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SERVICE DATE – OCTOBER 2, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35164

BNSF RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for comments.

SUMMARY: In response to a petition filed by BNSF Railway Company (BNSF) on July 15, 2008, the Board is instituting a declaratory order proceeding under 49 U.S.C. 721 and 5 U.S.C. 554(e) to determine whether what BNSF characterizes as two track relocation projects in Oklahoma City, OK, are subject to the Board's jurisdiction and require prior Board approval. One reply in opposition to the petition and three letters in support of the petition have been filed. The Board seeks public comments on this matter.

DATES: Supplemental evidence from BNSF is due by October 17, 2008. Replies are due by November 6, 2008.

ADDRESSES: Send an original and 10 copies of any comments, referring to STB Finance Docket No. 35164, to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, send one copy of comments to BNSF's representative, Kristy Clark, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828, and one copy to Edwin Kessler, 1510 Rosemont Drive, Norman, OK 73072.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245-0395.  
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1-800-877-8339].

SUPPLEMENTAL INFORMATION: BNSF's petition for declaratory order concerns what it now characterizes as a project to relocate two track segments of its Chickasha Subdivision between milepost 541.69 and milepost 539.96 to facilitate the Oklahoma City I-40 Crosstown Relocation project.<sup>1</sup> Petitioner states that these two track segments must be relocated to make way for this major highway project. BNSF states that the segment of the Chickasha Subdivision

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<sup>1</sup> These track segments were previously the subject of a notice of exemption in BNSF Railway Company—Abandonment Exemption—In Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X), that was rejected in a Board decision served June 5, 2008.

between milepost 540.15 and milepost 541.69 (referred to as the middle segment) would be relocated by rerouting traffic over BNSF's Packingtown Lead, which will have the same throughput capacity and operating speeds as the Chickasha Subdivision line. BNSF states that the portion of the Chickasha Subdivision between milepost 540.15 and milepost 539.96 (referred to as the eastern segment) would be relocated to the south.<sup>2</sup> BNSF adds that a contractor for the Oklahoma Department of Transportation (ODOT) is constructing: (1) a new railroad bridge to elevate BNSF's Red Rock Subdivision where it crosses the Chickasha Subdivision and where the new highway will be located, and (2) new industry tracks to connect the two shippers located adjacent to the eastern segment (Producers Cooperative Oil Mill (Producers) and Mid-States Wholesale Lumber (Mid-States)) directly to BNSF's Red Rock Subdivision north of the Chickasha Subdivision.

BNSF argues that neither of these relocation projects will affect service to shippers or involve an extension into or an invasion of new territory, and that these projects are therefore outside of the Board's jurisdiction, citing among other authorities Missouri Pac. R. Co. Trustee Construction, 282 I.C.C. 388 (1952); and City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995). BNSF requests expedited processing of this proceeding to allow the highway project to move forward.

On August 4, 2008, ODOT submitted into the record a letter expressing support for an expedited declaratory ruling in favor of BNSF. ODOT also attached letters of support from Mick Cornett, Mayor of Oklahoma City, and the Greater Oklahoma City Chamber.

On August 5, 2008, Edwin Kessler filed a reply to BNSF's petition and a request for a procedural schedule, including a public hearing in Oklahoma City, OK.<sup>3</sup> Mr. Kessler argues that BNSF has failed to demonstrate that its proposed actions would be mere relocations of track. Rather, Mr. Kessler argues that the relocation of these segments will deprive some shippers of service, particularly Boardman, Inc. (Boardman), and will allow BNSF to serve new markets. Mr. Kessler argues that BNSF needs Board authorization to: (1) construct the new tracks and (2) remove the two crossing diamonds on the eastern segment that enable it to reach two other shippers (Producers Co-Op Oil Mill and Mid-States Lumber Company).

On August 25, 2008, BNSF filed a response to Mr. Kessler's arguments in which it challenged several of Mr. Kessler's factual assertions.<sup>4</sup> BNSF also renewed its request for expedited Board handling of this matter.

