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June 1, 2009

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E. Street Southwest
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
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Part of
Public Record

Re: STB Finance Docket 35206

Dear Acting Secretary Quinlan,

Please file in the above referenced docket the enclosed original and ten copies of Request for Immediate Order Enjoining BNSF from Auctioning off Kessler's Locomotive and to Deliver Kessler's Locomotive to the Boardman Spur.

Thank you.

Sincerely,

Encs

cc: Kristi Clark, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth,
Texas 76131-2828
Craig Richey, 315 West 3rd Street, Pittsburg, Kansas 66762
Fritz Kahn, 8th Floor, 1920 N. Street, N.W., Washington, D.C. 20036-1601

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35206

PART 1117

PETITION FOR INJUNCTIVE RELIEF



**REQUEST FOR IMMEDIATE ORDER
ENJOINING BNSF AND SLWC
FROM AUCTIONING OFF KESSLER'S LOCOMOTIVE AND
TO DELIVER KESSLER'S LOCOMOTIVE TO THE BOARDMAN SPUR**

1. Edwin Kessler ("Kessler"), herewith files this Request for Immediate Order Enjoining BNSF and SLWC From Auctioning Off Kessler's Locomotive, and To Deliver Kessler's Locomotive to the Boardman Spur ("Request for Immediate Order"), and in support thereof says:

CONDENSED STATEMENT OF FACTS

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

3. 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.

4. 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.

5. **BNSF has begun the process of auctioning off Kessler's locomotive:** BNSF has placed advertisements in newspapers of general circulation, seeking bids for Kessler's locomotive. Bids were due on **May 25, 2009**.

6. Kessler has permission from Boardman, Inc., to use the Boardman spur for the purpose of unloading his locomotive from railcar HTTX 93507. See Kessler's May 4, 2009 Verified Statement.

7. The Board, in a Decision served on May 19, 2009, at pp. 5-6, in *BNSF Railway Company – Petition for Declaratory Order*, STB Finance Docket No. 35164, (granting BNSF authority to abandon the portion of the Chickasha Line that lies to the immediate east of Boardman,) relied upon BNSF's representations that:

BNSF "is willing to meet the needs of Boardman, located on the western segment, for rail service and maintains that, even if the middle segment is relocated, there will still be more than enough track remaining in place to serve Boardman. BNSF indicates that it will serve Boardman from the west. In that regard, BNSF states that it has reached a tentative arrangement with SLWC for the latter to relocate a signal mast located at the intersection of the Chickasha Line and the Packingtown Lead and to repair the tracks leading to Boardman."

COMMON CARRIER OBLIGATIONS AT COMMON LAW

8. "At common law the carrier was bound to provide reasonable facilities and appliances to transport such goods as it held itself out ready to carry. (Citations omitted.) And this common-law duty has been incorporated into both the state and federal statutes." *Illinois Central R. Co. v. River & Rail Coal & Coke Co.*, 150 Ky 489, 150 S.W. 641, 642 (1912).

9. In *Ethan Allen Inc. v. Maine Cent. R. Co.*, 431 F.Supp. 740, 742-743 (1977), the court stated:

"In fact, the duties imposed in §§1(4) and 1(11) rest on common law principles and the statutory provisions are declaratory of common law. *Johnson* [*v. Chicago, M., St.P. & P. R.R.*, 400 F.2d 968, 971 (9th Cir. 1968)]; *ICC v. Baltimore & A. R.R.*, 398 F.Supp. 454, 466 (D.Md. 1975), *aff'd* 537 F.2d 77 (4th Cir. 1976), *cert denied*, 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed.2d 136 (1976). It has long been recognized that the quasi-public nature of railroads entails a higher degree of public responsibility than is required of most private corporations. A railroad may not, for example, justify a refusal to provide service solely on the grounds that to continue to provide the service would be inconvenient or less profitable. See *Montgomery Ward & Co. v. Northern Pac. Term. Co.*, 128 F. Supp. 475 (D.Or. 1953). ... When an interstate carrier fails to furnish transportation in nonemergency circumstances without ICC approval in breach of its duty under §1(4) of the Act ... it is liable in damages to the "person or persons injured thereby" under §8 of the Act. *Chicago, R.I. & P. Ry. v. Hardwick Farmers Elevator Co.* *supra*, 226 U.S. [426], at 434, 33 S.Ct. 174; *Chicago and N.W. Ry. v. Union Packing Co.*, 373 F.Supp. 734, 737 (D. Neb. 1974) (by implication), *aff'd* 514 F.2d 30 (8th Cir. 1975)."

"Furthermore, in *ICC v. Chicago, R.I. & P. Ry.*, *supra* [501 F.2d 908 (8th Cir. 1974) *cert. denied*, 420 U.S. 972, 95 S.Ct. 1393, 43 L.Ed. 2d 652 (1975)] the Eighth Circuit [said] that 'until abandonment is authorized [the railroad is] liable for damages resulting from breach of their duty to provide transportation, 49 U.S.C. §1(4); *Johnson v. Chicago, M., St.P. & P. R.R.*, 400 F.2d 968, 971 (9th Cir. 1968).' 501 F.2d at 916. Finally, in the *Johnson* case, the Ninth Circuit implicitly held that damages were available in a diversity action brought under §§ 1(4) and 1(11) of the act, as well as common law, where a railroad had discontinued service following a tunnel cave-in which it made no effort to repair."

10. In *Johnson v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 400 F.2d 968, 971- 972 (9th Cir. 1968), the court stated:

“The Shipper’s first cause of action is based on the obligation of the Railroad, a carrier, to receive, carry and deliver all goods offered to the carrier for transportation. The obligation rests on common law principles, *Wabash Railroad Company v. Pearce*, 192 U.S. 179, 187, 24 S.Ct. 231, 48 L.Ed. 397 (1904), as well as on statute. 49 U.S.C. Sec. 1(4) and (11). In fact the federal statute, *supra*, is declaratory of common law. *Illinois Central R. Co. v. River, etc. Coal, etc. Co.*, 150 Ky. 489, 150 S.W. 641, 44 L.R.A., N.S., 643 (1912). This obligation of the carrier at common law is independent of the contract of carriage. *Hannibal Railroad Co. v. Swift*, 12 Wall. (79 U.S.) 262 at 270, 20 L.Ed. 423 (1870). This common law duty and obligation of the carrier has not been abridged by the Interstate Commerce Act. Section 22 of the Act, 49 U.S.C.A. §22 reads in part:

“* * * nothing in this chapter [act] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *.”

Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 129, 35 S.Ct. 484, 59 L.Ed. 867 (1915), and *Pennsylvania R.R. Co. v. Sonman Shaft Coal Company*, 242 U.S. 120, 124, 37 S.Ct. 46, 61 L.Ed. 188 (1916), to the same effect. ...

Thus, the primary burden is on the carrier, once its neglect or refusal to transport goods is shown, to present a defense or excuse for its non-performance. In an early case in this circuit, *Swayne & Hoyt v. Everett*, 255 F. 71 (9th Cir. 1919), this court said:

‘It does not admit of doubt that a common carrier, with certain well-established exceptions, is under legal obligation to carry the goods of any member of the public who may tender them for carriage. That such a carrier, subject to such legal obligation, may show that it was prevented from performing it by act of God or a public enemy, or by some other cause *over which it had no control*, is readily conceded, but in all such cases the defense is an affirmative one, *and the burden is upon the carrier to both plead and prove it.*’ 255 F. at p. 74.

Later decisions have expanded these exceptions only slightly, holding that the carrier is liable without proof of negligence unless it affirmatively shows that (1) the loss resulted from acts of the Shipper; (2) acts of God; (3) public enemy; (4) public authority, or (5) the inherent vice or nature of the commodity. *Secretary of Agriculture v. United States*, 350 U.S. 162, 165 note 9, 76 S.Ct. 244, 100 L.Ed. 173 (1956); *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S.Ct. 1142, 12 L.Ed. 2d 194 (1964).” P. 972.

“As stated by Judge Fee while on the district court, in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F.Supp. 475, 511 (1953), ‘Even where prevented by an act of God or the public enemy, there must be an affirmative showing that it (the

carrier) did everything in its power to carry out its absolute obligation.’ ” P. 972.

“The carrier is not excused if the interference with its service could have been avoided by forethought. Applying this principle, the Supreme Court imposed liability upon an Express Company for gold lost to a band of armed robbers, even though the receipt for the gold issued by the Express Company exempted it from losses due to ‘mobs, riots, insurrection or pirates.’ The Company had a choice of two routes, one a safe route and the other running through dangerous and unsettled country. By failing to choose the safer route, the carrier was negligent and subjected itself to liability. *United States Express Co. v. Kountze Bros.*, 8 Wall. (75 U.S.) 342, 19 L.Ed. 457 (1869). A carrier must anticipate problems and provide against them. ... *Lehigh Valley Railroad Co. v. Allied Machinery Company of America*, 271 F. 900, 903 (2 Cir. 1921), cert. denied 256 U.S. 704, 41 S.Ct. 625, 65 L.Ed. 1180.” P. 972.

11. In *Hannibal Railroad Co. v. Swift*, 12 Wall. (79 U.S.) 262 at 270 - 273, 20 L.Ed. 423, 428 - 429 (1870), the Supreme Court stated:

“Between those places the company was, in 1861, a common carrier, over its road, of passengers and their baggage, and of goods and merchandise. As such carrier, its duties and liabilities were plain; ... as a carrier of goods, to take all other property offered for transportation, and was responsible for the safe conveyance of the baggage and other property to the point for which they were destined, or the termination of the road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed. ...

It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter.

... The liability of the company attached when it thus took possession of the property. ... Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier. ...

In all such cases the liability of the common carrier attaches when the property passes with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property.”

12. In *I.C.C. v. Maine Central Railroad Co.*, 505 F.2d 590, 593-594 (2d Cir. 1974), the court stated:

“A railroad has a duty under both the Interstate Commerce Act and under its state franchises to maintain and repair its lines and provide service thereon.” *Id.* 593

“the lack of any action toward repair and restoration of the storm and flood damage and the restoration of freight service on the Beecher Falls Branch conclusively proved an intention on the part of the Maine Central permanently to discontinue the service, which under the circumstances constituted an unlawful abandonment of the 22.96 mile Branch.” *Id.* 594.

“The court’s power to enjoin an unauthorized abandonment ... remains operative whether the defendant has a petition for abandonment pending before the I.C.C. or not. The filing of or pendency of an abandonment application neither freezes nor legalizes a long drawn out embargo which has been transmuted into an unlawful abandonment.” *Id.* 594-595.

13. In *Missouri Pacific R.Co. v. Elmore & Stahl*, 377 U.S. 134, 137-138, 84 S.Ct. 1142, 1144-1145 (1964), the Supreme Court declared:

“The parties agree that the liability of a carrier for damage to an interstate shipment is a matter of federal law controlled by federal statutes and decisions. The Carmack Amendment of 1906, §20(11) of the Interstate Commerce Act, makes carriers liable ‘for the full actual loss, damage, or injury * * * caused by’ them to property they transport, and declares unlawful and void any contract, regulation, tariff, or other attempted means of limiting this liability. It is settled that this statute has two undisputed effects crucial to the issue in this case: first, the statute codifies the common-law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by ‘(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods.’ Bills of Lading, 52 I.C.C. 671, 679; *Chesapeake & O. Ry. Co. v. A.F. Thompson Mfg. Co.*, 270 U.S. 416, 421-423, 46 S.Ct. 318, 319-320, 70 L.Ed. 659. *Adams Express Co. v. Croninger*, 226 U.S. 491, 509, 33 S.Ct. 148, 153, 57 L.Ed. 314; *Hall & Long v. Railroad Companies*, 13 Wall. 367, 372, 20 L.Ed. 594. Second, the statute declares unlawful and void any ‘rule, regulation, or other limitation of any

character whatsoever' purporting to limit this liability. See *Cincinnati N.O. & Texas Pac.R.Co. v. Rankin*, 241 U.S. 319, 326, 36 S.Ct. 555, 557-558, 60 L.Ed. 1022; *Boston & M.R.R. v. Piper*, 246 U.S. 439, 445, 38 S.Ct. 354, 355, 62 L.Ed. 820. Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *Galveston, H.& S.A.R. Co. v. Wallace*, 223 U.S. 481, 492, 32 S.Ct. 205, 207, 56 L.Ed. 516. 377 U.S. at 138, 84 S.Ct. at 1145.

"The common law, in imposing liability, dispensed with proof by a shipper of a carrier's negligence in causing the damage." *Secretary of Agriculture v. U.S.*, 350 U.S. 162, 173, 76 S.Ct. 244, 251." Footnote 15.

"The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge '[a]ll the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty * * *. In consequence, the law casts upon [it] the burden of the loss which [it] cannot explain or, explaining, bring within the exceptional case in which [it] is relieved from liability.' *Schnell v. The Vallescura*, 293 U.S. 296, 304, 55 S.Ct. 194, 196, 79 L.Ed. 373. We are not persuaded that the carrier lacks adequate means to inform itself of the condition of goods at the time it received them from the shipper, and it cannot be doubted that while the carrier has possession, it is the only one in a position to acquire the knowledge of what actually damaged a shipment entrusted to its care." U.S. at 143-144, S.Ct. at 1148.

14. In *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F.Supp. 475 (D.Or. 1953), Chief Judge Fee authored a comprehensive treatise on the obligations of common carriers. A portion of his treatise is reproduced below.

"Now, at common law a carrier was obligated to accept and transport all commodities which it had held itself out to transport for hire, whenever such commodities were tendered to or accepted by it, on nondiscriminatory terms. No one was bound to invest himself with these duties and obligations to the public. Such assumption created a status monopolistic in character. [Footnote 6: 'The obligations are thus the involuntary ones of a legal status – not the defined ones of a specific assumption.' ... 'The status and relative position of the carrier and shipper render * * * void * * * abdication of the essential duties of his employment.'] Voluntary entry into this state gave to the carrier the sovereign power of carrying on the King's Highway for hire and other well known special privileges and prerogatives. Correlative obligations were also of the essence of the status. The duty was a public office or trust, conferred by the government as a franchise, accepted by the carrier voluntarily, and enforced for the public benefit. The common

carrier was chargeable according to the 'custom of the realm.' He could not refuse the duty incumbent by virtue of the public employment, for he was bound to serve all the people so far as his engagement extended. pp. 490-491.

"But the three essentials of the status so voluntarily assumed were acceptance, transportation and delivery to consignee. [Footnote 14: "* * * it is the common law duty of the carrier to receive, carry, and deliver goods." *Wabash Railroad Co. v. Pearce*, 1904, 192 U.S. 179, 187, 24 S.Ct. 231, 233. 'Under the legal duty to accept and transport ... and co-extensive with the duty to transport is the duty to deliver. ... Each is an integral part of transportation. *Bruskas v. Railway Express Agency, Inc.*, 10 Cir., 1949, 172 F.2d 915, 918.] ... Carrying the goods the full length of the designated route was essential. Delivery to the consignee at an accustomed or specified point was an obligation which stood on an equal footing with acceptance and carriage. [Footnote 16: 'The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. ... No obligation of the carrier ... is more strictly enforced.' *North Pennsylvania Railroad Co. v. Commercial Nat. Bank of Chicago*, 1887, 123 U.S. 727-734, 8 S.Ct. 266, 269, 31 L.Ed. 287. 'The duty of a common carrier is to transport and deliver safely. *Bank of Kentucky v. Adams Express Co.*, 1876, 93 U.S. 174, 181, 23 L.Ed. 872. '... charged with the duty of delivering them ...' *Galveston, Harrisburg & San Antonio Railway Co. v. Wallace*, 1912, 223 U.S. 481, 492, 32 S.Ct. 205, 207, 56 L.Ed. 516. '... to convey the shipment to its destination and make delivery to the consignee ...' *Union Pacific Railroad Co. v. Spano*, 1936, 99 Colo. 47, 59 P.2d 75.] p. 491.

"For breach of any of the three duties imposed in the public interest and defined in detail by the 'holding out,' the common law gave a remedy. The penalty for failure was drastic. Liability for breach was almost absolute. [Footnote 17: '... held responsible as an insurer ...' *Garside v. Trent and Mersey Navigation*, 4 T.R. 581, 582, 100 Eng. Rep. 1187, 1188 (1792). '... It is as a bailee that his liability as insurer arises, binding him to answer for the goods delivered to him at all events.' *Clark v. West Ham Corporation*, 2 K.B. 858, 878 (1909). ... The liability of the carrier is 'a survival from that period when all bailees were held strictly liable as debtors.' 'The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public.' *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 1911, 219 U.S. 186, 205, 31 S.Ct. 164, 170, 55 L.Ed. 167.] Justification for failure was confined to acts of God or of the enemies of the King. Overweening force beyond power of the carrier to resist did not excuse damage, loss or inability to deliver to consignee. The actions of the servants of the carrier were his actions. For their negligence, willfulness or default, he was liable. ... P. 492 - 493.

'But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier.' *Forward v. Pittard*, 1 T.R. 27, 33, 99 Eng. Rep. 953, 956 (1785). P. 493.

“The suggestion that these obligations have been abrogated or essentially modified by statute, law or policy is unthinkable. In the preservation of these obligations, the public at large – not any class or clique – is vitally concerned.” P. 494.

“The Congress has never shown a disposition to destroy these original remedies or to repudiate the common law of the respective states relating to carriers. The common law remedies for breach of the obligations thereof were preserved by positive mandate, and the statutory remedial devices were made additions thereto.” P. 496.

“The state and Federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission.” *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 1915, 237 U.S. 121, 134, 35 S.Ct. 484, 489, 59 L.Ed. 867.

“It would be illegal for a carrier, by its operating practices, to attempt to limit the holding out.” P. 500.

“... the shipper, to make a prima facie case ... is required to show only the fact of shipment made and a failure to deliver at destination.’ The burden is on the carrier to show that a permissible defense was the cause of the failure. *American Fruit Distributors of California v. Hines*, 1921, 55 Cal. App. 377, 388, 203 P.821, 826.” P. 501, footnote 44.

“But where the custom and ‘usage was to run their cars upon a side track to private warehouses’ to receive grain, the carrier ‘could not capriciously require that the grain should be delivered in a different manner, or at a different place.’ *Galena & Chicago Union Railroad Co. v. Rae*, 1857, 18 Ill. 488, 491.” Footnote 45, p. 502.

“The question of reasonable request for service is next for consideration. As to inbound shipments, the carrier, upon acceptance, voluntarily assumed obligations for hire which required transportation across the Portland area and delivery to Wards, as consignee, at its Portland establishment, at all events and at the peril of the carrier, as above noted.” P. 502.

“Persuading, counseling or assisting another in breaching a peculiar duty of the latter alone laid the basis for an action at common law [in conspiracy]. So likewise, joint action in breaching such an obligation incumbent upon only one party gave rise to joint and several liability of all who participated.” P. 503.

“Judged by this standard, the workers who took concerted action here would, upon this record, be liable themselves, because, not only were the objects illegal, but the means employed were also improper. The ultimate object was to cut Wards off from access to the facilities of commerce by causing common carriers to violate duties imposed by law,

to deprive it of all transportation in the area.” P. 506-507.

“Each took action in concert to cut Wards off from interstate transportation, which it was its duty to furnish. This was a conspiracy in restraint of trade, denounced by the statutes. To this charge, it is possible the workers may have had some lawful answer, but carriers had none. As to defendants, the objects were illegal, and so were the means.” P. 508.

“A concert of action between carriers, such as there was here, to discriminate against a single shipper, is action in restraint of trade.” P. 509.

“It does not require a written document or an express contract to indicate the adherence of party to a combination of two or more to accomplish an unlawful purpose. Nor need one be the author of the design or one of the original parties to the formulation thereof. ... It is sufficient if a person, after a conspiracy has been formulated by others and he has full knowledge of the purpose, willfully takes action in furtherance of the design. The concert of action effectuating the purpose is sufficient to establish adherence to the conspiracy. Each of the defendants, through its employees on the ground in the course of employment and by the acquiescence of its executives, was committed to the concert of action by acts calculated to accomplish the unlawful purposes of which each well knew.” P. 509.

“Besides, in order to establish such defenses affirmatively, the carriers must show that no action of theirs contributed to the result. ... Even where prevented by the act of God or the public enemy, there must be affirmative showing that it did everything in its power to carry out its absolute obligation” P. 511.

“Federal statutes supply criminal sanctions, enforceable in the federal courts, against persons who interfere in specified ways with the operation of interstate trains. ... Federal statutes which might here be applicable provided that it was unlawful for any agent ‘or person acting for or employed by such corporation’ who does or omits ‘any act, matter, or thing in this chapter prohibited or declared to be unlawful.’ 49 U.S. C. A. §10. See also 18 U.S.C.A. §1992.” P. 511.

15. In *Montgomery Ward*, 128 F.Supp. 520, 527-528 (D.Or. 1954), the court addressed the issue of damages to be awarded to Montgomery Ward due to the breach of the carriers’ common carrier obligations. In addition to actual compensatory damages, the court also awarded Montgomery Ward punitive damages. In doing so, the court stated:

“But each carrier of either class acted in a manner inimical to the public interest and without regard to the damage caused others by violation of its peculiar obligations for purely selfish motives. This is a definition of malice and must be covered by an award of punitive damages. Since the Court has observed that such a situation will not likely recur

and since the Court does not wish to compensate Wards for a breach of its own labor relations, such punitive damages will only mark the reproof, rather than be imposed in a sum adequate to the enormity of the offense which the Court finds as to each carrier.

If the Court were to follow an oriental theory of distribution of judicial favor, a large award might be made. Some notable practitioners and writers in an allied field seem to advocate this procedure. The Court feels that Wards has been grievously injured and inclines morally toward ample compensation.”

16. In *N.Y.C.R.R. v. Lockwood*, 17 Wall. 357, 21 L.Ed. 627 (1873), the Supreme Court stated:

“The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts also, losses by means of any superior force, and any inevitable accident. Wall at 376, L.Ed. at 639.

“It is carefulness and diligence in performing the service which the law demands.” Wall at 378, L.Ed. at 640.

“Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.” Wall at 381-382, L.Ed. at 641.

17. In *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 121, 35 S.Ct. 484 (1914), referred to in ¶¶ 10 and 14 above, the Supreme Court also stated:

The Hepburn Act did not abridge the common law. U.S. at 129, S.Ct. at 487.

“... the proviso to §22 [of the Hepburn Act] declared that ‘nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court,

recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties, and the like.” U.S. at 129-130, S.Ct. at 487.

“It will appear that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common-law liability” U.S. at 133, S.Ct. at 488.

18. In *President, etc. Bank of Ky v. Adams Express Co.*, 93 U.S. 174, 181, 23 L.Ed. 872, 875 (1876), the Supreme Court stated:

“The duty of a common carrier is to transport and deliver safely. He is made, by law, as insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God. ... It is agreed, however, he cannot, by any contract with his customers, relieve himself from responsibility for his own negligence or that of his servants; and this because such a contract is unreasonable and contrary to legal policy. So much as been finally determined in [N.Y.C.] R.Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.” U.S. at 181, L.Ed. at 875.

“The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable.” U.S. at 183, L.Ed. at 876.

“Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier’s duty, shall not be taken away by any reservation in the carrier’s receipt, or by any arrangement between him and the performing company.” U.S. at 185, L.Ed. at 876-877.

19. In *Robinson v. Bush*, 200 S.W. 757, 761 (Mo. 1918), the court stated:

“In the case of inanimate freight, the common carrier is an insurer, and the duty devolves upon him to deliver the goods intact at the point of destination.”

20. In *Swayne & Hoyt, Inc. v. Everett*, 277 F. 71,74 (9th Cir. 1919), the court stated:

“It does not admit of doubt that a common carrier, with certain well-established exceptions, is under legal obligation to carry the goods of any member of the public who may tender them for carriage. That such a carrier, subject to such legal obligation, may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control, is readily conceded, but in all such cases

the defense is an affirmative one, and the burden is upon the carrier to both plead and prove it.”

21. In *Secretary of Agriculture v. U.S.*, 350 U.S. 162, 76 S.Ct. 244 (1956), the Supreme Court stated:

“It is conceded that §20(11) codifies the common-law rule making a carrier liable, without proof of negligence, for all damages to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity.” Footnote 9. U.S. at 165, S.Ct. at 247.

“The common law, in imposing liability, dispensed with proof by a shipper of a carrier’s negligence in causing the damage.” U.S. at 173, S.Ct. at 251.

22. In *L.E. Whitlock Truck Svc v. Regal Drilling*, 333 F.2d 488, 491 (1964), the court stated:

“At common law a common carrier undertook to carry the shipment safely, and it was liable for all loss or injury excepting only that due to acts of God, public enemy, and those arising from the inherent nature of the goods transported or resulting from the fault of the shipper. It was also a rule of common law that as to these excepted causes of damage the carrier could nevertheless be held liable if it were negligent. The carrier was liable for damages whether negligent or not if the loss was not due to the excepted causes. Therefore a carrier could not escape liability by a showing of the absence of negligence on its part. *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 46 S.Ct. 318, 70 L.Ed. 659.

“Thus to establish the carrier’s liability, it is necessary only for the claimant to show the carrier’s receipt of the shipment in apparent good order, and the delivery or release of the shipment by the carrier in damaged condition. This being shown, the prima facie case is established and the burden is on the carrier to prove that the shipment was not delivered in good order, that it was delivered by it in good condition, or that the excepted causes were applicable, and it was free of negligence. *U.S. v. Mississippi Valley Barge Line Co.*, 285 F.2d 381 (8th Cir.). The Carmack amendment thus does not change the common law rule.

OBLIGATION TO RESTORE TRACKS / SERVICE

23. In *Ethan Allen Inc. v. Maine Cent. R. Co.*, 431 F.Supp. 740, 742-743 (1977), cited in ¶9 above, the court recited the following facts prior to issuing an injunction ordering the carrier to repair its tracks, and to reinstitute service to Ethan Allen:

“On July 3, 1973, the Maine Central Railroad Company (“Maine Central”), a carrier subject to the Interstate Commerce Act (“Act”) 49 U.S.C. §1 *et. seq.*, published an embargo notice ceasing all rail service on its 22.96 mile dead-end line from North Stratford, New Hampshire, to Beecher Falls, Vermont, because of track structure damage from heavy rains and flooding. The principal victim of this cessation of operations was Maine Central’s sole customer on the line, Ethan Allen, Inc., a furniture manufacturer with a plant in Beecher Falls, Vermont. ... Several months elapsed during which no repairs were begun and the embargo was not lifted.” Pp. 740-741.

“By Opinion and Order of July 18, 1974 this Court held that Maine Central had illegally abandoned the line in violation of Section 1(18) of the Interstate Commerce Act, 49 U.S.c. §1(18). **We granted the injunctive relief sought in that action and ordered Maine Central to restore rail service to Beecher Falls.** That order was affirmed by the United States Court of appeals for the Second Circuit in *ICC v. Maine Central R.R.*, 505 F.2d 590 (2d Cir. 1974). In accordance with that order, repairs were made and service was restored in November 1974.” P. 741. (Emphasis added.)

“Ethan Allen then moved for an order requiring Maine Central to pay damages and attorney’s fees sustained as a result of the illegal abandonment.” P. 741.

“The relevant portions of §§ 1(4) and 1(11) set out in the margin, establish the duty of every common carrier to provide and furnish ‘transportation’ and ‘car service’, respectively. The word ‘transportation’ in the Interstate Commerce Act is defined in §1(3), and is meant to include the entire body of services provided by common carriers incident to the carriage itself. *Southern Ry. v. Reid*, 222 U.S. 424, 440, 32 S.Ct. 140, 56 L.Ed. 257 (1912); *Cleveland, C.C. & St. L. Ry. v. Dettlebach*, 239 U.S. 588, 593, 36 S.Ct. 177, 60 L.Ed. 453 (1916).” P. 742.

“In fact, the duties imposed in §§ 1(4) and 1(11) rest on common law principles and the statutory provisions are declaratory of common law. *Johnson, supra* at 971 [*v. Chicago, M.St.P. & P. R.R.* 400 F.2d 968 (9th Cir. 1968)]; *ICC v. Baltimore & A. R.R.*, 398 F.Supp. 454, 466 (D.Md. 1974), *aff’d* 537 F.2d 77 (4th Cir. 1976), *cert. denied*, 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed.2d 136 (1976). P. 742.

“When an interstate carrier fails to furnish transportation in nonemergency circumstances without ICC approval in breach of its duty under §1(4) of the Act ... it is liable in damages to the ‘person or persons injured thereby’ under §8 of the Act. *Chicago, R.I. & P. Ry. v. Hardwick Farmers Elevator Co.*, *supra*, 226 U.S. at 434, 33 S.Ct. 174; P. 743.

24. In *ICC v. Baltimore & A. R.R.*, 398 F.Supp. 454, 466 (D.Md. 1974), *aff’d* 537 F.2d 77 (4th Cir. 1976), *cert. denied*, 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed.2d 136 (1976), the court was asked to enjoin the railroad from failing to provide rail service on a line prior to a final ruling

on the railroad's application to abandon the line. [Hurricane Agnes had washed out 4.2 miles of trackage, the railroad bridge over the Patapsco River, and the bridge over Old Annapolis Road.]

In ordering the railroad to restore the line and to resume providing service to the shipper at the end of the line, the court stated:

"Given the fact that most of the cost to repair the trackage is a result of B&A's conscious policy of deferred maintenance, it is reasonable to infer that such a policy also substantially contributed to the washout of the Patapsco River bridge. Although it cannot be stated with certainty that the bridge would have been operational after Agnes had B&A not failed to perform routine maintenance on the bridge, this court finds that the cost to repair and restore service over the bridge would have been substantially less, even though the final washout was directly attributable to Agnes." P. 459.

"It is undisputed that the initial cessation of service in June of 1972 was brought about by a condition over which defendants had no control: Hurricane Agnes. B&A therefore quite reasonably issued a temporary embargo of all rail service south of the Patapsco River. By September 9f 1972, the flood waters had subsided, and it was then physically possible to repair the damage and restore service." P. 460.

"B&A clearly has the present financial ability to make the repairs necessary to restore service without recourse to outside financing." P. 460.

"Jurisdiction of this court is properly grounded upon 28 U.S.C. §§1337, 1345 (1970), and 49 U.S.C. §1(20) (1970)." P. 461.

"Section 1(18) of the Interstate commerce Act states, in relevant part:

... [N]o carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. [Now codified at 49 U.S.C. 10903.]

Section 1(20) further provides:

... any ... abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of ... the Commission, ... or any party in interest" P. 461.

"However, the issue in this proceeding for a permanent injunction under sections 1(18) and 1(20) of the Act is not whether the abandonment should be granted or denied, for that question is for the ICC to decide subject to judicial review. *I.C.C. v. Chicago, Rock*

Island & Pac. R.R., 501 F.2d 908, 913 (8th cir. 1974). Rather, the questions for resolution here are (1) whether an 'abandonment' has occurred within the meaning of 49 U.S.C. §1(18), and (2) whether, considering a myriad of equitable factors, an injunction compelling B&A to restore service should issue. *Id.* at 913-914. Simply stated, if there has been an abandonment, then the court, in its discretion, may issue an injunction restraining such abandonment." P. 461.

" 'Abandonment' is defined as a permanent or indefinite cessation of rail service. *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532, 535 (2d Cir. 1958); *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911 (8th Cir. 1974). For purposes of sections 1(18) and 1(20), there is no conceptual distinction between discontinuing service permanently and suspending it indefinitely. *Meyers v. Jay Street Connecting R.R.*, *supra* at 535; *I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590, 593 (2d Cir. 1974). However, if the cessation of operations began and continues because of conditions over which the railroad had no control, no abandonment within the meaning of 49 U.S.C. §1(18) would be established. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, *supra* at 911." P. 462-463.

"Abandonment should be distinguished from the term 'embargo,' which is issued by the carrier alone and which will justify a cessation of service as a temporary emergency measure when for some reason the carrier is unable to perform its duty as a common carrier. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, *supra* at 911; *I.C.C. v. Maine Cent. R.R.*, *supra* at 593; 49 C.F.R. §1006.1 (1974). Because both abandonment and embargo entail a cessation of service, the question of whether an embargo has been transmuted into an unlawful abandonment revolves largely around the length of the cessation and intent of the railroad. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, *supra* at 911; *I.C.C. v. Maine Cent. R.R.*, *supra* at 593. See also *Williams v. Atlantic Coast Line R.R.*, 17 F.2d 17, 22 (4th Cir. 1927). Here the cessation has continued for nearly three years, certainly long enough to be an 'abandonment' within the meaning of the Act. See *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532, (2d Cir. 1958); *I.C.C. v. Maine Cent. R.R.*, Civil No. 74-81 (D.Vt., July 18, 1974), *aff'd* 505 F.2d 590 (2d Cir. 1974). The question is therefore whether B&A has an intent to cease service permanently or indefinitely. This court finds that B&A indeed has such an intent, as evidence by the following: (1) B&A has the financial ability internally to make the necessary repairs; (2) B&A has never sought outside public or private assistance to finance the repairs; (3) B&A has never even considered using its own funds; (4) B&A has sold off portions of its right of way and hopes to sell off more in the future; (5) B&A has long wanted to rid itself of its railroad operations; (6) B&A has a history of *de facto* abandonments without prior ICC approval; (7) B&A has no intention to resume service pending the outcome of its abandonment petition before the ICC; (8) a substantial portion of the required repair expenditures result from B&A's failure to expend funds for routine maintenance over the years. These facts amply support a finding that B&A intends to abandon its rail operations to Alco's plant." P. 462.

“B&A, however, contends that the cessation of operation cannot be deemed an unlawful abandonment because it was due to circumstances entirely beyond the control of the railroad, i.e., the occurrence of Hurricane Agnes. It is true that the initial cessation of service was beyond B&A’s control because of the physical impossibility of rail operations. Hence, no intent to abandon could be inferred from the initial cessation. However, in order to avoid a finding of abandonment, the cessation must continue to be beyond the control of the railroad. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911 (8th Cir. 1974). Hence, once the physical impossibility of service terminates, the cessation of service is no longer ‘beyond the control’ of the railroad, at least where the railroad is financially able to repair the damage. *I.C.C. v. Maine Cent. R.R.*, Civil No. 74-81, at 13 (D.Vt., July 18, 1974), *aff’d* 505 F.2d 590 (2d Cir. 1974); *Pennsylvania v. Penn Cent. Transp. Co.*, 348 F.Supp. 28, 30 (M.D.Pa. 1972). Similarly, if the unsafe track conditions have resulted in large part from the railroad’s policy of deferred maintenance, the cessation is not deemed ‘beyond the control’ of the railroad. See *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911-13 (8th Cir. 1974); *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, Civil No. CV 73-L-244 (D.Neb., Oct. 31, 1974) (on remand from Eighth Circuit). In this case it is physically possible to restore service, and B&A has the financial ability to do so. In addition, virtually the entire cost of repairing the track to safe conditions is a result of B&A’s longstanding policy of ‘deferred maintenance.’ As stated previously with respect to the bridge, it is certainly likely that much of the damage wreaked by Agnes would not have occurred had B&A performed routine maintenance on the bridge over the years. Hence, the current cessation of service cannot be deemed beyond B&A’s control.” P. 463.

“If a court finds that an initially valid, self-imposed embargo has over time become an abandonment within the meaning of 49 U.S.C. §1(18), the mere fact that the embargo is still in effect, and unchallenged by the ICC does not render an otherwise unlawful abandonment lawful. The courts have therefore not hesitated to find unlawful abandonments when unchallenged embargoes were still in effect. See, *e.g. I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590 (2d Cir. 1974), *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532 (2d Cir. 1958). P. 463.

“B. *Whether an injunction should issue.*” Pp. 463-466.

“After consideration of these and other factors, this court believes that the equitable factors balance in favor of granting an injunction enjoining B&A’s unlawful abandonment. P. 464.

“First, because of the importance of uninterrupted rail transportation service in the nation’s economy, congress has expressed a clear intent, even to the point of criminal sanctions, that abandonments without prior ICC approval are not tolerated. ... B&A’s violation of the statute combined with the strong Congressional purpose to forbid such violations necessarily weighs most heavily against the equitable position of defendants.” P. 464.

“Second, as to the costs to repair the railroad and restore service to Alco, the estimated cost of \$162,000 at 1975 prices is certainly a valid equitable factor that tends to favor defendants’ position. However, B&A cannot receive equitable advantage of inflationary factors that are included within that figure when it was possible to make the necessary repairs in 1972 at an estimated cost of \$84,000. Moreover, the latter figure must be reduced by \$35,000 in non-bridge damage attributable to B&A’s own pre-1972 deferred maintenance policy. In addition, a substantial but indeterminable portion of the remaining \$49,000 cost to repair the Patapsco River bridge is also the result of B&A’s deferred maintenance policy. Hence, the cost figure to weigh most heavily on B&A’s equitable side is reduced to something less than \$49,000. It should again be noted in this regard that in 1972 B&A had, and it presently has, the financial ability to make the necessary repairs.” P. 465.

“Third, B&A’s unlawful cessation of service has placed Alco in an untenable position. ... The additional costs clearly place Alco at a competitive disadvantage as compared to what its position would have been had B&A not unlawfully ceased operations. Under these circumstances, Alco has suffered and continues to suffer irreparable harm.” P. 465.

“Fourth, the delay in contesting B&A’s actions before this court probably weighs most heavily against the ICC. The ICC ignored previous pre-1972 abandonments of the B&A line and ignored the 1972 abandonment until August of 1974, at which time it brought the present action, apparently at the urging of the ICC’s own administrative law judge. Alco did pursue its complaint with the ICC almost immediately after it attempted negotiations with B&A for resumption of service in September of 1972. This remedy has proven unfruitful at the Commission level.” P. 465.

“Fifth, as stated in this court’s previous opinion, the ICC delay in the processing of B&A’s abandonment application caused by ICC’s own actions in response to the decision in *Harlem Valley Transp. Ass’n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff’d* 500 F.2d 328 (2d Cir. 1974), substantially undermines the equitable position of the ICC as a plaintiff in this case. This court is naturally reluctant to order substantial expenditures on the B&A line when there is a possibility that ICC would authorize abandonment, even though a final decision may not be forthcoming for a year or more. ...

Moreover, the ICC delay in ruling on the B&A abandonment cannot be attributed in any manner to fault on the part of Alco. Finally, B&A may have avoided much of the administrative delay, as well as the possibility of unnecessary expenditures for repair, had it petitioned for abandonment when it ceased operations. B&A would then have been either granted abandonment or ordered to continue service, and this proceeding would have been, in all probability, unnecessary.” P. 465-466.

“Sixth, as to considerations of the public interest in the grant or denial of a permanent injunction, it is clear that Alco is presently B&A’s only substantial prospective customer

south of the Patapsco River. This court has also considered the interests expressed by the MTA and Anne Arundel County in this case. [The MTA and Anne Arundel County had stated they did not want service restored. The MTA wanted to use the right-of-way for light rail purposes. See p. 460.] These interests, however, weigh only slightly, if at all, in favor of B&A's position." P. 466.

