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May 1, 2008

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E. Street S.W.
Washington, DC 20423-0001

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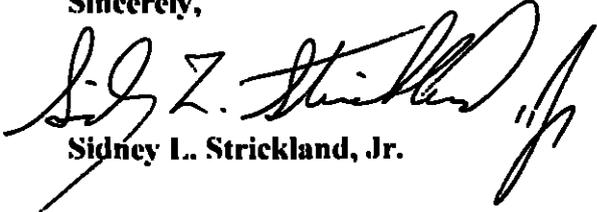
*Re: STB Docket No. AB-6 (Sub-No. 430X) BNSF Railway Company—
Abandonment Exemption—in Oklahoma County, OK*

Dear Acting Secretary Quinlan:

Enclosed for filing in the above referenced docket are an original and ten copies of a BNSF Reply to Motion for Clarification of Edwin Kessler Filed April 11, 2008.

Please acknowledge receipt of this material by date stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

Sincerely,



Sidney L. Strickland, Jr.

Encs.

cc: John Sims

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**STB DOCKET NO. AB-6
(SUB-NO. 430X)**

BNSF Reply to Motion for Clarification of Edwin Kessler Filed April 11, 2008

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Attorney for BNSF Railway Company

DATED: May 1, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**STB DOCKET NO. AB-6
(SUB-NO. 430X)**

BNSF Reply to Motion for Clarification of Edwin Kessler Filed April 11, 2008

BNSF RAILWAY COMPANY (“BNSF”) hereby replies to the Motion for Clarification of Edwin Kessler Filed April 11, 2008. As explained more fully below, the Chairman’s February 7, 2008 order is clear on its face and does not require any further clarification or revision. Mr. Kessler is simply seeking to create an appealable order before the US Courts of Appeal to delay further BNSF’s ability to consummate the proposed abandonment and, in so doing, simply seeks procedural mechanisms to delay the present proceeding and concurrently delay the Interstate 40 Highway project in Oklahoma City, Oklahoma. Also, as noted below, the Board (Chairman Nottingham) has recognized that parties have tried dilatory tactics through the use of motions for clarification, has stopped such activities and should do so here.

The procedural position here is not complicated. The Chairman issued an order on February 7, 2008, which ordered BNSF not to consummate the proposed abandonment in this proceeding. The order was clear in its language. Kessler made no subsequent filing for administrative review of the Chairman's February 7, 2008 order nor sought judicial review of the Chairman's February 7, 2008 order under the time provisions set out by the Hobb's Act. Instead, on April 11, 2008, Kessler filed the present "Motion for Clarification." Recognizing his lateness for challenging the Chairman's order, Kessler's singular purpose for the filing is manifestly to seek from this Board a decision which will permit further delay to these proceedings.

The Supreme Court has addressed the use of "Clarification" filings that seek to create a procedural do-loop that permits a party to back-door around Hobb's Act restrictions and simply delay the processing of proceedings that are instructive here. Specifically, in Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, Et AL., (ICCBLE) 482 U.S. 270; 107 S. Ct. 2360; 96 L. Ed. 2d 222; 1987 U.S. LEXIS 2476; 55 U.S.L.W. 4770; decided June 8, 1987, the US Supreme Court addressed the reviewability of petitions for reconsideration and for clarification. This Supreme Court decision as applicable to the former ICC's denial of a "clarification" request is pertinent here.

[The relevant factual background in BLE is as follows:

In September 1980, Union Pacific Railroad Co. (UP) and Missouri Pacific Railroad Co. (MP) and their respective corporate parents filed a joint application with the former Interstate Commerce Commission (ICC) seeking permission for UP

to acquire control of MP. The same day, a similar but separate application was jointly filed by UP and the Western Pacific Railroad Co. (WP). The control applications were opposed by labor organizations as well as several competing railroads, including (MKT) and (DRGW), which sought the right to conduct operations using the track of the new consolidated carrier in the event that the control applications were approved – with either the option to use their own crews or the crew of the consolidated railroad.

On October 20, 1982, the ICC approved UP's control acquisitions and granted the trackage rights to competing railroads with the trackage rights crewing provisions noted above, which became effective immediately upon consummation of the consolidations. Although numerous parties, including the Brotherhood of Locomotive Engineers (BLE), had petitioned for review of the Commission's October 20, 1982 order, no question concerning the crewing of MKT or DRGW trains was raised at that time.

Importantly, however, on April 4, 1983, BLE filed with the Commission a "Petition for Clarification," asking the Commission to declare that its October 20, 1982, order did not have the intent or effect of authorizing the tenant carriers to use their own crews on routes that they had not previously served. In a brief order served May 18, 1983, the Commission denied the petition, ruling that its prior decision "does not require clarification." The ICC added that the tenant railroads had proposed to use their own crews in their trackage rights applications, and "our approval of the applications authorizes such operations." *Ibid.* Importantly, within the period prescribed by Commission rules for filing petitions for administrative

review, labor parties sought "reconsideration" of the Commission's denial of the clarification request. In a lengthy order served on October 25, 1983, the Commission denied the petitions.

