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Edwin Kessler
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February 20, 2007

Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423
Fax: (202) 565-9019

ENTERED
Office of Proceedings

FEB 21 2007

Part of
Public Record

RE: Docket No. AB- 6 (Sub-No. 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*

Dear Secretary Williams:

I am faxing to your office a copy of a Petition to Reopen / to Reconsider the Board's January 26, 2007 Decision in Docket No. AB- 6 (Sub-No. 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*. I am sending the original and ten copies of the Petition to the Board via overnight delivery with a check for the filing fee.

Respectfully,

Edwin Kessler

FILE RECEIVED

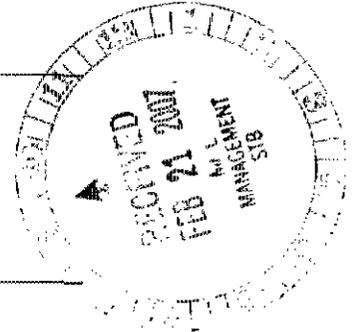
FEB 21

SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-6 (Sub- No. 430X)

**BNSF RAILWAY COMPANY
ABANDONMENT EXEMPTION
IN OKLAHOMA COUNTY, OK**



PETITION TO REOPEN / TO RECONSIDER

1. Edwin Kessler ("Kessler"), herewith gives notice that he intends to participate as a party of record in the above entitled proceeding. All documents, filings or decisions in the above entitled case should be served on Kessler at:

Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072
(405) 360-2194

2. Kessler, pursuant to the applicable regulations of the Surface Transportation Board ("STB" or "Board") herewith files his Petition to Reopen / to Reconsider ("Petition"), requesting that the Board reopen, then reconsider, its January 26, 2007 decision in the above entitled case, and for reasons states:

BACKGROUND INFORMATION

3. On February 12, 2007, Kessler filed his formal Notice of Intent to File an Offer of Financial Assistance, to purchase from the BNSF Railway Company ("BNSF") that portion of a line of railroad between milepost 539.96 and milepost 542.91, in Oklahoma City, Oklahoma, within Oklahoma County, Oklahoma (the "Line"), a distance of 2.95 miles more or less, which line of railroad is the subject of the above entitled proceeding. The line traverses Postal Zip Codes 73102, 74108, and 73129.

4. On September 23, 2005, BNSF and Stillwater Central Railroad, Inc. ("SLWC") (collectively, the "Applicants") jointly filed a notice seeking to invoke the class exemption under

49 CFR 1152 Subpart F for authority for BNSF to abandon (“AE”), and for SLWC to discontinue service (“DSE”), over approximately 2.95 miles of railroad between mileposts (“MP”) 539.96 and 542.91 in Oklahoma City, Oklahoma County, OK. Notice of the exemptions was served and published in the *Federal Register* on October 13, 2005 (70 FR 59802), and the exemptions were scheduled to take effect on November 12, 2005. On November 9, 2005, Bio-Energy Wellness Center and the North American Transportation Institute (collectively, “Petitioners”), filed a Petition to Revoke the AE and DSE, arguing they contained false and misleading information, specifically, that local traffic had been shipped over the Line within the two-year period of time prior to the September 23, 2005 filings by BNSF and SLWC.

5. On January 26, 2007, the Board found that SLWC’s December 28, 2004 acquisition of a leasehold interest in, and operating rights over, portions of the Line, “indicates a perception of a demand for service, at least at the time of the transaction, over that portion of the line [that was subject to the lease and operating rights]. Such a perception contravenes the predicate of the class exemption: that 2 years of inactivity indicates no need for service.” *Op. at 4.*

6. The Board further found that based on pleadings submitted by the Applicants, and based on a Lease Exemption served on January 19, 2005 (STB FD No. 34610) (see footnote 1 of the Board’s Decision) SLWC sought to discontinue serving “two unconnected segments, one only .04 of a mile long and the other .91 of a mile long. The two segments are 2 miles apart. These two small disconnected segments do not allow SLWC to operate over the 2.95-mile line that ... BNSF seeks to abandon.” “Thus, SLWC has no authority to serve any of the shippers that the petitioners claim need service.” “SLWC does not appear to possess operating authority for the middle portion of the line between mileposts 540.0 and 542.0.” *Op. at 5.*

7. The Board denied the Petition to Reject the AE filed by BNSF; the Board granted the Petition to Reject SLWC’s DSE. The Board then granted, on its own motion, an Exemption for SLWC to discontinue service over those portions of the Line that it leases from BNSF.