"After consideration of the law, the evidence, and the balance of the equities, and giving greatest weight to the first three factors enumerated above, this court concludes that a permanent injunction should issue requiring B&A to restore rail freight service to Alco's Glen Burnie plant." P. 466.

25. §1(18) is now codified at 49 U.S.C. 10903. §1(20) is now codified at 49 U.S.C. 11702 with regard to suits by the Board, and at 49 U.S.C. 11704 with regard to suits by shippers. As noted previously, the statutory provisions are declaratory of the common law, but do not abrogate any provisions of the common law unless such provisions of the common law are clearly inconsistent with the statutory scheme.

SUMMARY OF LAW – COMMON LAW DUTY TO DELIVER

26. When BNSF accepted Kessler's locomotive, "the liability of the company attached when it thus took possession of the property ... [and] having received the property and undertaken its transportation ... the company assumed ... the ordinary liabilities of a common carrier." *Hannibal*, ¶ 11, *supra*.

27. The three essentials of the status of common carrier are "acceptance, transportation and delivery to consignee." "Carrying the goods the full length of the designated route was essential. Delivery to the consignee at an accustomed or specified point was an obligation which stood on an equal footing with acceptance and carriage." *Montgomery Ward* at 491 (¶14, *supra*).

28. "This obligation of the carrier at common law is independent of the contract of carriage. *Hannibal*, *op. cit.* at 270. This common law duty and obligation of the carrier has not been abridged by the Interstate Commerce Act." *Johnson*, *op. cit.* at 971.

29. "It would be illegal for a carrier, by its operating practices, to attempt to limit the holding out." *Montgomery Ward* at 500.

30. "In the case of inanimate freight, the common carrier is an insurer, and the duty devolves upon him to deliver the goods intact at the point of destination." *Robinson v. Bush, op. cit.* 761.

31. "The question of reasonable request for service is next for consideration. As to inbound shipments, the carrier, **upon acceptance**, voluntarily assumed obligations for hire which required transportation across the Portland area **and delivery to Wards, as consignee, at its Portland establishment, at all events and at the peril of the carrier, as above noted.**" *Montgomery Ward* at 502.

32. "For breach of any of the three duties imposed in the public interest and defined in detail by the 'holding out,' the common law gave a remedy. The penalty for failure was drastic. Liability for breach was almost absolute. '... held responsible as an insurer' *Garside v. Trent and Mersey Navigation, op. cit.* '... It is as a bailee that his liability as insurer arises, binding him to answer for the goods delivered to him at all events.' *Clark v. West Ham Corporation, op. cit.* Justification for failure was confined to acts of God or of the enemies of the King. Overweening force beyond power of the carrier to resist did not excuse damage, loss or inability to deliver to consignee. The actions of the servants of the carrier were his actions. For their negligence, willfulness or default, he was liable." *Montgomery Ward* at 492 - 493.

33. "The duty of a common carrier is to transport and deliver safely. He is made, by law, as insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God. ... It is agreed, however, he cannot, by any contract with his customers, relieve himself from responsibility for his own negligence or that of his servants; and this because such a contract is unreasonable and contrary to legal policy. So much has been finally determined in [N.Y.C.] R.Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627." *President, op. cit.* at 875. "The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. *Id.* at 876.

34. "The carrier is not excused if the interference with its service could have been avoided by forethought." *Johnson* at 972 (§10, *supra*).

35. “ ‘Even where prevented by an act of God or the public enemy, there must be an affirmative showing that it (the carrier) did everything in its power to carry out its absolute obligation.’ ” *Montgomery Ward, op. cit.* at 972.

36. “But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, **the law presumes against the carrier.**’ *Forward v. Pittard, op. cit., Montgomery Ward* at 493. (Emphasis added.)

37. “... **the shipper, to make a prima facie case ... is required to show only the fact of shipment made and a failure to deliver at destination.**’ **The burden is on the carrier to show that a permissible defense was the cause of the failure.** *American Fruit Distributors of California v. Hines*, 1921, 55 Cal. App. 377, 388, 203 P.821, 826.” P. 501, footnote 44

38. “But where the custom and ‘usage was to run their cars upon a side track to private warehouses’ to receive grain, the carrier ‘**could not capriciously require that the grain should be delivered in a different manner, or at a different place.**’ *Montgomery Ward* at 502 and *Galena* at 491 [¶14, *supra*]

ARGUMENT – DAMAGES

39. Once BNSF accepted railcar HTTX 93507, which had Kessler’s locomotive on it, and took possession of Kessler’s locomotive, a common law and statutory obligation devolved upon BNSF **to deliver the locomotive to the Boardman Spur.** Pursuant to the holding in *Montgomery Ward* at 502 and *Galena* at 491, **BNSF could not require that the car be delivered in a different manner or to a different place.**

40. “ ‘[T]o make a prima facie case ... [Kessler] is required to show only the fact of shipment made and a failure to deliver at destination.’ The burden is on the carrier to show that a permissible defense was the cause of the failure. *American Fruit Distributors of California v. Hines, op. cit.* Quoted in *Montgomery Ward* at 501.

41. As was stated in *L.E. Whitlock Truck Svc v. Regal Drilling*, 333 F.2d 488, 491 (1964), once a shipper establishes that goods were delivered to the carrier in good condition, and that the tariff was paid, the burden of proof then shifts to the carrier to prove that non-delivery of the goods was due to “one of the excepted causes relieving the carrier of liability,” and “that it was free from negligence.” *Galveston, op. cit.* at 492. Quoted in *Missouri Pacific v. Elmore & Stahl, op. cit.*, U.S. at 138, S.Ct. at 1145.

42. In *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 121, 35 S.Ct. 484 (1914), the Supreme Court stated:

“The Hepburn Act did not abridge the common law.” U.S. at 129, S.Ct. at 487.

“... the proviso to §22 [of the Hepburn Act] declared that ‘nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for **damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties, and the like.**” U.S. at 129-130, S.Ct. at 487. (Emphasis added.)

43. Kessler is entitled to damages caused by delay in shipment, for BNSF’s failure to comply with its common-law duties, for any damage rendered to Kessler’s locomotive while in the possession of BNSF, and for exemplary damages due to BNSF’s willful violation of its common law duties. See *Montgomery Ward*, 128 F.Supp. 520, 527-528 (D.Or. 1954).

SUMMARY OF LAW – OBLIGATION TO RESTORE TRACKS / SERVICE

44. In *Ethan Allen, op. cit.* (¶23), the carrier embargoed a 22-mile line that had been severely damaged by heavy rains and flooding. Several months elapsed during which no repairs were begun and the embargo was not lifted. One year after the embargo was imposed, the court ordered the carrier to restore rail service, having concluded that the carrier had *de facto* abandoned the line without authority.