BLE petitioned for judicial review of the May 18, 1983, and October 25, 1983, orders and The United States Court of Appeals for the District of Columbia Circuit vacated both orders. *245 U. S. App. D. C. 311, 761 F.2d 714 (1985)*. As relevant here, the DC Circuit rejected Counsel's claim that the appeals were time barred. The ICC then sought and received Supreme Court Review of the DC Circuit's rulings.]

The Supreme Court, among other things, addressed the reviewability of the May 18, 1983, order refusing to clarify the Commission's prior approval order, and the October 25, 1983, order refusing to reconsider that refusal to clarify.

Of particular import here is the Court's treatment of the May 18, 1983 order refusing to clarify the Commission's prior order. In this regard, the Supreme Court noted that while the petition for review was filed more than 60 days after that order was served, it was nonetheless effective, because the timely petition for administrative reconsideration which was the subject of the October 25, 1983, stayed the running of the Hobbs Act's limitation period until the related petition for reconsideration of the May 18, 1983 order had been acted upon by the Commission.

Here, Kessler made no subsequent filing of a petition for administrative review of the Chairman's February 7, 2008 order nor sought judicial review of the Chairman's February 7, 2008 order under the time provisions set out by the Hobb's Act. Thus, the Supreme Court analysis -- that the petition for review of the May 18,

1983 order in the ICCBLE case was timely -- would not apply here and an order here denying the request would, therefore, not be reviewable; and, even if timely, would still not be an appealable order under the Supreme Court's ICCBLE ruling.

In ICCBLE, the Supreme Court emphasized:

"If BLE's motion is treated as a genuine "Petition for Clarification" – *i. e.*, as seeking nothing more than specification, one way or the other, of what the original order meant with regard to crewing rights -- then the denial is unappealable because BLE was not "aggrieved" by it within the meaning of the Hobbs Act. BLE could have been aggrieved by a refusal to clarify in this narrow sense only if the refusal left it uncertain as to the Commission's view of its rights or obligations, which plainly was not the case. Though the May 18, 1983, order denied the petition for clarification, the text of the denial made it unmistakably clear that the Commission interpreted the October 20, 1982, order as authorizing MKT and DRGW to use their own crews. BLE could, of course, disagree with that construction, but it could hardly complain that the clarification it sought had not been provided."

Importantly, the Supreme Court noted further:

"If, of course, the ICC's action here had gone beyond what was (at most) clarification of an ambiguity, and in the guise of interpreting the original order in fact *revised* it, that would have been a new order immediately appealable." *Id.*

That is what Kessler seeks here – a revision of the Chairman’s order to create an immediately reviewable order that does not now exist. The Board has no reason based on fact, reason or policy to revise the Chairman’s order. The Chairman’s order clearly stated that BNSF is not to consummate the proposed abandonment; BNSF will abide by that order; and there is no reason to revise it or otherwise engage in language in a decision that could be interpreted as revising the Chairman’s February 7 order. This would simply assist in further delay of BNSF’s proposed abandonment and delay the I-40 Highway project. The Board (Chairman Nottingham) has recognized that parties have tried dilatory tactics through the use of motions for clarification and has stopped such activities. See, e.g., STB Finance Docket No. 34867, General Railway Corporation, D/B/A Iowa Northwester Railroad – Exemption For Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA, served July 13, 2007, p. 2. wherein the Chairman indicated: “this motion for clarification and for stay appears to be merely an effort to protract this proceeding.”

In sum, there is no reason for the Board to create an immediately reviewable order that does not now exist in relation to the February 7, 2008 order. That will simply permit a present and future abuse of STB procedures that help prolong transactions that should be expeditiously processed. As previously noted, each day this decision is delayed because of Mr. Kessler’s actions, costs considerable federal, state and city tax dollars, and now public safety. Expedition is in the best interest of all, including the highway expansion project and the citizenry of Oklahoma City.

Conclusion

**BNSF respectfully urges the Board to deny the request for clarification,
without revising the Chairman's February 7, 2008 order.**

Respectfully submitted,

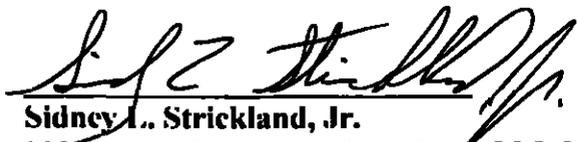


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**ATTORNEY FOR BNSF RAILWAY
COMPANY**

CERTIFICATE OF SERVICE

BNSF Railway Company by and through its counsel, Sidney L. Strickland, Jr., certifies that on May 1, 2008, BNSF served a copy of the foregoing "BNSF Reply to Motion for Clarification of Edwin Kessler Filed April 11, 2008" by mailing copies thereof by first-class mail to Edwin Kessler at: Common Cause Oklahoma, 1510 Rosemont Drive, Norman, Oklahoma, 73072, and to Karl Morell at: Ball Janik LLP, 1455 F Street N.W., Suite 225, Washington, D.C. 20005, and to Fritz Kahn, 8th Floor 1920 N Street, NW, Washington, DC 20036-1601.



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