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<sup>2</sup> BNSF states that it plans to file an individual exemption request or an application to abandon the western segment—the portion of the Chickasha Subdivision between milepost 541.69 and milepost 542.91—in the future. Therefore, the western segment is not at issue here.

<sup>3</sup> The public hearing request will be denied. The Board believes that the record can be developed and the issues resolved on the basis of written submissions.

<sup>4</sup> In that document, BNSF also withdrew an earlier request that the Board rule that the United States District Court for the Western District of Oklahoma was without jurisdiction to

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On September 5, 2008, Mr. Kessler filed a reply to BNSF's August 25, 2008 response and also filed a separate document labeled "Motion to Compel" and "Motion to Cease and Desist" asking that the Board compel BNSF to undertake certain actions. In these motions, Mr. Kessler alleges that, in late July 2008, a railroad car carrying his locomotive was delivered to BNSF for transport to Boardman's facility, but that after reaching Oklahoma City some 19 days later, the car ultimately could not be delivered because the tracks leading to Boardman's facility had been removed. Mr. Kessler provided no verified statement to support these allegations.

On September 24, 2008, BNSF moved the Board to strike Mr. Kessler's September 5 pleading because it is an impermissible reply to a reply, is not properly verified, and involves matters that are either premature or outside the scope of this proceeding. BNSF also calls Mr. Kessler's locomotive shipment a "fraudulent ploy," which BNSF is investigating.

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. BNSF asserts that no Board jurisdiction is implicated here, while Mr. Kessler argues that these projects are in fact subject to the Board's jurisdiction, as they would remove service to existing shippers and would allow BNSF to extend service into new territory. A declaratory order proceeding will be instituted in this proceeding to address these issues. To facilitate BNSF's request for expedition, BNSF will be permitted to supplement its petition by October 17, 2008. Any person seeking to reply in support of, or in opposition to, BNSF's position may submit written comments to the Board by November 6, 2008. Because there is already a substantial record in this proceeding, the parties are directed to focus their comments on the issue of whether these two planned projects are merely track relocations not requiring Board authorization or whether they would remove service to shippers and/or extend BNSF's operations into new territory. Both the continued ability to serve Boardman and any specific new territory that could be served should be identified and addressed. Additionally, concerning service to shippers on the eastern segment, BNSF is specifically directed to submit a statement from ODOT confirming that its contractor is obligated to construct both a new railroad bridge to elevate the Red Rock Subdivision over the planned location of the new highway and new industry tracks to connect Producers and Mid-States directly to the Red Rock Subdivision.

In the meantime, Mr. Kessler has not shown that his requests for injunctive relief should be entertained in this declaratory order proceeding. Mr. Kessler says that, with the request for a locomotive shipment, Boardman was "testing" BNSF's ability to serve Boardman.<sup>5</sup> But Boardman is not before us complaining that a locomotive was not delivered, or that BNSF has failed to meet any reasonable request for service. Indeed, according to BNSF, Boardman refused

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enjoin the two relocation projects. On August 14, 2008, the District Court issued an order granting BNSF's motion to dismiss Kessler's petition to enjoin BNSF for lack of jurisdiction. Edwin Kessler v. BNSF Railway Company and Oklahoma Department of Transportation, Case No. CIV-08-358-R (W.D. Okla. 2008).

<sup>5</sup> Kessler's Reply to BNSF's Amendment to Petition at 11.

delivery of the shipment by transload, explaining that the car was ordered for political reasons. The Board will not order injunctive relief where the supposedly aggrieved shipper does not even appear before the agency, and certainly will not do so where, as here, the moving party has not provided any verified evidence. Any party aggrieved by a service failure may file a complaint and seek appropriate relief. Finally, because BNSF has had an opportunity to respond to Mr. Kessler's September 5 pleading, the Board will not strike it.

Board decisions, notices, and filings in this and other Board proceedings are available on our website at [WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).

Decided: October 1, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary