Spur, eludes Kessler.

**26 Kessler does not have title to the locomotive:** As stated previously, Kessler has a leasehold interest in the locomotive, and has the exclusive right to possess and use the locomotive. The locomotive is 'Kessler's locomotive,' to the same degree that the Boeing 757's that Southwest Airlines leases from General Electric, belong to Southwest Airlines, and to the same degree that the locomotives that BNSF leases, belong to BNSF.

**27 The I-40 highway traversing Oklahoma City 'poses an imminent and serious safety hazard for the traveling public:'** In a pleading filed by Ontrac on February 9, 2009 in *BNSF Railway Company – Petition for Declaratory Order*, STB Finance Docket No. 35164, Ontrac appended as its Exhibit 1, which is incorporated by reference herein as if fully reproduced herein, a copy of a news article that appeared in the October 10, 2008 edition of the *Daily Commercial News*. In this news article, Oklahoma Transportation Director Gary Ridley was asked if the I-40 would last until 2012. Mr. Ridley was quoted as saying, "If we felt there was anything wrong that would cause us concern, we would close it, and we wouldn't think twice about it." Mr. Ridley, as Oklahoma's Transportation Director, is in a position to know if the I-40 highway traversing Oklahoma City 'poses an imminent and serious safety hazard for the traveling public.' Mr. Ridley has unequivocally stated, there is nothing wrong with the I-40 highway 'that would cause us concern.' If there is nothing wrong "that would cause us concern," then the I-40 highway obviously **does not** 'pose an imminent and serious safety hazard for the traveling public.'

**28 Railcar HTX 93507 cannot be delivered to a location adjacent to Kessler's property at MP 541.95:** BNSF has represented that rail carriers are somehow prohibited from delivering

rail cars adjacent to a shipper's property. Historically, rail carriers provided rail service to all adjacent landowners desiring rail service. Small platforms were built adjacent to a rail carrier's line. Local farmers would place their milk or other goods on the platform. The local train would stop at all platforms that had goods sitting on them, then load the goods into an available railcar. Empty milk cans would be deposited on the platforms, to be retrieved and refilled by the local farmer. Ramps were built, to facilitate loading livestock onto cattle cars. Spotting railcar HTTX 93507 on the Chickasha Line in the vicinity of MP 541.95, would not create any type of hazard for BNSF, since the Line no longer is used for overhead traffic. Were BNSF to place railcar HTTX 93507 adjacent to Kessler's property, Kessler would hire two cranes, position them near the railcar, lift the locomotive from the railcar, then swing the locomotive onto Kessler's adjacent property. The whole operation would take less than an hour. (It only took 20 minutes to load the locomotive onto the railcar.)

29 **Blue carded locomotive:** Mr. Funderburk is a certified FRA locomotive inspector. He represented to Mr. Riffin that the locomotive was "blue-carded." Mr. Riffin, in reliance upon Mr. Funderburk's representation, represented to Kessler that the locomotive was "blue-carded." Mr. Riffin inspected the wheels on the locomotive on July 17, 2008. The wheels appeared to be "in gage." Mr. Robert Fuller is not a certified FRA locomotive inspector, while Mr. Funderburk is. Mr. Funderburk's representation that the locomotive has been 'blue-carded' by Mr. Funderburk, would be far more credible than Mr. Fuller's unsubstantiated statement that the wheels were too 'out-of-gauge' to blue-card the locomotive.

#### Mr. Riffin

30 Kessler has known Mr. Riffin for several years. Some years ago, it was suggested to Kessler that if he wanted to learn how to preserve a rail corridor that might be abandoned, he should read some of Mr. Riffin's filings, particularly those associated with the Cockeysville Industrial Track in Cockeysville, Maryland, See *Norfolk S Ry Co Abandonment Exemption In Baltimore Co, MD*, STB Docket No. AB-290 (Sub-No. 237X), *Norfolk Southern Railway Company Abandonment Exemption Norfolk and Virginia Beach, VA*, STB Docket No. AB-290 (Sub-No. 293), and *Kansas City Southern Railway Company - Abandonment Exemption - Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X). Kessler read Mr. Riffin's pleadings, then began to emulate what Mr. Riffin did. When Kessler needed / needs legal advice, he has three attorneys he can consult: Micheal Salem, an Oklahoma attorney, Fritz Kahn,

a railroad attorney, who has filed a number of pleadings for Kessler and for others opposing BNSF's proposed abandonment of the Chickasha Line, and Tom McFarland, another railroad attorney who is the attorney of record for John Kessler, Edwin Kessler's brother, and who has also filed a pleading opposing BNSF's proposed abandonment of the Chickasha Line. In conversations with Mr. Riffin, he has stated on numerous occasions that he can not provide legal advice to Kessler nor represent him.

## CONCLUSIONS

31 In previous filings, BNSF has made several false and misleading statements to the STB. Misrepresentations continue in BNSF's reply.

32 BNSF has a common carrier obligation to provide rail service on the Chickasha Line. Kessler made a reasonable demand for service, which BNSF agreed to provide, and for which BNSF was compensated.

33 The Line serving Boardman's Spur and Kessler's property, has not been embargoed.

34 BNSF has represented to the STB that BNSF has removed some of the track material leading to Boardman's Spur, and has represented to the STB that BNSF would replace that track material if BNSF did not receive abandonment authority pursuant to BNSF's Abandonment Exemption. BNSF did not receive abandonment authority. BNSF now refuses to replace the track material it represented to the STB that it would replace.

35 BNSF did not contact the consignee, Edwin Kessler, as required by 49 CFR 1035.1, Appendix B, Sec. 2(b).

36 Kessler, the consignee, has never refused delivery of railcar HTTX 93507, and demands that BNSF actually deliver railcar HTTX 93507 to either Boardman's Spur, or to a location adjacent to Kessler's property near MP 541.95.

37 BNSF's representation that it would be 'unlawful' for BNSF to deliver railcar HTTX 93507 to either Boardman's Spur or to a location adjacent to Kessler's property at MP 541.95, is

unsupported by any reference to any statute or rule, and is false

38 WHEREFORL, Kessler would reiterate his request for injunctive relief, to wit Enjoin BNSF (1) from refusing to deliver railcar HTTX 93507 to either the Boardman Spur at MP 541 75, or to a point on the Chickasha Line adjacent to property Kessler owns, near MP 541 95, (2) to enjoin BNSF from charging Kessler demurrage, storage or any other charges associated with BNSF's failure to deliver railcar HTTX 93507 to Kessler on or before August 19, 2008, (3) to enjoin BNSF from auctioning the locomotive that is on railcar HTTX 93507, and (4) to enjoin BNSF from refusing to pay to Kessler \$50 00 per day for each day since August 20, 2008, BNSF has deprived Kessler from the use of said locomotive

39 And for such other and further relief as would be appropriate

40 I, Edwin Kessler, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief Further, I certify that I am qualified and authorized to file the above pleading

Executed on March 11 2009

Respectfully submitted,



Edwin Kessler

#### CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of March, 2009 a copy of the foregoing Response of Edwin Kessler was mailed via first class postage, postage prepaid, to Karl Morell, Ball Janik Ste 225, 1455 F St NW, Washington, D C 20005, counsel for BNSI Railway Company



Edwin Kessler