45. In *ICC v. Baltimore & Annapolis R.R., op. cit* (§24), the carrier embargoed 6 miles of its line after two bridges and 4 miles of track had been damaged by Hurricane Agnes in June, 1972. When, after three months, the carrier had not begun to repair its line, the sole shipper at the end of the line, Alco, filed a complaint with the Interstate Commerce Commission (“I.C.C.”). Sometime thereafter, the carrier filed an application to abandon the line. While the abandonment application was pending, the ICC filed suit in the U.S. District Court, District of Maryland. In its suit, the ICC asked the court to enjoin the carrier from refusing to repair its line, and to enjoin the carrier from refusing to provide service on the line. The court, after considering six factors, granted injunctive relief, ordering the carrier to repair its line, and ordering the carrier to restore service on the line. The injunction was granted even though (1) the cost to repair the line was substantial (the carrier estimated it to be \$290,000); (2) the carrier lost money on the line (\$68,000 a year); (3) there was only one shipper on the line, who could ship its goods via motor carrier (at a greater cost); (4) Maryland’s Mass Transit Administration had a desire to purchase the line in the near future for its proposed light rail; (5) the line had been damaged by an act of God (Hurricane Agnes); (6) and the carrier had an abandonment application pending before the I.C.C.

46. The court stated the following three factors were given the greatest weight by the court:

- A. The importance of uninterrupted rail transportation service in the nation’s economy, coupled with Congress’ clearly expressed intent, even to the point of criminal sanctions, that abandonments without prior ICC approval are not tolerated.
- B. The cost of making the repairs, in light of the carrier’s financial ability to make the repairs.
- C. The competitive disadvantage suffered by the shipper, due to the loss of its rail service (which the court found to be a continuing irreparable harm).

47. The court indicated that the following three factors, though considered, were given little weight:

- A. The court faulted the ICC's delay in contesting the carrier's actions, and made note that the carrier's complaint, though timely filed, received little to no attention from the ICC.
- B. The court stated it was naturally reluctant to order substantial expenditures to repair the line, when there was a possibility that the ICC would grant abandonment authority.
- C. The MTA's interest in using the line for a public purpose. The court stated "these interests, however, weigh only slightly, if at all, in favor of B&A's position."

ARGUMENT – OBLIGATION TO RESTORE TRACKS / SERVICE

48. In the instant case, BNSF's has never embargoed the line, nor has BNSF filed an application to abandon the line. (The most BNSF has done is intimate that it is considering abandoning the line at some unspecified future date.) The impediments which make it difficult for BNSF to provide service to Boardman, were all created by BNSF. (BNSF permitted a signal mast to be erected in the middle of the tracks that approach Boardman from the west; permitted a portion of the tracks that approach Boardman from the west, to be removed; permitted a portion of the tracks that approach Boardman from the east, to be removed.) None of the permitted exceptions are applicable in this case. [There has been no act of God; no act of a public enemy; no act of public authority; no act of the shipper; and no inherent vice or nature of the commodity. *Secretary of Agriculture, op. cit.* (§§ 10 and 21).] The impediments to service, were all created with the actual or tacit permission of BNSF.

49. 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), ("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."

50. On p.12 of BNSF's August 25, 2008 Amendment to *Petition of BNSF For Declaratory Order*, STB Finance Docket No. 35164, BNSF states that rail access to Boardman has not been permanently severed from the west. BNSF acknowledges that a signal mast has been erected in the middle of where the Chickasha tracks had been, and acknowledges that a portion of the Chickasha rail has been removed. Of particular 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."

51. In a decision served on May 19, 2009, in *Petition of BNSF For Declaratory Order*, STB Finance Docket No. 35164, at slip op. p. 6, the Board stated:

"BNSF indicates that it will serve Boardman from the west. In that regard, BNSF states that it has reached a tentative arrangement with SLWC for the latter to relocate a signal mast located at the intersection of the Chickasha Line and the Packingtown lead and to repair the tracks leading to Boardman."

52. 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."

ENJOINING SALE OF LOCOMOTIVE

53. 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]

54. Kessler argues he has met the four criteria for enjoining the threatened actions, namely:

55. **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 locomotive is one-of-a-kind, unique, historic, and cannot be replaced.

56. **Kessler is likely to prevail on the merits.** Once BNSF took possession of Kessler's locomotive, an absolute common carrier obligation devolved by common law upon BNSF to deliver Kessler's locomotive to Kessler on the Boardman spur.

57. **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.

58. 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 or permitted others to remove portions of the track that services Boardman's spur, Kessler's locomotive would have been delivered without incident. If BNSF replaced the removed track, 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 that BNSF had severed the line, and knowing that 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 took possession of the locomotive, transported the locomotive to Oklahoma City, and 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.

59. 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.* ¶49.

60. **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.

61. 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 or permitted others to remove from the Chickasha line. In addition, if BNSF is permitted to ignore the representations it made to the Board regarding replacing track material 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 or allow removal of 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.

62. 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.

63. WHEREFORE, Kessler prays that the Board:

- A. **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.
- B. **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.
- C. **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.
- D. **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.

64. 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.

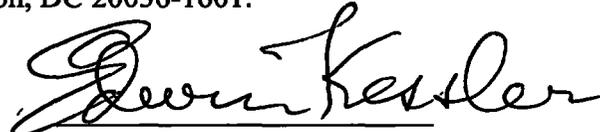
Executed on: June 1, 2009

Respectfully submitted,


Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2009, a copy of the foregoing Request for Immediate Order, was mailed by first class mail, postage prepaid, to Kristy Clark, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828, to Craig Richey, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for the Stillwater Central Railroad Company, and to Fritz Kahn, 8th Floor, 1920 N Street, N.W., Washington, DC 20036-1601.


Edwin Kessler

Verified Statement of Edwin Kessler
1510 Rosemont Drive
Norman, Oklahoma 73072-6337
Voice Phone - 405-360-3246; Fax Phone - 405-360-3246
E-mail - kess3@swbell.net

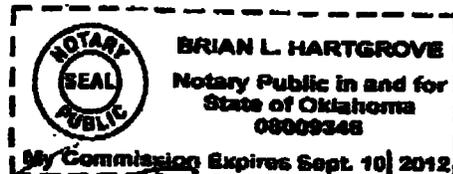
I am Edwin Kessler. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

On or about March 25, 2009, I spoke on the telephone with Joseph Merry, Vice President of The Boardman Company in Oklahoma City. Mr. Merry said that The Boardman Company would accept delivery in their yard of flatcar 93507, for purposes of unloading the locomotive that is in place thereon.

I, Edwin Kessler, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Dated in Norman, Oklahoma, this 4th day of May, 2009,

Edwin Kessler



Brian L. Hartgrove