8. The Board then concluded: “In sum, more detailed scrutiny under section 19093 is not necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101.” *Op. at 5.*

ARGUMENT

I. The Decision Contravenes Precedent and was Not Persuasively Distinguished.

9. In *Consolidated Rail Corporation – Abandonment Exemption – In Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (**Decided January 18, 2007**) (“*Robbinsville*”), on page 4, the Board stated:

“When those carriers acquired operating rights over the lines of railroad ... they assumed a common carrier obligation over those lines. That common carrier obligation cannot be extinguished without Board authorization or exemption. Thus, to remove any uncertainty, CSXT and NSR would need discontinuance authority **before** Conrail could consummate its abandonment authority.” (Emphasis added.)

10. In *New York Cross Harbor R.R. v. Surface Transp. BD.*, 374 F.3d 1177, 1181 (D.C. Cir. 2004), the court stated: “An agency acts arbitrarily and capriciously if it “reverse[s] its position in the face of a precedent it has not persuasively distinguished,” citing *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).”

11. The Board’s decision in the above entitled proceeding was **decided January 22, 2007**. Thus, *Robbinsville* is precedent for this proceeding.

12. SLWC’s DSE was effective on January 26, 2007. Pursuant to the Board’s *Robbinsville* precedent, BNSF’s AE could not become effective **prior** to the effective date of SLWC’s DSE. Since the Board did not reject BNSF’s AE, the AE became effective on November 12, 2005, which is nearly 15 months prior to SLWC’s DSE, which became effective on January 26, 2007.

13. Kessler would argue BNSF’s AE should have been rejected. Were the Board to reopen this proceeding, reject BNSF’s AE, then grant BNSF an exemption, just as it granted SLWC an exemption, that would eliminate any uncertainty and would bring the Decision into conformity with the Board’s *Robbinsville* decision.

14. Kessler would ask that the time period within which an Offer of Financial Assistance must be filed, be 15 days, rather than 10 days, after service of the Board’s decision. This would allow

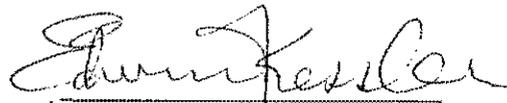
for three days for the Board's decision to reach Kessler via the U.S. Postal Service, would give Kessler 6 weekdays to prepare his OFA, or to prepare a Motion to Toll the time period within which an OFA must be filed, and would allow for three calendar days for Kessler's OFA or Motion to Toll, to be delivered to the Board. [Due to 9 / 11 security restrictions, it now takes three days for U.S. Mail to arrive at locations in the Midwest. It takes two weekdays for overnight express packages to be sent to the Board. There are four weekend days in any 15 calendar day period, during which overnight packages cannot be accepted by the Board, due to the Board's mail room being closed on the weekend.]

WHEREFORE, Kessler would pray that the Board:

- A. Reopen this proceeding;
- B. Reject BNSF's Abandonment Exemption;
- C. On the Board's own motion, pursuant to 49 U.S.C. §10502(a), grant BNSF an Exemption from the prior approval requirements of 49 U.S.C. §10903;
- D. Order that an Offer of Financial Assistance under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroads and the Board within 15 days after service of the Board's decision, subject to time extensions authorized under 49 CFR 1152.27 (c) (1)(i)(C).

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2007, a copy of the foregoing Petition to Reopen / to Reconsider, was served by first class mail, postage prepaid, upon the parties of record noted below.


Edwin Kessler

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